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Karl N. Llewellyn, American Legal Realism, and the Steadyning Factors in Common Law Adjudication

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The concern of this paper is with the work of one of the greatest American jurists of the twentieth century: Karl Nickerson Llewellyn (1893–1962). The quite particular focus of the paper is with the place that Llewellyn occupies in the twentieth-century movement in American jurisprudence that is known as legal realism.[1] Llewellyn is not only a jurist who is closely associated with the American legal realist movement. He is also recognized to be the most notable representative of the movement, and to be the jurist who did most to define its essential aims and objectives. That this is so is in large part on account of the decisive contribution that Llewellyn is held to have made in the 1930s to the establishing of the terms of the radical critique of law and adjudication, and of legal processes and institutions generally, which was central to the realist project in American jurisprudence.

The realist critique of legal phenomena to which Llewellyn contributed in the 1930s involved certain positive claims concerning the essential nature of the law, and concerning the methods that were to be followed for the proper understanding and explanation of it. These claims were sometimes left implicit rather than rendered

explicit, but they were for all that claims which were such as to constitute a distinctively realist perspective on law and legal phenomena. One important claim made by the realists was that jurisprudence was to be thought of as a discipline that was based in a scientific method of enquiry, and hence that its subject-matter, the law, was something that was to be thought of as admitting of a fully scientific analysis as to its true nature. Another important claim advanced by the realists was that the essence of law was something that was to be found embodied in the actual practice of the courts, or, to adopt the realist idiom favoured by Llewellyn, in the actual behaviour of judges and other legal officials. A third claim about law that ran through the work of the American legal realists was the claim that law was to be understood and explained in instrumentalist terms. That is to say, it was claimed by the realists that the law was to be understood and explained as something that functioned within society as a means or instrument for the promotion of public goods and public policies, and hence as a means or instrument for the realization of such collectively defined ends and objectives as society set and determined for itself.

In addition to the positive claims about law that the American legal realists advanced, the realist critique of legal phenomena of the 1930s also had a more negative aspect. For the realist critique of law was a critique that served to call into question many of what are most appropriately to be termed orthodox assumptions about law, and assumptions that, as it will be observed, were very much bound up with the viewpoint in American legal thought and practice which is known as formalism. Among the assumptions of or-

thodox legal thought that the realists challenged was the assumption that law and adjudication were to be conceived of as subject to the constraints and discipline of logic and reason. A related assumption of orthodox legal thought that was brought into question by the realists was the assumption that formal legal rules and principles were to be conceived of as playing a controlling role in the process of adjudication, such that formal legal rules and principles were to be taken as serving to determine the decision of actual cases by the courts with an acceptable degree of stability and regularity. Yet again, the emphasis placed by the realists on the instrumental character of law committed them to challenging a further orthodox assumption regarding law and adjudication. This was the assumption that law and adjudication involved procedures of reasoning and decision-making that were to be thought of as being, in principle at least, indifferent to, and exclusive of, all considerations which were to do with public policy and the collective interests of society.

Llewellyn played a major part in bringing the orthodox assumptions about law and adjudication into question in the 1930s through his seminal contribution to the realist critique of legal phenomena of the period. However, it is remarkable that Llewellyn was at the end of his life to provide what must be taken to stand as a highly orthodox endorsement of law and its inherent rationality, and of the integrity of adjudication as a procedure involving the reasoned and disciplined application of law within society for the purpose of the resolution of disputes. The endorsement that Llewellyn gave to the orthodox view of law and adjudication came in his last full-length

book: *The Common Law Tradition: Deciding Appeals* (1960). [2] This work is of the first importance in understanding Llewellyn in his relation to the American legal realist movement. For the positions that Llewellyn took regarding law and adjudication in *The Common Law Tradition* are indicative of a substantial retreat on his part from the radicalism of the realist project in jurisprudence as he had defined and argued for it in the 1930s. At the same time, the book points to an underlying acceptance by Llewellyn of much of the standpoint of legal orthodoxy, as well as pointing, in a more particular sense, to his affirmation of the inherent stability and regularity of the established common law procedures of adjudication.

In Part 1 of this paper, there is provided a summary outline account of the realist project in jurisprudence. Included here is discussion not only of Llewellyn's part in setting the terms of the realist project in the 1930s, but also discussion of other jurists who were associated with the legal realist movement. In Part 2 of the paper, there is a detailed examination of Llewellyn's arguments in *The Common Law Tradition.* The emphasis here is on Llewellyn's statement and explanation of what he termed the steadying factors in common law adjudication, as he claimed to find them present in the adjudicative practice of the United States courts at the appellate level. The steadying factors in common law adjudication were the factors that Llewellyn saw as making for stability and regularity, and hence also for predictability, in the decisions of the American appellate courts. The discussion that Llewellyn provided of the steadying factors is crucial for the argument of the present paper. This is so because it is what Llewellyn said about the steadying fac-

tors that underlines the full extent of his endorsement of the integrity of the common law procedures of adjudication, and the full extent of his retreat from the radical form of realism that he had argued for in the 1930s. In the Conclusion to the paper, some brief consideration is given to the question of the significance of Llewellyn and his defence of the common law tradition of adjudication in relation to the broader current of positivist-utilitarian jurisprudence in the Anglo-American tradition with which the realist movement is so closely associated.

1. American Legal Realism

American legal realism was a movement in legal thought and practice that, following a long period of development that began in the late nineteenth century, came to establish itself as a distinct movement in the jurisprudential community of the United States in the early 1930s.[3] The part played by Llewellyn in establishing the realist movement in the early 1930s was foundational. For the start of the realist movement proper is generally associated with the publication by Llewellyn in 1930 in the *Columbia Law Review* of his seminal article 'A Realistic Jurisprudence: The Next Step'.[4] In the following year, the leading American jurist Roscoe Pound (1870–1964) published a critique of the new realist jurisprudence in the *Harvard Law Review,*[5] and, in response to this, Llewellyn published in the same journal an article in which he summarized the main lines of argument that he saw as being developed by the ju-

rists who were involved with the realist movement: 'Some Realism about Realism: Responding to Dean Pound'.[16]

Llewellyn was an academic lawyer who began his career as a full-time teacher of law at the Yale Law School in 1922, before going on to teach as a law professor at the Columbia Law School from 1925 to 1951 and at the Chicago Law School from 1951 until his death in 1962. In the event, the jurists associated with the realist movement included practising lawyers as well as those, such as Llewellyn, who were academic lawyers. Thus Oliver Wendell Holmes (1841–1935) practised as a lawyer in Boston following his graduation from the Harvard Law School, taught for a year as a law professor at Harvard before his appointment in 1882 to the Supreme Judicial Court of Massachusetts, and eventually went on to serve as an Associate Justice of the United States Supreme Court from 1902 to 1935. John Chipman Gray (1839–1915) held professorial appointments at Harvard in addition to practising law in Boston. Jerome New Frank (1889–1957) held important positions in public administration during the 1930s, including the Chairmanship of the Securities and Exchange Commission, before his appointment in 1941 to the United States Court of Appeals for the Second Circuit.

Of the jurists to whom we have made reference above, only Llewellyn and Frank rank as members of the mainstream realist movement that established itself in the early 1930s. With that said, however, there should be no disputing the central importance of Oliver Wendell Holmes in helping to create the intellectual context for discussion about law, and about the role and functions of

law in society, from which there emerged the agenda in legal theory that was to be addressed by jurists like Llewellyn and Frank in the 1930s and after. Indeed, Holmes is notable for his setting down what were to become some of the most basic themes developed by the mainstream legal realists in the celebrated address that he delivered in 1897 at the Boston University School of Law: 'The Path of the Law'.[7] Thus Holmes here defined law as consisting in the actual decisions made by the courts, or, as he put it, as consisting in predictions, or prophecies, concerning what the courts would do in fact.[8] Then, again, Holmes cast doubt on the rationality of law as a form of social regulation, through his insistence that it was a fallacy to suppose that logic was the only force that played a part in the development of the law.[9] Yet further, Holmes pointed to the instrumental functions of law in its relation to society, as he did when he lamented the failure of judges to recognize what he claimed to be the basic duty falling on them to take into account considerations of social advantage in the performance of their legal work.[10]

The view of law that Holmes adopted in 'The Path of the Law' was a court-centred view of law. For it was the decisions of the courts that Holmes saw as determining the actual law in force in society. A court-centred view of law was also adopted by John Chipman Gray in his major work in the field of general jurisprudence: *The Nature and Sources of the Law* (1909).[11] In this work, Gray argued that it was necessary to recognize a clear distinction between the sources of law and the law itself. For Gray, statute law, judicial precedents and the law of custom were not to be thought of as law in the full and proper sense, but rather as the

sources for a body of law that remained essentially judge-made in character. Hence, in Gray's definition of it, the actual law of a state or society was the law that was to be found embodied in the rules laid down by the courts, for purposes concerning the determination of substantive legal rights and duties.[112] From this Gray took it to follow that the establishing of law depended on the decisions of the courts, in the sense that it was to be assumed that there was no law prior to judicial decisions, and to follow also that the activities of the courts in their deciding of disputes and controversies were to be thought of as involving the *ex post facto* making of law.[113]

Gray was an orthodox legal scholar, and the emphasis that he placed on the judge-made nature of law was not such as to imply any serious challenge on his part to the traditional procedures of adjudication, as these were followed by the American courts of his own time. In contrast to Gray, however, realists like Llewellyn and Frank were very much concerned to bring into question the integrity of the established procedures of adjudication and methods of legal reasoning. In this respect, their work stands in opposition to, as it in fact served to counteract, the formalism that had come to dominate thinking about the law in the United States during the decades before the emergence of the mainstream realist movement at the beginning of the 1930s. The dominance of the formalistic style of thinking about the law in this period was reflected in the popularity in the American law schools of the so-called case method of legal education.

The case method of legal education was closely associated with the Harvard Law School following the appointment of Christopher

Columbus Langdell (1826–1906) as its Dean in 1870. The formalistic approach to law that Langdell promoted with the case method had a profound influence on American legal culture from the late 1870s up to the 1920s. Informing the case method was a quite specific view as to the essential nature of law and adjudication. In this view of it, the law was understood to be a logical science, which comprised a system of general, logically inter-connected principles and doctrines. These formal legal principles and doctrines were assumed to be capable of being established through the detailed examination of the existing case law in which they were embodied, and then of being adopted as the basis for the decision of the actual cases submitted to the courts for adjudication and for the derivation of the specific rules that were necessary to support and justify such decisions.

For Langdell, then, the law was held to be a science, and, in consequence of this, the formalist view of law that he argued for was one that tended to involve the appeal to a rigorous standard of legal certainty. This was so in the sense that it was assumed that the adjudication of disputes by the courts was always to be based in the application of the system of principles and doctrines which were embodied in the case law, and which, for this reason, were to be taken to stand as the established sources of the law. At the same time, Langdell held that all the available materials of the science of law were to be found in written form in the law books, which books were to be understood as standing as the ultimate sources of the whole of legal knowledge. The identification that Langdell made of law with the written law laid down in books was essential to his

case method of legal education. Hence the case method that Langdell followed was one that encouraged the separation of legal education from other academic discipines. So also did it encourage a general acceptance of the formalist view that the law in practice, and for the purposes of the study of it, was to be thought of as something that existed in more or less complete independence from other social norms, and from the conditions that governed its actual application and functioning in society.[14]

The maintenance of the firm distinction between law and society implicit in the formalistic approach to legal education of Langdell and his followers was not acceptable to realists like Llewellyn and Frank. For the mainstream realists, the law was to be thought of as having its life only within the concrete sphere of society considered in its entirety. In consequence, the mainstream realists proceeded on the assumption that the law was to be described and explained through attention to the circumstances of its interaction with the social whole of which it was a part. In the case of Llewellyn, this meant that the law was to be described and explained by reference to its relation to, and its impact on, the actual behaviour of men in society. This was the position that Llewellyn defended, and made integral to the realist project in jurisprudence, in 'A Realistic Jurisprudence: The Next Step'. The central argument that Llewellyn set out in the article was that existing jurisprudence had been too much concerned to identify the substance of the law with rules of law, and with the rights which were to be found laid down and expressed in such rules. This, essentially, was the orthodox view of law associated with formalist jurisprudence, and, against it,

Llewellyn maintained that the rules of substantive law, and the rights that they provided for, were to be understood in terms of their relation to the behaviour of legal officials and ordinary laymen. Hence he emphasized, as one his principal lines of argument, that

> substantive rights and rules should be removed from their present position at the *focal point* of legal discussion, in favor of the *area of contact* between judicial (or official) *behavior* and the *behavior* of laymen; that the substantive rights and rules should be studied not as self-existent, nor as a major point of reference, but themselves with constant reference to that area of behavior-contacts.[15]

Llewellyn did not only oppose himself to the formalism of Langdell and the Langdellian school in jurisprudence through the emphasis that he placed on the interrelationship of law and society, as this was manifested in the effects of law on the behaviour of legal officials and laymen within society. He also brought into question the particular ideal of legal certainty that was implied in the formalist view of law. He did so through his insistence that legal rules, as such and in themselves, provided no fully reliable basis for predicting the outcomes of the cases that went before the courts for decision.

Crucial, here, was the distinction that Llewellyn drew in 'A Realistic Jurisprudence: The Next Step' between what he called *paper rules* and *rights* and what he called *real rules* and *rights*. As Llew-

ellyn explained the distinction, 'paper' rules and rights were the rules and rights that were to be found set down and embodied in the written sources of the law. In contrast to paper rules and rights, there were the so-named 'real' rules and rights. These were rules and rights that were to be identified, and conceived of, in terms of behaviour, and rules and rights whose meaning was to be grasped and explained only through reference to the actual practice of the courts in the context of particular cases.

Llewellyn distinguished between paper rules and rights and real rules and rights in terms such as to underline that legal rules, in the form in which they were understood in traditional jurisprudence, were not to be thought of as playing an absolutely decisive controlling role in the process of adjudication. In Llewellyn's view, it was a fundamental error to regard formal rules of law as prescriptive rules which the courts automatically adhered to in rendering their decisions, and hence as rules which were to be pointed to so as to provide the basis for a precise and accurate description of judicial behaviour. On the contrary, Llewellyn emphasized that the actual practice of the courts frequently diverged from the accepted rules of law. In consequence of this, it followed, for Llewellyn, that it was essential to turn to judicial behaviour as it manifested itself in the practice of the courts, rather than to paper rules and rights, in order to identify the law that was actually, and in real terms, being maintained and enforced within society.[16]

For Llewellyn, then, the proper understanding of law and adjudication required that the jurist should remain sceptical about claims to the effect that legal rules stood as a sufficient basis for

the determination of judicial decisions. It was very much in accordance with this scepticism about legal rules that Llewellyn suggested, in the part of 'A Realistic Jurisprudence: The Next Step' where he explained the proper approach to be taken regarding the place and understanding of paper legal rules, that it was necessary to be prepared, among other things, to compare official paper rules with actual judicial behaviour, to examine the actual uses made of legal rules by judges and lawyers in the circumstances of specific cases, and to ascertain when the rules referred to by judges and lawyers were, and were not, in fact being followed by them in arriving at particular decisions.[17]

However, mere scepticism about the effectiveness of legal rules in controlling adjudication, and in determining judicial decisions, did not prove satisfactory to Jerome Frank. Frank's two most important contributions to realist jurisprudence were *Law and the Modern Mind* (1930),[18] and *Courts on Trial* (1949).[19] In these works, Frank followed Llewellyn in holding that judicial decisions were the essence of the law, and that formal legal rules were to be thought of as indeterminate with respect to the decisions of the courts. Even so, Frank also emphasized that the sort of scepticism entertained by realists like Llewellyn as to whether legal rules controlled adjudication arose from an excessive concern on their part with the practice of the higher courts. As a counter to this, Frank argued that attention to the workings of the ordinary trial courts would bring out that judicial decisions were not to be thought of as arbitrary only for the reason that rules were indeterminate in the sort of respects pointed to by Llewellyn and like-minded realists. In

Frank's view, attention to the ordinary trial courts would also serve to bring out that judicial decisions were arbitrary for the even stronger reason that the examination by the courts of the facts of the cases that legal rules were applied to remained subject to disputes and disagreements, such that court judgments about the facts of cases were unavoidably steeped in arbitrariness. So, for example, Frank maintained that court judgments about the facts of cases were arbitrary because always influenced by personal factors, with the result that he was led, through this fact-sceptical form of realism, to underline how judicial outcomes were characteristically determined by the racial, religious, political and other prejudices of trial judges and jury members.[20]

It is clear from what has been said that the realist critique of law involved quite radical claims as to the nature of law. The most radical of the claims made by the realist thinkers regarding law was the claim that the essential substance of the law was to be found not in the rules and principles that stood as the formal sources of the law, but in the decisions made by the courts in the context of actual disputes, and hence in the actual behaviour of judges and other legal officials. This, as we have seen, was a claim about law that was advanced, albeit with different meanings and significances, by Holmes, Gray, Llewellyn and Frank.

The principal defect of the realist analysis of law is the neglect by the realist thinkers of what is perhaps most appropriately referred to as the normative dimension of the law. This is the dimension of the law that relates to the law considered in its status as a system of norms possessing an inescapable binding force in respect

of action and deliberation, and hence the dimension of the law that relates to the law as a system of rules and principles providing normatively compelling grounds and reasons for action and for deliberation about action. The explanation for the neglect of the normative dimension of the law by the realists lies precisely in their claim that the essential nature of law was to be found not in the rules and principles comprising the formal sources of the law, but in actual court decisions and in the actual behaviour of judges and legal officials. For the identification of the law with court decisions, and with the behaviour of judges and legal officials, is hardly to be reconciled with two ideas which must be taken to be integral to the very concept of law and adjudication as such. The first of these ideas is the idea that courts, and more particularly judges and legal officials, are to be considered as bound to act in conformity with the rules and principles embodied in the formal sources of law, and so as bound to explain and justify their decisions in actual cases in terms of, and through reference to, what is contained and present in the formal sources of law. Second and related to the first idea, there is the idea that courts, and hence in particular judges and legal officials, are to be considered as bound to act to decide cases in conformity with the established rules and principles of procedure that serve to define the specific institutional obligations and responsibilities which fall on judges and legal officials.

The two ideas about law, as stated above, are such that while the law may indeed be presented as something that is to be established through the judicial decision of actual disputes, the fact remains nevertheless that the decision of disputes by the courts is not

for that reason to be thought of as being arbitrary or unpredictable (as the realist critique of law implied that it is), but is rather to be thought of as a process of decision-making that stands as subject to its own internal constraints and disciplines. So, for example, the courts, and in a particular sense judges and legal officials, are to be thought of as subject to the constraints that are imposed through the disciplines implicit in the specifically legal, or judicial, modes of reasoning and deliberation. So also are the courts, and judges and legal officials, to be thought of as subject to the constraints imposed through the framework of established procedures and institutionally defined official obligations and responsibilities which apply to the courts and to judges and legal officials. The constraints here referred to comprise an integral part of the normative dimension of law and adjudication. It is in their normative dimension that they stand as constraints that serve to order the processes through which cases are decided by the courts, and to limit and restrict the considerations that are to be admitted by the courts, and by judges and legal officials, in the formulation, issuing and justification of their decisions in cases.

The constraints to which the courts, and judges and legal officials, are to be thought of as subject do not pertain only to the normative dimension of law and adjudication. They pertain also to the internal structure of adjudication as a quite distinct process of decision-making. The internal structure of the process of adjudication was not central to the realist critique of legal phenomena in the behaviour-oriented form in which Llewellyn expounded it in 'A Realistic Jurisprudence: The Next Step'. However, the internal

structure of adjudication was a principal concern of Llewellyn's in *The Common Law Tradition,* where this was pointed to and explained by him in order to counter and defeat claims to the effect that the decisions of the courts were arbitrary and unpredictable.

2. Llewellyn and Common Law Adjudication

Llewellyn wrote *The Common Law Tradition* in response to what he saw as a crisis of confidence within the American legal profession during the 1950s as to whether the decisions of the United States appellate courts of that time had been achieving an acceptable degree of predictability, or, as he put it, of reckonability. The position that Llewellyn took regarding this crisis of confidence in *The Common Law Tradition* was that the decisions of the United States appellate courts were to be thought of as acceptably predictable or reckonable, and hence that judicial decision-making at the level of the appellate courts was to be thought of as rising to a proper and passable standard of stability and regularity. To support this position, Llewellyn pointed to certain features of the tradition of common law adjudication at the appellate court level in the United States which he saw as working to promote stability and reckonability of result in the decision of the cases submitted to the appellate courts.

In all, Llewellyn picked out fourteen such features of common law adjudication at the appellate court level. These he referred to as *steadying factors,* and listed as follows:

1. Law-Conditioned Officials.
2. Legal Doctrine.
3. Known Doctrinal Techniques.
4. Responsibility for Justice.
5. One Single Right Answer.
6. An Opinion of the Court.
7. A Frozen Record from Below.
8. Issues Limited, Sharpened, and Phrased in Advance.
9. Adversary Argument by Counsel.
10. Group Decision.
11. Judicial Security and Honesty.
12. A Known Bench.
13. The General Period-Style and Its Promise.
14. Professional Judicial Office.[21]

The steadying factors that Llewellyn identified were factors that, in his explanation of them, related to the normative dimension of law and adjudication. At the same time, they were factors that, again as he explained them, pertained to the internal structure and organization of common law adjudication as a process of decision-making, and that for this reason served to underline the internal discipline and order which belonged to this tradition of judicial practice.

i. The Steadying Factors in Common Law Adjudication

The first steadying factor in common law adjudication that Llewellyn discussed was a factor that concerned the standing of the official personnel who were involved in the United States appellate courts. This was that the court officials were *law-conditioned officials.* The consideration that Llewellyn wanted to emphasize here was that judges, and other such official personnel, were trained and experienced lawyers, and that for this reason they would be inclined to see issues, and to see significances in issues, from the perspective of the law itself. In addition to this, Llewellyn emphasized that the legal conditioning of the officials associated with the United States appellate courts was such that the officials would be taught to think not just as lawyers, but as American lawyers.[122]

As a second steadying factor in common law adjudication, Llewellyn pointed to the role played in the judicial process by *legal doctrine.* In Llewellyn's view, it was an important truth about the procedures followed by the United States appellate courts that the discussion of matters submitted for adjudication, and the decision of the same, always took place in a containing context for discussion and decision which worked to shape and direct the decision-making process. This context was set by the body of existing legal doctrine. Thus the body of legal doctrine, for Llewellyn, formed a framework that served to control the decision of cases which left no room for doubt and to guide decisions in doubtful cases. At the same time, the framework for judicial decision-making formed through legal doctrine was such that it served to constrain the courts to decide

even problematic hard cases in accordance with at least the spirit of some part or other of the available legal doctrine. As Llewellyn explained the matter, the body of legal doctrine available to the courts consisted of explicit rules of law, such as the rules contained in the statutes. In addition, legal doctrine was presented by him as including the general legal concepts, principles and ideals that were implicit in, and involved in, the organization and interpretation of the authoritative material sources of the law. Despite the great importance that Llewellyn attached to legal doctrine as setting the context and framework for judicial decision-making, it should be noted that he emphasized, as a counter consideration in qualification of the second steadying factor, that with any case submitted to the appellate courts for decision the consulting of the authoritative legal doctrines would still allow for more than one possible outcome.[23]

In the event, Llewellyn did not consider that the United States appellate court were merely to decide cases in accordance with the terms of established legal doctrine. The courts were also to decide cases in accordance with what were recognized to be the correct techniques for the using of, and working with, the authoritative doctrinal materials. Hence the third steadying factor in common law adjudication that Llewellyn picked out was the preparedness of the appellate courts to adopt, and to follow, the *known doctrinal techniques*. This steadying factor was qualified by Llewellyn with the counter consideration that the known and recognized correct techniques for using, and working with, the authoritative materials were techniques which allowed for wide discretion, or as he put it

wide leeways, such as to make possible the producing of some considerable variation in result in decisions.[24]

In emphasizing the place of legal doctrine and known doctrinal techniques in the American appellate judicial process, Llewellyn gave recognition to the concern of the United States appellate courts to render their decisions formally consistent with the terms and provisions of existing law. With the fourth and fifth steadying factors in common law adjudication, Llewellyn moved from considerations that were to do with the form of the court decisions to considerations that were to do more with their substance. Thus the fourth steadying factor was what Llewellyn saw as the preparedness of the appellate courts to act in acceptance of what he called a *responsibility for justice.* Here, Llewellyn underlined that the decisions of the appellate courts were stable and regular in part because the courts acted to decide cases in accordance with, as he put it, some deeply felt need, duty and responsibility on their part for reaching decisions which were just. In qualification of this, Llewellyn added the counter consideration that there existed a potential conflict between the concern of the courts to do justice and the pressure on the courts to act in conformity with the terms of legal doctrine.[25] The fifth steadying factor that made for stability and reckonability in the United States appellate court decisions was what Llewellyn saw as the preparedness of the courts to decide cases on the premise that cases submitted for decision were such that the deciding of them admitted, in principle, of only *one single right answer.*[26]

The next seven steadying factors that Llewellyn saw as making

for reckonability of result in common law adjudication were factors that were to do with such conventions adopted by the United States appellate courts as concerned the manner in which the courts issued decisions and the manner in which cases were presented to the courts for decision, and as concerned the organization, privileges and composition of the courts.

Thus the sixth steadying factor in common law adjudication that Llewellyn picked out was that the decisions of the United States appellate courts were generally presented in the form of an *opinion of the court.* Crucial among the considerations set out, in Llewellyn's explanation of this steadying factor, was that the decisions of the appellate courts were supported by published opinions which stated the grounds for decisions reached. Another consideration, here, was that published opinions had a prospective, forward-looking effect and function in indicating how comparable cases were to be decided in the future.[27]

The seventh steadying factor was that the cases submitted to the United States appellate courts for decision were presented in the form of *a frozen record from below.* What Llewellyn meant by this was that the factual material relating to cases submitted to the appellate courts was always strictly circumscribed, such that new facts pertaining to cases were not to be allowed to disturb, distract or alter the official record of the cases, as these were presented to the courts.[28]

The eighth steadying factor was that such matters as were presented to the United States appellate courts for decision were presented as issues that had the form of *issues limited, sharpened, and*

phrased in advance. What this meant, for Llewellyn, was that matters coming before the appellate courts for decision were issues which were presented by lawyers in the context of the framework set by established legal doctrine and procedure, and issues which were also presented in explicit language. The result of this focusing in the presentation of issues, as Llewellyn explained it, was that it worked to limit and restrict the scope for discussion and reflection by the appellate courts, and hence also to limit and restrict the lines and parameters of judicial decision-making.[29]

The ninth steadying factor was that the United States appellate courts arrived at their decisions only subsequent to the presentation of relevant materials through *adversary argument by counsel.* In Llewellyn's explanation of the matter, the convention of adversary argument by trained counsel in the submission of cases for decision to the appellate courts was one that worked greatly to promote reckonability in judicial decision-making. For he saw the convention as serving, among other things, to locate and point up significant issues, to gather and focus the relevant legal authorities, and to clarify the likely consequences of the different decisions which were being sought and contended for by counsel. In addition, he underlined that the convention of adversary argument by counsel served to confront the appellate courts with the relevant legal authorities in such a way as to enhance, and to reinforce, the degree of reckonability in judicial decision-making which followed from the preparedness of the courts to act in conformity with the terms of established legal doctrine.[30]

The tenth steadying factor was that the decisions of the United

States appellate courts were decisions that were taken by groups of judges, and so, for that reason, were decisions which were arrived at through the process of *group decision.* According to Llewellyn, group decisions tended to be informed by a broader perspective, and by much less extremism, than was the case with the decisions that were arrived at by individuals. Further to this, he pointed out that the convention that appellate court decisions were to be expressed in the form of a written group decision was such as to promote greater stability, and hence greater reckonability, in the decision of cases.[31]

The eleventh steadying factor was the factor of *judicial security and honesty.* In explanation of this factor, Llewellyn emphasized that it was an important feature of the United States appellate courts that the judges and the courts were afforded institutional securities against attacks from persons who objected to their decisions. This, he maintained, had the result of promoting reckonability in court judgments and decisions.[32]

The twelfth steadying factor was that the judges sitting in the United States appellate courts comprised a *known bench,* where the judges belonging to particular courts were able to be recognized to have their own individual ways of approaching issues, of dealing with the established legal authorities, and so on. As Llewellyn explained it, the factor of known benches was a steadying factor that worked to make the appellate judicial decision-making process more intelligible, and so also more predictable. Thus he noted, among other things, that the appeal judges belonging to a particular bench would tend to develop their own traditional manner of work and

outlook and of relating to one another, and that new judges admitted to the bench in question would tend to be broken into the ways of its on-going tradition. While the tradition of a particular bench was susceptible to change, and often to rapid change at that, it remained the case, Llewellyn argued, that even when in the process of undergoing change, the existing tradition of the bench was something that was available to be known to some degree or other. In addition, Llewellyn noted that the convention by which the appellate court decisions were to be supported by signed opinions, and the convention by which the votes for and against decisions were to be recorded, were such as to allow for study of the individual views of sitting judges.[33]

The thirteenth steadying factor in common law adjudication that Llewellyn picked out was the one to which he devoted the greatest attention in *The Common Law Tradition.* This was the factor that he called *the general period-style and its promise.*[34] What Llewellyn meant in referring to period style was the idea of a distinct form or way of legal thought and practice. Thus as he defined it, a period style in the law was

> the general and pervasive manner over the country at large, at any given time, of going about the job, the general outlook, the ways of professional knowhow, the kind of thing the men of law are sensitive to and strive for, the tone and flavor of the working and of the results.[35]

In his explanation of the thirteenth steadying factor in *The*

Common Law Tradition, Llewellyn drew and developed a fundamental distinction between two identifiable period styles in law and adjudication, which, as he argued, had been adopted by the American courts during different times in the history of the United States. First, Llewellyn picked out a period style that he called the *Grand Style of the Common Law.* In Llewellyn's specification of it, the grand style of common law adjudication was one where the courts followed, and acted in accordance with, established precedents, as the authoritative sources of the law. However, it was also a style of adjudication where, as Llewellyn emphasized, the precedent rules remained subject to certain forms of interpretation, or testing, by the courts. Hence the grand style of adjudication was one where precedent rules were tested by the courts through consideration of the standing of the judges who had set the precedents. At the same time, the grand style was one where precedent rules were tested through consideration of the general principles that informed them, and where this was done with a view not only to establishing order among the rules, but also to establishing the proper meaning, or sense, of the rules. In addition, the grand style was a style of adjudication where precedent rules were tested by the courts through consideration of their relation to policy, that is, through consideration of the prospective consequences of the precedent rules with which the courts were concerned. Thus did Llewellyn describe the type of legal thought that he saw as being characteristic of a time or period when the grand style was prevalent:

The *type*-thinking of the time is to view precedents as wel-

come and *very* persuasive, but it is to test a precedent almost always against three types of reason before it is accepted. The reputation of the opinion-writing judge counts heavily (and it is right reason to listen carefully to the wise). Secondly, 'principle' is consulted to check up on precedent, and at this period and in this way of work 'principle' means no mere verbal tool for bringing large-scale order into the rules, it means a broad generalization which must yield patent sense as well as order, if it is to be 'principle.' Finally, 'policy', in terms of prospective consequences of the rule under consideration, comes in for explicit examination by reason in a further test of both the rule in question and its application.[136]

Llewellyn claimed that the grand style in the common law had prevailed in the United States from the 1800s to the 1870s.[137] In his view of it, the grand style was the best style of adjudication. It was also the style of adjudication that he saw as enhancing stability and reckonability of outcome and result in judicial decision-making. This, as he explained it, was so for three reasons. First, the grand style of adjudication provided for procedures that served to resolve and overcome conflicts as between the legal rules laid down in the authoritative sources of the law and the intuitively compelling demands of justice. Second, the grand style was one that involved the courts moving to make their decisions consistent not only with the formal language of the legal authorities, but also with the underlying reason of the legal authorities. Third, the

grand style was a forward-looking style of adjudication, in the respect that it was a style where the courts concerned themselves with the prospective or future consequences of the legal rules which they were to apply. Hence the grand style was a style of adjudication that involved procedures of reasoning and decision-making which permitted the courts to work for the improvement of the existing rules of law. As Llewellyn put it:

> On reckonability of result, three points cry for attention: first, the Grand Style is the best device ever invented by man for drying up that free-flowing spring of uncertainty, conflict between the seeming commands of the authorities and the felt demands of justice. Second, when a frozen text happens to be the crux, to insist that an acceptable answer shall satisfy the reason *as well as* the language is not only to escape much occasion for divergence, but to radically reduce the degree thereof.... Third, the future-directed quest for ever better formulations for guidance, which is inherent in the Grand Style, means the on-going production and improvement of rules which make sense on their face, and which can be understood and reasonably well applied even by mediocre men. Such rules have a fair chance to get the same results out of very different judges, and so in truth to hit close to the ancient target of 'laws and not men.' [38]

In Llewellyn's specification of it, then, the grand style of the common law was a style of adjudication where the courts were not

restricted to the rules that were to be found set down in the formal sources of law as the basis for the decision of cases. On the contrary, the grand style of adjudication was one where the courts proceeded to move beyond the formal rules of law, so as to decide cases through relating rules of law to other norms such as principles and policies, and, in doing this, to decide cases in such a way as to create overall order and sense within the law. It was, here, that there was the greatest contrast between the grand style of the common law and the period style that Llewellyn called the *Formal Style* of law and adjudication.

The formal style of law and adjudication, in Llewellyn's account of it, was a logical, authoritarian style of adjudication, and it was the style that he claimed had begun to acquire the status of the orthodox ideology in American legal thought and practice during the 1870s and 1880s. This style was one where cases were decided by the courts through reference to the established rules of law, which rules of law were assumed to be formally decisive. The formal style was also a style of adjudication where matters of policy, and even matters concerning changes to the substance of the common law, were understood to be matters which were to be settled by legislative institutions rather than as matters which were to be addressed and settled by the courts. Yet further, the formal style was a style of adjudication where when principles were appealed to and applied by the courts, then this was done to resolve problems concerning anomalous cases or rules, rather than, as with the grand style of the common law, to establish the overall meaning and sense of the law. As Llewellyn put it:

> The Formal Style is of peculiar interest to us because it set the picture against which all modern thinking has played - call it, as of the last eighty or ninety years, 'the orthodox ideology.' That picture is clean and clear: the rules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law. Opinions run in deductive form with an air or expression of single-line inevitability. 'Principle' is a generalization producing order which can and should be used to prune away those 'anomalous' cases or rules which do not fit, such cases or rules having no function except, in places where the supposed 'principle' does not work well, to accomplish sense - but sense is no official concern of a formal-style court.[39]

The idea of period style in law and adjudication, and the distinction that Llewellyn drew between the grand style and the formal style, occupied a central position in the argument of *The Common Law Tradition.* For it was Llewellyn's contention that the emergence of the formal style of law and adjudication had created a false image as to what the United States appellate courts were doing, and as to what they were supposed to be doing. It was the prevalence of this formal-style image of law and adjudication, Llewellyn claimed, that was to be regarded as the major cause for the crisis of confidence among the members of the American legal profession as to the stability and reckonability of appellate court decision-making which, in *The Common Law Tradition,* he was so

concerned to address and resolve. As for Llewellyn's response to the crisis of confidence he identified, the main burden of his argument in *The Common Law Tradition* was to demonstrate that the conformity of the courts with the ways of the grand style of law and adjudication in fact tended to make for, and to produce, stability and reckonability in judicial decision-making. At the same time, he demonstrated that to the degree that the United States appellate courts in the decades before 1960 had achieved a high level of reckonability, then this was to be accounted for by the fact that the practice of the appellate courts during that period involved fidelity on their part to the ways of the grand style of common law adjudication.

The fourteenth and final steadying factor in common law adjudication that Llewellyn picked out in *The Common Law Tradition,* as a factor working to enhance reckonability of result in the appellate judicial decision-making process, was the factor that the judges - that is, the men who actually arrived at and issued decisions - were the incumbents of a *professional judicial office.* According to Llewellyn, the official status of judges was a factor that worked to constrain judges such that they would act to promote stability and regularity in judicial decision-making. For, as he explained, the principle of professional judicial office meant that the judges were subject to the demands or pressures that went with the judicial office, and so were compelled through the institutional constraints of office to aim to be selfless and impartial. Despite this, there was no suggestion on Llewellyn's part that the institution of the judicial office was such as to produce uniformity in the decisions

reached by holders of the office. The factor of the person remained highly important, Llewellyn emphasized, and the reckonability in appellate judicial decisions that came with judges occupying an office was not to be mistaken for complete predictability.[140]

ii. The Steadying Factors in Common Law Adjudication Assessed

The analysis and explanation that Llewellyn made of the steadying factors in American appellate court adjudication was the central component of his defence of the common law tradition as a tradition of law and adjudication that was based in a stable, regular and reckonable process of judicial decision-making. To the extent that Llewellyn was prepared in 1960 to defend the common law through reference to what he identified as its integral steadying factors in adjudication, then to this extent it must be recognized that the Llewellyn of *The Common Tradition* was involved in a significant abandonment of certain of the key elements of the radical critique of law and adjudication that had been essential to the realist project in jurisprudence which he had sponsored in the 1930s.

As we have seen, Llewellyn in the 1930s followed jurists like Holmes and Gray in taking up a court-centred view of law. In doing this, he came to maintain that the real essence of the law lay in the substantive decisions of the courts, and not in the legal rules and principles that were to be found standing as the formal sources of the law. The formal sources of the law, in Llewellyn's explanation of the matter, comprised what he called paper rules and rights,

and these, he argued, were to be contrasted with the so-called real rules and rights which were established through, and embodied in, the actual practice, or behaviour, of the courts and of the judges and other legal officials. The emphasis that Llewellyn placed on judicial behaviour, as the determinant of real law, was such that it implied that the process of adjudication was to be thought of as a more or less arbitrary process of decision-making. For in identifying the law with court decisions in the judicial-behavioural terms that he favoured, Llewellyn implied that the process of adjudication was a process of decision-making that was neither founded in nor controlled by the rules and principles which were given in the formal sources of the law. So, at the same time, did he imply that formal legal rules and principles were not to be thought of as determining the substantive decisions that the courts arrived at through the process of adjudication on any reliable or predictable basis.

The arbitrariness that Llewellyn implied for the process of judicial decision-making, and the marginal role that he was prepared to assign to formal legal rules and principles in adjudication, are indicative of what has already been pointed to in this paper as the central defect of the classic realist critique of law and adjudication. This was the failure of Llewellyn and the mainstream realists to give adequate and proper recognition to the conception of law as a normative order: that is, the conception of law as a system of rules and principles which were understood to possess binding normative force, and hence to embody normatively compelling reasons for action and deliberation.

Thus, for example, the classic realist analysis of law and adju-

dication was defective in its failure to bring out the respects in which the courts, and judges and legal offficials, were to be thought of as being bound to conform with the rules and principles laid down in the formal sources of law, and hence bound to base and justify their decisions in cases in terms of the legal rules and principles which were actually established and in force. So also was the classic realist analysis defective in its failure to bring out the respects in which the courts, and judges and legal officials, were to be thought of as being bound to decide cases in accordance with the rules and principles that served to define the procedures of adjudication, and to define the specific institutional obligations and responsibilities of the courts and those of judges and legal officials. Then, again, the classic realist analysis was further defective in its failure to bring out the respects in which adjudication was to be thought of as a process of decision-making that remained subject to its own internal constraints and disciplines, including the constraints and disciplines which were implicit in the specifically legal, or judicial, form of reasoning and deliberation.

The defects of the classic realist analysis of law, as detailed above, were defects of the particular analysis of law that Llewellyn set out in 1930 in his seminal article 'A Realistic Jurisprudence: The Next Step'. However, they were defects in the analysis of law that Llewellyn successfully avoided when it came to the analysis of law and adjudication that he provided in *The Common Law Tradition.* Thus it is that, as it is argued in this paper, Llewellyn in *The Common Law Tradition* shifted away from the radical realist jurisprudence of the 1930s, and towards the acceptance of a more ortho-

dox conception of law and adjudication.

One of the considerations that must be noted, in this connection, relates to the view that Llewellyn adopted in *The Common Law Tradition* as to the role played by formal legal rules and principles in the process of judicial decision-making. For in contrast to the view of this matter that he had taken in the 1930s, Llewellyn in *The Common Law Tradition* affirmed the irreducibly normative force and standing of legal rules and principles. In doing so, he emphasized particularly that legal rules and principles controlled and determined the process of judicial decision-making, such that it was the fact of the conformity of the courts with the established rules and principles of law which was to be understood as making for reckonability of result in appellate court adjudication.

Of obvious relevance, here, is what Llewellyn picked out as the second steadying factor in common law adjudication. For with this steadying factor, Llewellyn pointed to how the context for decision-making by the United States appellate courts was set by the existing body of legal doctrine that comprised the explicit rules of law, like statutes, and the general concepts and principles that were present in the interpretation of the authoritative sources of the law. So, likewise, with the third steadying factor did Llewellyn point to how the United States appellate courts acted to decide cases in accordance with existing legal doctrine only through the resort to proper techniques for the use, and application, of the established doctrinal materials. In all this, it is clear that Llewellyn in *The Common Law Tradition* departed from the terms of the classic realist critique of law and adjudication. This is so for the reason

that he no longer presented court decisions as the determinant of law. Instead, he presented court decisions as decisions which presupposed the existence of antecedently established legal rules and principles, and as decisions which were to be supported and justified in terms of their grounding in, and derivation from, these authoritative sources of law.

There is a further notable respect in which the discussion of law and adjudication that Llewellyn provided in *The Common Law Tradition* diverged markedly from the terms of the classic realist critique of law and adjudication, as he had set this out in the 1930s. This concerns the emphasis that Llewellyn placed on the procedures and conventions which he saw as serving to structure common law adjudication as a specific process of decision-making. It has been observed in this paper that the classic realist critique of law and adjudication that Llewellyn contributed to in the 1930s was one where adjudication was presented as a process of decision-making, but one where little or no effort was made to explain the process of adjudication in relation to the procedures and conventions which the courts were understood to conform with in order to decide the cases submitted to them. In *The Common Law Tradition*, on the other hand, Llewellyn presented common law adjudication, as it was embodied in the ways of the United States appellate courts, as being a complex institutional practice, and one that was understood to be based in procedures and conventions which served to shape and organize the process of appellate court decision-making, and which, on account of this shaping and organizing of judicial process, served to establish stability and reckonability

in the decisions of the appellate courts.

By far the greater part of the steadying factors in common law adjudication that Llewellyn discussed were factors that related to procedures and conventions of United States appellate court decision-making which went to mark out common law adjudication as a distinct institutional practice. So, for example, there is the first steadying factor. For this makes it clear that, for Llewellyn, appellate court adjudication was a practice in the respect that court officials were law-conditioned officials, and hence persons who were required to be brought to follow the ways of the practice of adjudication through training and experience.

Then again, there are the steadying factors to do with the procedures and conventions that Llewellyn saw as governing the proper form for the presentation and decision of cases which were to be considered by the United States appellate courts. The steadying factors to be mentioned, here, are the following: the seventh, the factor that cases submitted to the appellate courts for decision were to be presented in the form of a frozen record from below; the eighth, the factor that materials going before the appellate courts were to have the form of issues limited, sharpened, and phrased in advance; the ninth, the factor that cases going before the appellate courts were to be presented through adversary argument by counsel; and the tenth, the factor that appellate court decisions were in the form of a group decision. These steadying factors concerned principles of formal procedure in adjudication. To be sure, the procedural principles in question were not such that they were put forward by Llewellyn as principles whose observance by the appellate

courts was to be thought of as serving to determine outcomes in specific cases in some absolute sense. Nevertheless, they do very clearly stand out as principles which, for Llewellyn, went to constitute appellate court adjudication as a stable and regular practice of judicial decision-making.

Finally, there must be considered the eleventh steadying factor, which was to do with the bases of judicial security and honesty, and the twelfth steadying factor, which was to do with the convention of adjudication by a known bench. These were not factors that concerned formal procedures of adjudication as such. Instead, they were factors that concerned conventions relating to the organization of appellate court decision-making that underlined that this was a practice of decision-making which was intended to aim at promoting integrity and transparency in its results and outcomes.

The most important respect in which Llewellyn's argument in *The Common Law Tradition* reflects a break with the terms of the classic realist critique of law and adjudication concerns the view he took as to the rational bases of judicial decision-making. The classic realist definition of law as consisting of court decisions was presented in terms where it was implied, even if it was not stated explicitly, that judicial decision-making was arbitrary because it stood as a process that was not as such based in any determinate form of reasoning and deliberation. In *The Common Law Tradition*, however, Llewellyn very obviously saw common law adjudication, in the form that it was practised in the United States appellate courts, as a process of decision-making which was based in a specifically legal, or judicial, mode of reasoning and deliberation. Indeed it is clear

that, for Llewellyn in *The Common Law Tradition*, the reckonability, and the validity, of the appellate court decisions presupposed the acceptance by the courts of the constraints and disciplines which were bound up with the judicial mode of reasoning as the appropriate and proper method for the making and justification of such decisions.

Most of the steadying factors in common law adjudication that we have referred to in detail go to confirm that Llewellyn saw great significance in how decision-making by the courts was based in, and guided through, the legal or judicial mode of reasoning. This is certainly true of the seventh, eighth and ninth steadying factors that Llewellyn picked out. For these are steadying factors that bear very directly on the question of the proper form of judicial reasoning, in the respect that they are factors relating to the principles of procedural propriety that Llewellyn saw as governing the presentation of issues and matters to the courts for adjudication. Likewise, there are the second and third steadying factors. These concerned what Llewellyn saw as the adherence of the United States appellate courts to established legal doctrine in the decision of cases, and what he saw as the adoption by the courts of appropriate techniques for the application of the authoritative legal doctrines. Here, Llewellyn once again quite clearly addressed the matter of the form of judicial reasoning. For he underlined that the reasoning involved in common law adjudication has to be thought of as a specifically judicial form of reasoning precisely because it is reasoning that is directed to the application of the law, and hence a form of reasoning where the authoritative sources of the law must be assigned a spe-

cial normative weight and priority.

The fourth, fifth and sixth steadying factors in common law adjudication that Llewellyn picked out are notable in bringing out important features of the judicial form of reasoning. The fourth steadying factor concerned the general responsibility that Llewellyn saw as falling on the United States appellate courts for the doing of justice in the decision of cases, even where the pursuit of justice was in conflict with the determination of the courts to adhere to the terms of established legal doctrine. Here, Llewellyn pointed not only to how the judicial form of reasoning was to be understood as a form of reasoning that was directed to the application of the law. He pointed also to how judicial reasoning was a form of reasoning that was guided by a proper consideration of the truth that justice was to be thought of as standing as the ultimate point or purpose of the practice of adjudication.

The fifth steadying factor in common law adjudication that Llewellyn picked out was what he held to be the determination of the United States appellate courts to decide cases on the premise that cases involving disputes submitted for adjudication admitted of only one single right answer. This steadying factor was one where the logic of judicial reasoning was of central concern. For it was here underlined that the judicial form of reasoning adopted by the common law courts was not concerned merely with the provision of rationalizations for arbitrary court decisions. Rather, it was underlined that judicial reasoning was concerned with the reaching of decisions by the courts that were objectively defensible from the standpoint of reason, and that were to be presented and justified in

terms which were capable of securing rational consent and agreement. In other words, it was affirmed by Llewellyn, with his specification of the fifth steadying factor, that the judicial form of reasoning was a form of reasoning which involved genuine rational reflection on law, and which involved the subjection of law to the constraints and disciplines essential to the exercise of reason and to rational reflection.

As for the sixth steadying factor, this also served to underline that judicial reasoning was concerned with very much more than the rationalizing of arbitrary court decisions. For this steadying factor was the factor that the decisions of the United States appellate courts were presented in the form of published opinions. This, as Llewellyn explained it, was such as to bring out that judicial reasoning was not to be thought of as directed at the decision of particular cases considered in isolation from one another. Rather, judicial reasoning was to be thought of as being directed at the decision of cases in terms of the enunciation of rules and principles which would have an objectively binding normative force, by virtue of their having application to similar and like cases.

The part of the discussion of the common law tradition that most clearly underlines Llewellyn's break with the terms of the classic realist critique of law and adjudication is what he wrote in explanation of the thirteenth steadying factor in common law adjudication. The thirteenth steadying factor was the factor of period style in law and adjudication. Central to the explanation of this that Llewellyn provided was the distinction that he drew between the formal style in law and adjudication and the grand style of the

common law, as the principal jurisprudential styles that he saw as having been adopted by the courts in the United States. This distinction, in its various ramifications, bears crucially on the question of Llewellyn as defender of the common law in relation to Llewellyn the radical realist of the 1930s.

As it was explained in Part 1 of the present paper, the realist project in jurisprudence, in the form that it came to be established in the 1930s, was set in opposition to formalist thinking about the law and adjudication. Thus realists like Llewellyn rejected the formalist view of law as something that was to be thought of as consisting in explicit legal rules and principles. In doing so, the realists came to advance the rival view of law as something that was to be thought of as consisting in the substance of court decisions, and hence as something that was to be explained in terms of the actual practice of judges and other legal officials. In *The Common Law Tradition*, Llewellyn confirmed the opposition to formalism that had been integral to the realist jurisprudence that he had argued for in the 1930s. For Llewellyn pointed to the prevalence of the formal-style image of law and adjudication as the principal cause for what, as he complained in the book, was the widespread misrepresentation as to what the practice of the United States appellate courts was in fact and what ideally it was meant to be, and hence as the principal cause for the crisis of confidence among American lawyers about the reckonability of appellate court adjudication which was the pretext for his writing the book.

According to Llewellyn in *The Common Law Tradition*, the formal style in law and adjudication was one where rules of law were

assumed to stand as the basis for the decision of cases by the courts, and where it was assumed that formal legal rules were such as to control and determine the process of judicial decision-making. Moreover, the formal style in law and adjudication was one where it was assumed that the courts were restricted to the formal rules of law in the elaboration of the grounds of justifications that they appealed to in the decision of cases, and one where this restriction was assumed to be essential as a precondition for meeting the requirements of legal certainty. Thus the formal style was such that the courts were assumed to have no particular responsibilities in matters concerning public policy and in matters concerning the substantive principles of the common law, which matters were taken as being the concern of legislative rather than judicial institutions. So, likewise, was the formal style such that the courts were assumed to have no particular responsibilities even for the elaboration of the general principles that informed the body of legal rules which they were charged with applying.

It is clear from Llewellyn's discussion of the thirteenth steadying factor that he regarded the formal style in common law adjudication as inferior to the grand style of the common law. It is also clear that the grand style in common law adjudication, as Llewellyn specified it, was a style that gave proper recognition, as the formal style did not, to certain of the features of law and adjudication which he had been most at pains to emphasize in the 1930s in his arguments for the realist project in jurisprudence. Thus the grand style in common law adjudication was a style where the law was recognized to have its life and embodiment in the activity of the

courts, and where the courts were recognized to have a constructive and creative role to play in the maintenance and development of the law through the process of the decision of actual cases. Even so, it remains the case that Llewellyn went far beyond the terms of the realist project in jurisprudence of the 1930s with the appeal that he made to the grand style as the proper style in law and adjudication, which was to be adopted and followed by the courts. For, as Llewellyn specified it, the grand style was a style in law and adjudication where full recognition was given to the normative dimension that belonged to the law and to the process of adjudication. So also was the grand style a style where full recognition was given to adjudication as a process of decision-making that remained subject to internal constraints and disciplines, such that it was a process in which the decisions of the courts were recognized to stand in need of support through the specifically legal or judicial form of reasoning and deliberation.

The grand style in common law adjudication, then, was a style that Llewellyn saw as giving recognition to the normative dimension of law and adjudication, and hence as giving recognition to the standing of law as something that embodied an essentially normative order. This was so in the respect that, in the grand style of the common law, the formal legal rules comprising the law were understood to possess a binding normative force for the courts, and to provide normatively compelling grounds of justification for the decisions reached by courts. Here, of course, there was a clear parallel between the grand style of the common law and the formal style in law and adjudication. For Llewellyn was quite explicit that the

grand style in common law adjudication, no less than the formal style, was a style where the courts accepted that they were bound to act in deference to, and in accordance with the terms of, the established precedent rules that stood as the authoritative sources for law. Nor should it surprise that Llewellyn identified the fidelity of the courts to established rules of law as a distinguishing feature of the grand style in common law adjudication. For, after all, Llewellyn saw it as one of the main steadying factors in common law adjudication that the courts acted to decide cases in a context set by established legal doctrine, and that this body of legal doctrine comprised the rules of law that formed the authoritative material sources of the law, and the general concepts and principles which were involved in the proper judicial interpretation of the sources of the law.

In the event, of course, the grand style in common law adjudication, in Llewellyn's account of it, was a style of judicial practice that was set apart from the formal style in law and adjudication. The principal respect in which this was so was that the grand style was presented as a style in law and adjudication where the courts were not restricted to the rules comprising the formal sources of the law as the grounds of justification available to them for the decision of cases. Thus Llewellyn emphasized that it was a characteristic of the grand style of the common law that the courts that adopted it were directed to look beyond the the rules standing as the formal sources of the law, and to appeal to other kinds of norm, such as the general principles of law and the general norms of public policy, in support and justification for their decisions. In this, Llewellyn

pointed to how the grand style was a style of law and adjudication where recognition was given to the role of the law, and more particularly to the role of the courts, in giving effect to norms that reflected the values and interests of the whole order of society. Through bringing this out, Llewellyn affirmed the thrust of the classic realist critique of law and adjudication, as a critique that set itself against the sort of formalism in jurisprudence where it was presupposed that law was to be considered in abstraction from the conditions governing its interaction with the containing social order of which it was a part.

In *The Common Law Tradition*, Llewellyn endorsed the tendency of courts of the grand style of the common law to resort to arguments of principle, and to arguments of policy, in the decision of the cases submitted for adjudication. Nevertheless, there was nothing about this endorsement of the grand style in common law adjudication that involved the implication that adjudication was to be thought of as an arbitrary procedure of decision-making, or the implication that in judicial decision-making the courts were to be thought of as unconstrained by established rules of law and established forms of judicial reasoning. These were central among the implications of the classic realist critique of law and adjudication of the 1930s, in the form in which Llewellyn had contributed to it at that time. They were not, however, implications carried in Llewellyn's account of the common law tradition, and of the grand style in law and adjudication that he saw as the best embodiment of the tradition.

Here, it must be emphasized that Llewellyn did not claim that

the courts that followed the grand style were to be thought of as exempt from the constraints, and disciplines, set by established legal rules and established forms of judicial reasoning in the appeal that they made to considerations of principle and policy in the decision of cases. On the contrary, Llewellyn presented the grand style in law and adjudication in terms such that the courts were understood to make appeal to considerations of principle and policy in connection with the interpretation, or as he put it the testing, of the formally established rules of law. That is to say, the grand style, for Llewellyn, was a style in law and adjudication where the courts were understood to make reference to arguments of principle and arguments of policy only in the course of reasoning and deliberation on their part that remained directed at the formal rules of law, and at the particular sense and meaning that the formal rules of law were taken to have in relation to the cases submitted for decision. Thus was the appeal to considerations of principle and policy by the courts of the grand style presented by Llewellyn as forming an integral part of what was to be viewed as a disciplined, and internally constrained and ordered, procedure of judicial reasoning and deliberation.

Beyond this, it should be emphasized further that, in Llewellyn's account of the matter, the courts that adopted the grand style of the common law were not to be thought of as being concerned narrowly with the decision of individual cases in their substantive particularity. For Llewellyn, the courts of the grand style were to be thought of as being concerned to decide individual cases in terms such that the process of decision-making itself was to serve to pro-

mote, and preserve, the law in its status as a normative order which was based in and transparent to reason, and in its status as a normative order which possessed its own systematic coherence and integrity.

Thus Llewellyn underlined that the grand style of the common law was a style of law and adjudication where the courts were to decide cases in such a way as to resolve conflicts between the established legal rules and the imperatives of justice. So, at the same time, did he underline that the grand style of the common law was such that the courts that adopted it were to base their decisions not only in the established rules of law as these were to be construed in their literal meaning, but also in what was to be taken as being the underlying rationale or reason of the legal authorities. Then again, the procedure of decision-making followed by the courts of the grand style was a procedure that, as Llewellyn maintained, involved the courts in the continuous generation and improvement of rules of law through the decision of cases. These were features of the grand style of the common law that underlined the absence of arbitrariness from the process of adjudication. Most particularly, they were features of judicial practice in the grand style that, for Llewellyn, pointed to the honouring by the courts adopting this style of the ideal of legal certainty which was so closely associated with formalism in the law. Indeed, it should be emphasized, in this connection, that the features of law and adjudication here referred to were features that Llewellyn singled out as pointing to stability and reckonability in the outcomes in judicial decision-making.

The view that Llewellyn took of common law adjudication in

The Common law Traditionem must be reckoned as a highly conventional and orthodox one. Thus in this view of adjudication, the courts were understood to accept the authority of precedent and that of other recognized sources of law, and to decide cases in accordance with the established precedents and rules of law and in accordance with the established techniques for the application of the legal authorities. At the same time, it was understood that the fidelity of the courts to established legal rules presupposed their adoption of an inclusive approach to the law and its interpretation. Thus the approach the courts were to take was one where the courts were to appeal to considerations of principle and policy in the decision of cases, and to act to bring these norms into an integrated and systematic relation with the formal sources of the law. It is clear from all this that Llewellyn took the view of common law adjudication that it was adjudication involving the adoption by the courts of the principled approach to the law, where the courts were to act not only to apply legal rules to individual cases, but also to decide cases in such a way as to maintain the law in its character as a system of rules which were founded in a set of consistent and mutually reinforcing principles.

What is here described as the orthodox view of common law adjudication is a view that is obviously to be found informing Llewellyn's discussion of the grand style of the common law. However, it is also to be found present in the discussion of the other steadying factors in common law adjudication. This is true of the second and third steadying factors, these being the factors to do with the conformity of the courts with legal doctrine and with the techniques for

the proper working of legal doctrine. It is true too of the fourth steadying factor, which related to the acceptance by the courts of a responsibility for justice, and true of the fifth steadying factor, which related to the working premise of the courts that cases submitted for decision pointed to one single right answer. Finally, it merits notice that the orthodox view of common law adjudication that Llewellyn argued for in *The Common Law Tradition* stands confirmed by his discussion of professional judicial office as the fourteenth steadying factor. For Llewellyn here underlined that judicial decision-making was something that belonged to a specific office, whose incumbents were subject to the institutional duties and responsibilities which were essential to the judicial office. So at the same time did Llewellyn here underline that the judicial office was such as to incline its incumbents to be impartial in the decision of cases, and impartiality must surely be taken to stand as a virtue essential to adjudication as a procedure involving the stable and regular application of rules of law in accordance with consistent principles.

Conclusion

It is evident that the view of law and adjudication that Llewellyn favoured with his endorsement of the common law tradition was one where law and adjudication were presented as going together to form a complex institutional practice. Thus law and adjudication, as specific to the common law tradition, were presented by Llewel-

lyn as comprising an institutional practice that was distinguished by the complexity of its internal structure, by the complexity of its normative organization and the weight of its normative authority, and by the discipline and sophistication of the complex forms of reasoning and deliberation which it involved as the basis for its effective and regular operation. The account of law and adjudication that Llewellyn provided in *The Common Law Tradition* was one that transcended the limitations of the realist critique of law and adjudication of the 1930s, principally so because of the recognition given to the normative quality of law and to the workings of the internal structure of law. It was also an account of law and adjudication that served as a corrective to the general thrust and direction of realism as a distinct school of jurisprudence. This is so, most notably, with respect to two aspects of classic realist jurisprudence that quite particularly reflect the neglect by the realists of the normative and the internal structural dimensions of law and adjudication. First, there is the matter of the positivism of the realist approach to the law and to its analysis. Second, there is the matter of the instrumentalist view of law that was assumed and appealed to by the realists.

The American realists were apt to think of jurisprudence, in the form that they conducted it, as something that was to involve a fully scientific method of enquiry into the nature of legal phenomena. The scientific status that the realists were disposed to attribute to their enquiries into law goes to underline how they are to be situated in the positivist tradition in Anglo-American jurisprudence. The foundations of the positivist tradition in jurisprudence

were laid in England during the late eighteenth and nineteenth centuries by such legal theorists as Jeremy Bentham (1748–1832) and John Austin (1790–1859). The positivist tradition was to prove dominant in legal thought and practice in England during the twentieth century, as witness the enormous influence of the positivist theory of law expounded by the Oxford legal philosopher H.L.A. Hart (1907–92). So also was positivism a dominant tradition in twentieth-century legal thought and practice in the United States, as witness, for example, the positivism characteristic of the sociological school of jurisprudence of Roscoe Pound, and as witness the positivist conception of law which is characteristic of the work of the American realists themselves.

From the standpoint in jurisprudence adopted by Bentham and Austin, the study of law was scientific, or positivistic, in the respect that, for the purposes of study, law was to be considered as a factual subject-matter of enquiry which called for analysis and description of its nature, to the exclusion of the study of law in its status as a subject-matter which called for judgments as to its value. Hence the positivist jurisprudence that Bentham and Austin constructed, in both its substantive and methodological aspects, was founded in the distinction that in the social sciences is referred to as the fact-value distinction. The assumption of this distinction was to involve Bentham and Austin, and their positivist successors generally, in the endeavour to pick out and isolate the law as a subject-matter of enquiry in terms such that the law was to be thought of as something that was quite distinct from other forms of normative regulation. This part of the positivist endeavour in jurisprudence

led the exponents of positivism to argue for a clear divide between law and normative principles of justice and morality, and, in doing so, to insist that there existed no necessary or conceptually guaranteed connection between the law and the final ends of justice and morality. The terms of the fact-value distinction, as it was assumed by Bentham and Austin, were also such as to involve them in the presenting of jurisprudence as a science that comprised a distinct form of enquiry, and one that, with respect to its method and subject-matter, was to be set apart from the enquiries conducted in ethics and normative political theory where principles of justice and morality were appealed to in the critical evaluation of the law.[41]

The distinguishing of facts from values in the study of legal phenomena, the separating of law from the principles of justice and morality, and the decoupling of jurisprudential enquiry from the concerns of ethics and normative political theory: these were defining features of positivist jurisprudence that were present also as defining features of the American realist jurisprudence as it was argued for by its classic exponents in the United States in the 1930s. Indeed, the positivism of the American realists, in the sense that positivism is here understood, is everywhere apparent in their determination to direct enquiries in jurisprudence away from law in its normative dimension, and towards the actual behaviour of judges and legal officials, and so in this way to make of realism a science of the observable in judicial practice. Certainly this was so with the behaviour-directed approach to the analysis of law and adjudication that Llewellyn made central to the realist project in jurisprudence at the start of the 1930s.[42]

Nevertheless, the absolutism of the positivist dichotomies as between facts and values, as between law and the ends of justice and morality, and as between jurisprudence and the concerns of ethics and normative political theory was very much brought into question in the arguments that Llewellyn set out in *The Common Law Tradition.* For the arguments that Llewellyn advanced about common law adjudication were such as to bring into question any claim to the effect that the rules and principles comprising the law were distinct from normative principles of justice and morality. To begin with, he emphasized that reckonability of result in judicial decision-making in the common law tradition depended on the preparedness of the courts to act not only in deference to the established legal authorities, but also to act so as to promote the cause of justice. At the same time, he emphasized that the courts that adopted the grand style in common law adjudication were to decide cases through the appeal to general principles and general policies, as much as through the application of the formal rules and principles of law. Here, obviously, it was conceded by Llewellyn that principles of justice and morality were present as integral operative factors in law and adjudication. For the responsibility for justice that he attributed to the courts was such that the courts were to be thought of as being compelled to articulate principles for the determining of what was just. Similarly, the recognition that the courts of the grand style were licensed to base their decisions in principles and policies opened the way for the appeal by the courts to such considerations of justice and morality as would tend, characteristically, to be found present in the sort of general principles and poli-

cies in play in common law adjudication.

The Common Law Tradition was an essay in jurisprudence, and, as such, it set out no critically constructed theory of justice and political morality. Despite this, the recognition that Llewellyn gave to principles of justice and morality, as considerations in law and adjudication, was such as to imply the necessity that the jurist should engage in normative theorizing as an essential part of the analysis and explanation of law and legal phenomena. So also was it implied, again much contrary to the tenets of positivist jurisprudence, that reflection on the values associated with the law was to be thought of as inseparable from enquiry into the factual subject-matter of the law. Here, it should be noted that Llewellyn's discussion of common law adjudication pointed to the overcoming of the positivistic fact-value distinction, in the respect that this was a discussion that involved, and indeed demanded, attention to the values that were embodied in, and promoted through, the law and the process of adjudication. This was so, certainly, with regard to the sort of principles of justice and morality that Llewellyn was prepared to accept as serving to shape judicial decision-making. It was so also in the even more fundamental sense that the identification of steadying factors in common law adjudication itself presupposed the making of judgments of value such as would inevitably be bound up with determining the underlying point, or purpose, of the law being brought to maintain the kind of stability and reckonability of result in judicial decision-making which the steadying factors were understood to make for. The judgments of value at stake in this matter would plainly be to do with judgments as to the propri-

ety, and desirability, of the encouraging of stable expectations regarding the law and its enforcement on the part of the subjects of the law, and judgments of this sort, no less plainly, would tend to touch very directly on the question of the propriety, and desirability, of the maintenance of the rule of justice which was to be preserved through the law.

While Bentham and Austin insisted on the independence of the form of positivist jurisprudence that they conducted from normative forms of enquiry, this did not mean that they were indifferent to the normative concerns of ethics and political theory as such. In fact, Bentham and Austin expounded a quite specific normative theory of law, state and government, and one that they saw as complementing, if nevertheless one that remained formally separate in terms of method and substance from, their analytical enquiries regarding the nature of legal phenomena. This normative theory was the theory of utilitarianism. The foundation of utilitarianism lay in the principle of utility. In Bentham's classic formulation of it, the principle of utility was such that it provided that men were to act, and that the institutions of law, state and government were to be organized and maintained, so as to promote the greatest happiness of the members of the community. From this, it is clear that utilitarianism involved an instrumentalist conception of law. For the principle of utility provided that law and the institutions of the law were to be thought of as a means, or instrument, for the realization of the ends of the collective welfare of the members of society, and for the implementation of such public policies as were essential for bringing about that condition of collective welfare.[43]

The view of law as a means or instrument that is presupposed, and appealed to, in the classical utilitarianism of Bentham and Austin is essentially the same as the instrumentalist view of law that is to be found informing various of the leading schools of American jurisprudence of the twentieth century.[44] One such school was that of the sociological jurisprudence of Roscoe Pound, this being the school where the law was considered in terms of its function in securing, and promoting, certain fundamental social interests.[45] Another notable instrumentalist school in twentieth-century American jurisprudence was that of the economic analysis of law, which school has been associated chiefly with the work of Judge Richard A. Posner (b. 1939). Thus for the exponents of the economic analysis of law, the law and legal processes and institutions, such as, specifically, the processes and institutions bound up with the practice of common law adjudication, were to be explained in terms of their instrumental function in promoting the maximization of overall total wealth within society, as this was to be determined in accordance with criteria relating to economic efficiency.[46]

The legal realists too adopted an instrumentalist view of law. This was true not least of Llewellyn himself. Thus it was that in 'Some Realism about Realism', Llewellyn claimed that realism was distinguished as a movement in jurisprudence by the adherence of its exponents to the conception of the law as something that stood as a means to the realization of social ends, rather than as an end in itself.[47] It was very much in line with this conception of law as a means to social ends that Llewellyn was to go on to set out at the beginning of the 1940s his well-known theory of law-jobs. For in

this theory, the law and legal institutions and processes were explained in functional terms: that is, in terms of the basic functions or jobs - such as the settlement of disputes, the prevention of disputes, and the allocation of authority and determination of authoritative procedures - that Llewellyn held that the law and legal institutions and processes were to be thought of as discharging within society.[148]

It is well understood that utilitarianism is defective as a theory relating to the normative foundations of the law and legal institutions. Of course, there is no denying that utilitarianism is virtuous as a normative theory in jurisprudence, for the reason that it underlines that law and legal institutions must be directed to serving such ends as are essential to the collective welfare of the community. Nevertheless, the theory remains flawed, and this because it fails to give proper recognition that the ends of community welfare that law and legal institutions serve to promote are ends that are to be promoted only within, and through, the framework set by the rules and principles, and by the processes and procedures, which are internal to the structure of law and legal institutions. So, for example, the terms of utilitarianism are such that no proper account is provided in the theory for the respects in which the institutions charged with the maintenance of law within the community - such as the executive agencies of government, the courts and the police - are to be thought of as being bound in justice to conform with, and to apply, the rules and principles embodied in established law, even in circumstances where this in fact proves to constitute an impediment to the realization of the collective welfare of the

community. Nor, more specifically, does utilitarianism adequately account for the respects in which the rules and principles that the law-maintaining institutions are to conform with, and to apply, are rules and principles that frequently affirm values that are set in opposition to the values bound up with collective community welfare. Central, here, are the rules and principles through which recognition is given in law to the fundamental rights that are understood to belong to individuals, where these are considered to stand as rights which are not to be set aside to serve community welfare or interests.

The defects of utilitarianism as it applies to law are to do with the excessive emphasis placed by the theory on the instrumental dimension of the law and legal institutions, and with the comparative neglect of their normative and internal structural dimensions. In this respect, the defects of utilitarianism are essentially the same defects as those of the instrumentalist schools of American jurisprudence. This is true, for example, of the school of the economic analysis of law, since this analysis of law, in its classical form, presupposed that the procedure of common law adjudication was to be thought of as a means for the implementing of policy objectives relating to the maximization of social wealth. It is true also of the judicial-behavioural approach to the analysis of law and adjudication pointed to by Holmes, and made central to realist jurisprudence by Llewellyn. For in making the substantive decisions of judges and legal officials the determinant of actual law, it was clearly implied in the judicial-behavioural analysis of law and adjudication that judges and legal officials were at liberty to decide dis-

putes with a view to giving effect to considerations of social advantage (Holmes), and giving effect to social ends (Llewellyn). In this, however, there was no recognition that judges and legal officials were bound to abide by the terms of established law, as an internal constraint of procedure in judicial decision-making, and that this constraint served to set limits to the judicial endeavour to utilize the law in the securing of favoured social objectives. Much the same is to be said about Llewellyn and the theory of law-jobs. For, here, the instrumental functions of the law were emphasized, but without the discussion of these functions being supported by Llewellyn with any proper explanation as to the complexity of the internal structure of the institutions and procedures through which the basic functions of law, like dispute settlement, dispute prevention and authority allocation, were to be fulfilled.

All this about Llewellyn notwithstanding, it remains the case that the defects and limitations of utilitarianism in its application to law, and those of instrumentalist thinking about legal phenomena generally, were to a large extent avoided and overcome by Llewellyn in his discussion of law and adjudication in *The Common Law Tradition.* For, as we have seen, Llewellyn in this work focused directly on the internal structure of adjudication as a procedure of decision-making. In doing so, he gave full recognition to the respects in which the procedures of adjudication in the common law tradition required that the courts, and court officials, were to conform with the terms of established legal doctrine and with the technical principles of method which governed the application of legal doctrine. To be sure, there was no preference for formalism on

Llewellyn's part, such that he held that the courts were to restrict themselves to formal rules of law as the grounds of justification for the decision of cases. Indeed, he accepted that the courts in the common law tradition had resorted, and were properly to resort, to arguments of policy in decision-making. Nevertheless, it remains vital to grasp that the acceptance by Llewellyn of the role of policy considerations in common law adjudication fell far short of involving a commitment by him to an instrumentalism where judicial decision-making was to be taken to stand as a means for the realization of collectively defined community ends and objectives. On the contrary, the entertaining of arguments of policy by the courts was, for Llewellyn, a feature of the grand style of the common law, and, with this style of adjudication, as he explained it, the courts were bound to decide cases not with a view to giving effect to instrumental considerations, but always with a view to maintaining and preserving the law as an integrated and fully self-sufficient system of norms, rules and principles.

As a final consideration, it should be noted briefly, and very much in passing, that the movement away from positivism and instrumentalism by Llewellyn, as this is reflected in the argument of *The Common Law Tradition*, serves to suggest something of how he is to be aligned with American legal theorists of the twentieth century who are to be placed as opponents of the realist project in jurisprudence. Particularly deserving of recognition here in connection with Llewellyn are two jurists who were notably resistant to the positivist-utilitarian tradition in jurisprudence: Lon L. Fuller (1902–78)[149] and Ronald Dworkin (b. 1931).[150] For Fuller and

Dworkin stand out as orthodox defenders of the common law style of adjudication, and as jurists whose endorsement of common law adjudication was couched in terms comparable with those that Llewellyn adopted in his endorsement of the grand style of the common law tradition. This is true, certainly, of the account that Fuller provided of the common law and of the features of the common law that he saw as marking it out as a system of law.[51] As for Dworkin in relation to Llewellyn and the grand style of the common law, there is the general theory of law and adjudication that in the 1980s Dworkin was to present as law as integrity. For this was a theory where the courts were understood to decide cases, and so preserve the systematic quality of the law, not only through the application of the formal rules that were contained in the conventional sources of law, but also through the elaboration and application of the general principles of justice and political morality which, for Dworkin, were presupposed as the basis and foundation of the conventional law established within the community.[52]

The standpoint in jurisprudence from which Fuller and Dworkin wrote was that of natural law.[53] This standpoint, as Fuller and Dworkin adopted it, was one that was understood to allow for the affirmation of the objective validity of law and legal institutions, and for the affirmation of the objective normative force of the values which were embodied in the law and given effect to in legal institutions. Llewellyn is not to be put together with Fuller and Dworkin in the natural law tradition. Even so, it is clear that the concerns that Llewellyn had in *The Common Law Tradition* were very much to do with demonstrating the objective foundations of the

law and the values that the law and legal institutions embodied and gave effect to. Here, certainly, the Llewellyn of *The Common Law Tradition* stands with Fuller and Dworkin in his dissenting from the positivist-utilitarian tradition in jurisprudence, and from the assumptions to do with the ultimate relativism of legal order and legal values which were bound up with this tradition.

In the event, however, and with the benefit of hindsight, it is proper to observe that there is a datedness about the concern of Llewellyn with the objective in the law, as this is to be found present in his endorsement of the stability and reckonability of the grand style of common law adjudication. For in the years following 1960, when Llewellyn published *The Common Law Tradition*, there emerged in the United States, and elsewhere, schools of thought in jurisprudence and legal theory that not only opposed themselves to the positivist-utilitarian tradition, but that also served to counter the sort of claims advanced by thinkers like Llewellyn, Fuller and Dworkin for the integrity of common law adjudication through the challenging and subversion of all assumptions as to the objective validity of the modes of normative regulation which are associated with the rule of law. Among these schools are the schools of critical legal studies and postmodernist jurisprudence.[154] The schools of legal thought here mentioned opened up radical lines of investigation regarding legal phenomena, and the radicalism of the jurisprudential enquiries involved was similar in spirit to that of the classic realist critique of law and adjudication of the 1930s. The ultimate substance and validity of the arguments about law developed in schools such as critical legal studies and postmodernist jurispru-

dence for the proper understanding of law in its relation to politics and society in the contemporary situation are matters which would appear to remain very much open to question. What must be taken to be beyond question, at least where the concerns of the present paper are in issue, is that attention to the arguments of the critical and postmodernist jurists serves only to underline the orthodoxy and conservatism of the treatment of the common law tradition that was provided by Karl N. Llewellyn.

Notes

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1. For a general introduction to American legal realism, and one where Llewellyn's central position in the movement is underlined, see: William Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicolson, 1973). For further discussion of American legal realism, see: Wilfrid E. Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaca, New York: Cornell University Press, 1968); Robert Samuel Summers, *Instrumentalism and American Legal Theory* (Ithaca, New York: Cornell University Press, 1982); Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) – especially Chapters 6–8. For an appraisal

of the American legal realist movement by one of its members, see: Hessel E. Yntema, 'American Legal Realism in Retrospect', *Vanderbilt Law Review,* 14 (1960–1), 317–30. For a treatment of American legal realism by the present author, where the movement is related to later schools of Legal thought in the United States, see: Charles Covell, 'American legal Realism and Instrumentalism in Recent Legal Theory in the United States', *Jurisprudentia,* 4 (June 1995), 1–48.

2. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston and Toronto: Little, Brown, 1960). Cited hereafter as *CLT.*
3. On the rise of the realist movement during the period running from 1870 to 1931, see: Twining, *Karl Llewellyn and the Realist Movement,* Chapters 1–5.
4. Karl N. Llewellyn, 'A Realistic Jurisprudence: The Next Step', *Columbia Law Review,* 30 (1930), 431–65; rpt. in Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago, Illinois: University of Chicago Press, 1962), pp. 3–41. (It should be noted that *Jurisprudence: Realism in Theory and Practice* was a volume of collected papers that Llewellyn had been preparing for publication at the time of his death.) The seminal importance of Llewellyn's 'A Realistic Jurisprudence: The Next Step' in establishing the realist movement is well recognized. Thus Twining takes the publication of the article in 1930 to mark the beginning of discussion of legal realism as a distinct form of jurisprudence. For Twining on this point, see: *Karl Llewellyn and the Realist Movement,* Chapter 5, pp. 70–1.

5. Roscoe Pound, 'The Call for a Realist Jurisprudence', *Harvard Law Review,* 44 (1931), 697–711.
6. Karl N. Llewellyn, 'Some Realism about Realism: Responding to Dean Pound', *Harvard Law Review,* 44 (1931), 1222–64; rpt. as 'Some Realism about Realism', in *Jurisprudence: Realism in Theory and Practice,* pp. 42–76.
7. Oliver Wendell Holmes, 'The Path of the Law', *Harvard Law Review,* 10 (1897), 457–78; rpt. in Holmes, *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920), pp. 167–202.
8. Holmes set out what he saw as the traditional view of law in these terms: 'Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions.' It was against this view of law that Holmes went on to state his own celebrated definition of law as follows : 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.' 'The Path of the Law', pp. 172, 173.
9. So, for example, Holmes maintained that while judicial decisions were supported through the application of logical method, the truth was that lying behind the outward logical form of judicial decisions there lay judgments that were often inarticulate and unconscious and that concerned the relative worth and importance of the different and competing legal grounds for decision. For Holmes's argument here, see: 'The Path of the Law',

pp. 180–4. In this connection, there should be noted Holmes's observation about law that comes at the start of his treatise on the common law: 'The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.' *The Common Law* (Boston, Massachusetts: Little, Brown, 1881), Lecture I, p. 1.

10. For Holmes on this point, see: 'The Path of the Law', p. 184.
11. John Chipman Gray, *The Nature and Sources of the Law,* 2nd edition from the author's notes, by Roland Gray (New York: Macmillan, 1921).
12. Thus did Gray define law: 'The Law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties.' *The Nature and Sources of the Law,* Chapter 4, p. 84.
13. For Gray on the senses in which there could exist no law prior to the decisions of the courts, and the senses in which the courts were to be thought of as making *ex post facto* law, see: *The Nature and Sources of the Law,* Chapter 4, pp. 98–9, 99–101.

14. For an account of Langdell's view of law, his approach to legal education, his influence in American jurisprudence, and the reaction of other leading American jurists to his teachings, see: Twining, *Karl Llewellyn and the Realist Movement,* Chapter 1.
15. Llewellyn, 'A Realistic Jurisprudence: The Next Step', p. 16.
16. For an explanation of the distinction between 'real' rules and rights and 'paper' rules and rights, see: 'A Realistic Jurisprudence: The Next Step', pp. 21–7. Regarding the implications of Llewellyn's attention to 'real' rules and rights as opposed to their 'paper' equivalents, see also his specification of the basic tenets of realist jurisprudence in 'Some Realism about Realism'. Here, he claimed that realists were distinguished by their distrust of traditional legal rules and concepts, considered as rules and concepts that were to be thought of as descriptive of the doings of courts and people. Hence there was what he noted to be the tendency of the realists to emphasize that legal rules were to be thought of as generalized predictions as to what the courts were likely to decide. Related to this, Llewellyn maintained that realists tended to distrust the view that traditional rules and rule-formulations, in their prescriptive aspect, were to be thought of as the heavily operative factor in the making of court decisions. 'Some Realism about Realism', p. 56.
17. For Llewellyn on the proper approach to be adopted for the understanding of paper legal rules, see: 'A Realistic Jurisprudence: The Next Step', pp. 23–5.
18. Jerome Frank, *Law and the Modern Mind* (1930), 6th printing

with a new Preface (New York: Coward-McCann, 1949).

19. Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton, New Jersey: Princeton University Press, 1949).

20. For Frank's contrast between the rule-scepticism of jurists like Llewellyn and his own fact-scepticism, see his Preface to the 6th printing of *Law and the Modern Mind* of 1949. See also: *Courts on Trial,* Chapters 1–5, especially Chapter 5, pp. 73–7. For discussion of Frank's contribution to American legal realism, see: Julius Paul, *The Legal Realism of Jerome N. Frank: A Study of Fact-Skepticism and the Judicial Process* (The Hague: Martinus Nijhoff, 1959), especially Chapters 1 and 4. The view of law that Frank argued for from the perspective of the fact-scepticism that he favoured was classically realist in its definition of law in terms of judicial decisions, and in terms of the predictions, or guesses, of lawyers concerning such decisions. As he put the matter in a well-known passage: 'For any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law but only a guess as to what a court will decide.' *Law and the Modern Mind,* Chapter 5, p. 50.

21. For Llewellyn on the fourteen steadying factors in common law

adjudication, see: *CLT*, pp. 19–51.

22. As a counter consideration to what was said in explanation of the first steadying factor, Llewellyn entered a note regarding what he saw as the vagaries of the professional training and work experience of American lawyers. So, for example, he underlined that there was no necessity in the United States that the preliminary work or training of the appellate judge should relate to preparation for holding the office of judge. *CLT*, pp. 19–20.
23. Llewellyn, *CLT*, pp. 20–1.
24. Ibid., pp. 21–3.
25. Ibid., pp. 23–4.
26. Ibid., pp. 24–5.
27. Among the counter considerations to this advanced here, Llewellyn noted with regret the tendency of the courts to substitute memoranda or announcements for full opinions. However, he conceded that this did not necessarily have material consequences for the maintenance of steadiness in appellate court decision-making. *CLT*, pp. 26–7.
28. As a counter consideration to this, Llewellyn added that the rule for the freezing of the factual record of cases submitted for decision stood compromised in its operation by the acceptance by the United States appellate courts of the duty to do justice, and by their sense or feel for matters which were not rendered explicit in the record. *CLT*, p. 28.
29. Llewellyn set down the counter consideration, here, that the United States appellate courts were able to act, and often did

act, to reformulate issues that had been left poorly drawn. Even so, he noted that, on the larger scale, such action was relatively rare, and that it was generally the result of what was felt to be some particularly pressing need. *CLT*, p. 29.

30. As a counter consideration, Llewellyn conceded that under the as then prevailing conditions in the United States, the presentation of cases through adversary argument by counsel was much more often than not likely to reduce reckonability in appellate judicial decision-making, rather than to enhance it. This was so for the reason, among others, that imbalances in skill as between different counsel tended to determine the outcome of cases in the appellate field to the detriment of predictability. *CLT*, pp. 29–31.
31. As a counter consideration to this, Llewellyn observed, among other points, that there were examples of appellate courts in the United States where groups of judges were completely dominated by one individual judge. *CLT*, pp. 31–2.
32. The factor of judicial security and honesty was one that Llewellyn explained in such a way as to point to the link between the independence of the United States appellate courts and reckonability of result in judicial decision-making. Needless to say, Llewellyn was quite clear that the cause of reckonability was not to be thought of as being well served through the subjection of the courts to political control. *CLT*, pp. 32–3.
33. It should be noted that Llewellyn entered, to this, the counter consideration that there were aspects of the United States appellate court practice which made it difficult to know in ad-

vance which of the personnel of the bench would be involved in particular cases. Thus some appellate courts sat in divisions, and some continually reshuffled their benches. Then again, there were always new arrivals on the bench, while, in some states, the appeal court judges sat only for short terms. Even so, Llewellyn emphasized that such conditions of appellate court practice resulted in a diluting, rather than in an elimination, of the advantages in reckonability that were to be had from knowing the personnel of the bench. *CLT*, pp. 34–5.

34. For Llewellyn's discussion of the factor of period-style and its promise, see: *CLT*, pp. 35–45.
35. Llewellyn, *CLT*, p. 36.
36. Ibid.
37. Llewellyn claimed that the grand style had been the manner of appellate judicial work which had prevailed in the United States from the time of the Administration of Jefferson (1801–9) to the Administration of Grant (1869–1877). On this point, see: *CLT*, p. 5.
38. Llewellyn, *CLT*, pp. 37–8.
39. Ibid., p. 38.
40. Ibid., pp. 45–50.
41. The classic works in the English positivist tradition in jurisprudence are as follows: Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1780; first published, 1789), ed. J.H. Burns and H.L.A. Hart (London: Athlone Press, 1970); John Austin, *The Province of Jurisprudence Determined* (1832), ed. H.L.A. Hart (London: Weidenfeld and Nicolson,

1954). For discussion of the distinction between law and morality in respect of the positivist tradition in jurisprudence, see: H.L.A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review,* 71 (1958), 593–629; rpt. in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), pp. 49–87.

42. In 'Some Realism about Realism', Llewellyn did write of the divorce of factual considerations from considerations of value in the study of legal phenomena as being a temporary divorce, for the reason that the divorce of facts and values had to be set aside if there was to be change made to the law. Nevertheless, he was absolutely clear that the distinction between facts and values was to hold in the sense that no judgments of value were to be involved in the observation and description of legal phenomena, and in the establishing of objective knowledge of the law. 'Some Realism about Realism', pp. 55–6.
43. For Bentham on the principle of utility, see: *An Introduction to the Principles of Morals and Legislation,* Chapter 1.
44. Thus Summers writes of what he calls 'pragmatic instrumentalism' as a general theory of law that was indigenous to the United States. For Summers's characterization of pragmatic instrumentalism as a theory of law, and his assessment of its influence on American legal thought during the twentieth century, see: *Instrumentalism and American Legal Theory,* General Introduction, General Conclusion.
45. Regarding Pound and the tenets of the sociological form of jurisprudence he expounded, see: 'The Scope and Purposes of Socio-

logical Jurisprudence', Parts 1, 2 and 3, *Harvard Law Review,* 24 (1911), 591–619, and 25 (1912), 140–68, 489–516; 'A Survey of Social Interests', *Harvard Law Review,* 57 (1943), 1–39.

46. For the authoritative statement of the terms of the economic analysis of law, see: Richard A. Posner, *Economic Analysis of Law* (1973), 4th edition (Boston and Toronto: Little, Brown, 1992). For a further statement of position by Posner, see: *The Economics of Justice* (Cambridge, Massachusetts: Harvard University Press, 1981). Posner expounded a version of instrumentalist legal theory which he called 'pragmatic jurisprudence'. For Posner on this, see: *Problems of Jurisprudence* (Cambridge, Massachusetts: Harvard University Press, 1990), Introduction, pp. 26–9, Chapter 15.
47. Llewellyn, 'Some Realism about Realism, p. 55.
48. For Llewellyn's exposition of the theory of law-jobs, see: 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method', *Yale Law Journal,* 49 (1939–40), 1355–1400 – especially pp. 1373–91 for his statement and explanation of what he identified as the basic law-jobs. For a further elaboration by Llewellyn of the theory of law-jobs, see the study of American Red Indian tribal law that he wrote with E. Adamson Hoebel: *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, Oklahoma: University of Oklahoma Press, 1941), Chapters 10–12.
49. For the main elements of Fuller's legal thought, see particularly the following of his major works: *The Law in Quest of Itself* (Evanston, Illinois: Northwestern University Press, 1940); *The*

Morality of Law (1964), 2nd edition (New Haven, Connecticut: Yale University Press, 1969); *Anatomy of the Law* (New York: Praeger, 1968). It should be noted that Fuller was an early critic of the classic realist jurisprudence. In this connection, see: 'American Legal Realism', *University of Pennsylvania Law Review,* 82 (1934), 429–62; *The Law in Quest of Itself,* Lecture 2, pp. 47–65.

50. The principal works by Dworkin setting out his legal thought are as follows: *Taking Rights Seriously* (1977), 2nd edition (London: Duckworth, 1978); *A Matter of Principle* (Cambridge, Massachusetts: Harvard University Press, 1985); *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986); *Life's Dominion: An Argument about Abortion and Euthanasia* (London: HarperCollins, 1993); *Freedom's Law: The Moral Reading of the American Constitution* (New York: Oxford University Press, 1996).
51. It should be noted that for Fuller, as for Llewellyn, the common law was understood, among much else, to comprise a system of judge-made law, where the systematic coherence of the law derived from the decision of cases being based not only in legal rules, but also in the appeal to general principles which went beyond the conditions of their application to individual cases. For Fuller's discussion of the common law tradition, see: *Anatomy of the Law,* Part 2, pp. 84–112–especially pp. 94–6 for his treatment of the systematic nature of the common law.
52. For Dworkin's exposition of the theory of law as integrity, see: *Law's Empire,* especially Chapters 6–7.

53. Concerning the respects in which Fuller and Dworkin are to be placed in the natural law tradition in jurisprudence, see: Charles Covell, *The Defence of Natural Law: A Study of the Ideas of Law and Justice in the Writings of Lon L. Fuller, Michael Oakeshott, F.A. Hayek, Ronald Dworkin and John Finnis* (London: Macmillan, 1992), Chapters 2 and 4.

54. Regarding the school of critical legal studies, see for example: Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, Massachusetts: Harvard University Press, 1986); Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, Massachusetts: Harvard University Press, 1987). Regarding postmodernist jurisprudence, see for example: Costas Douzinas *et al., Postmodern Jurisprudence: The Law of the Text in the Text of the Law* (London: Routledge, 1991).