The Theory of Rules

KARL N. LLEWELLYN

Edited and with an Introduction by

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The University of Chicago Press
Chicago and London

Karl N. Llewellyn (1893–1962) was a major figure in American legal thought and one of the pioneers of American Legal Realism. He taught at Columbia University and the University of Chicago and was the author of such classic works as *The Bramble Bush: On Our Law and Its Study* and *The Common Law Tradition: Deciding Appeals.*

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The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London

Printed in the United States of America

20 19 18 17 16 15 14 13 12 11 1 2 3 4 5

ISBN-13: 978-0-226-48795-3 (cloth)
ISBN-10: 0-226-48795-4 (cloth)

Library of Congress Cataloging-in-Publication Data

Llewellyn, Karl N. (Karl Nickerson), 1893–1962.
The theory of rules / Karl N. Llewellyn ; edited and with an introduction by Frederick Schauer.
p. cm.
Includes bibliographical references and index.
ISBN-13: 978-0-226-48795-3 (cloth : alk. paper)
ISBN-10: 0-226-48795-4 (cloth : alk. paper) 1. Law—Decision making—Philosophy. 2. Law—Methodology. 3. Decision making—Philosophy. I. Schauer, Frederick F. II. Title.
K230.L485A37 2011
340'.11—dc22

2010025879

♾ The paper used in this publication meets the minimum requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992.

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EDITOR'S INTRODUCTION

The perfect turn of phrase brings costs as well as benefits. The ability to create a memorable line is a valuable talent, but one that can increase the risk that the creator will be remembered for the wrong thing precisely because a vivid wording sticks so firmly in the mind and in history.

So it is with Karl Llewellyn, and with his description of legal rules in *The Bramble Bush* as "pretty playthings."[1] This phrase, in conjunction with Llewellyn's occasional Holmesian focus on law as the prediction of judicial decisions, led H.L.A. Hart to treat Llewellyn as an exemplary "rule skeptic."[2] And numerous others before and since have taken the contemptuousness of the "pretty playthings" language as representing Llewellyn's beliefs in particular and those of the Legal Realists in general about the place of rules in legal decision making.[3]

The view that Llewellyn viewed legal rules as no more than pretty playthings does not even survive a full reading of *The Bramble Bush*, let alone the entire corpus of Llewellyn's work.[4] In fact, when almost thirty years later he

1. "[R]ules . . . are important so far as they help you see or predict what judges will do or so far as they help you get judges to do something. That is their importance. That is all their importance, except as pretty playthings." K.N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 5 (Columbia 1930).

2. H.L.A. Hart, *The Concept of Law* 135 (Penelope A. Bulloch and Joseph Raz, eds, 2d ed, Oxford/Clarendon 1994).

3. See, for example, George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 Am J Comp L 683, 687 (1998); Susan Haack, *On Legal Pragmatism: Where Does "The Path of the Law" Lead Us?*, 50 Am J Juris 71, 85 (2005); Heidi Margaret Hurd, Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S Cal L Rev 1417, 1438 (1988); William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis L Rev 29, 39–42.

4. In the 1951 second edition of *The Bramble Bush*, Llewellyn expressed regret that his earlier "unhappy words" had sown so much confusion and misunderstanding. Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 9 (Oceana, 2d ed 1951). Interestingly, Hart notes

published *The Common Law Tradition: Deciding Appeals*,[5] Llewellyn's opinions about the effect and importance of legal rules had a surprisingly conventional and non-skeptical cast. Nevertheless, Llewellyn's catchy dismissal of rules as "pretty playthings" has helped to frame both him and Legal Realism, and has fostered generations of inaccurate caricatures about the Realist view of legal rules, caricatures that have hindered our understanding not only of Llewellyn and Realism, but also of rules in general and their role in legal decision making.

Believing that his views about legal rules were being widely mischaracterized, Llewellyn commenced work in 1938 on a book he tentatively entitled *The Theory of Rules*. He labored steadily on the manuscript over the ensuing two years, but then turned to other things, including writing about the law of sales and about legal education, as well as conducting the research on legal anthropology that would culminate in *The Cheyenne Way*.[6] Llewellyn may have remained too busy with other projects ever to have returned to this almost-completed book on rules, or perhaps he (mistakenly) believed that everything he had to say about rules would find its way into *The Common Law Tradition*[7] or into his *Law in Our Society* teaching materials,[8] but for whatever reason the manuscript of *The Theory of Rules* remained uncompleted at Llewellyn's death in 1962, and has languished among his papers at the University of Chicago ever since. When William Twining catalogued those papers in 1964–65,[9] he included in the published catalog a chapter from *The Theory of Rules*,[10] but other than that the book manuscript has never seen the light of day.

Llewellyn's partial retreat in H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv L Rev 593, 615 n.40 (1958), but for some unexplained reason chose to ignore it three years later when discussing Legal Realism in Chapter VII of *The Concept of Law*. And in a 1942 correspondence with Lon Fuller, Llewellyn, who tended to be prickly about misunderstanding of his own work in particular or that of the Realists in general (see Karl N. Llewellyn, *Some Realism about Realism*, 44 Harv L Rev 1222 (1931)), lamented that few recognized that "[e]ven Bramble Bush p. 3 carried its own correction in Ch. V."

5. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown 1960).

6. Karl Llewellyn and E. Adamson Hoebel, *The Cheyenne Way* (Oklahoma 1941).

7. *The Common Law Tradition*. On the background of this book, see William Twining, *Karl Llewellyn and the Realist Movement* 203–5 (Weidenfeld and Nicolson 1973, reprinted with Postscript, 1985).

8. This important but still unpublished work, as good or better a window into the later Llewellyn as *The Common Law Tradition*, is described in detail in Twining, cited in note 7, at 170–202.

9. William Twining. *The Karl Llewellyn Papers* (Chicago 1968).

10. Id at 81–96. A brief description of the book manuscript also appears in Twining, *Karl Llewellyn and the Realist Movement*, cited in note 7, at 488–93, as part of Twining's summary of Llewellyn's views about legal rules.

The Theory of Rules is important for three reasons. First, it helps frame the development of Llewellyn's own thought, and thus contributes to the intellectual history of one of the major figures in American legal thought. Second, it provides the most sophisticated analysis in existence of the Legal Realist view about rules. *The Common Law Tradition* is a mature, sane, and balanced work, but perhaps so much so that the bite of the characteristic—or at least stronger even if not characteristic—Realist perspective disappears almost entirely. There are differences, to be sure, between *The Common Law Tradition* and some of the glorification of reason, judgment, and common sense that one finds in traditional English celebrations of common law adjudication.[11] And there are differences as well between *The Common Law Tradition* and the more or less contemporaneous Legal Process tradition, which also stressed the importance of reason, judgment, and the rational purposes of law.[12] But these differences are relatively minor when compared to the differences between the paeans to legal and judicial judgment that one finds in Lord Coke, Hart and Sacks, and the later Llewellyn, on the one hand, and the iconoclastic core of the stronger or more extreme Realist perspective,[13] on the other. This more skeptical and perhaps more prototypically Realist position not only plays an important role in *The Theory of Rules*, especially in its earlier chapters and in Chapter VII, but is also one that has more to be said for it, still, than those whose too-easy dismissal (or domestication) of Realism are willing to acknowledge. Much of the modern unwillingness to take a plausible rule-skeptical view seriously has been fostered by some of the rhetorical extravagances in *The Bramble Bush*, as well as by the even less

11. See, most prominently, Edward Coke, *The First Part of the Institutes of the Laws of England* (F. Hargrave and C. Butler, eds, London 1832). A valuable analysis and critique of this self-confident English tradition is Alan Cromartie, *The Idea of Common Law as Custom*, in *The Nature of Customary Law: Legal, Historical, and Philosophical Perspectives* 203 (Amanda Perreau-Saussine and James Bernard Murphy, eds, Cambridge 2007).

12. See Henry M. Hart, Jr., and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge Jr. and Philip P. Frickey, eds, Foundation Press 1995). On the relationship between Realism and Legal Process, see G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 Va L Rev 279 (1973).

13. In characterizing a strong or extreme Realist perspective, I am not referring to the stylistic extravagances of Jerome Frank, Fred Rodell, or, at times, Thurman Arnold. Rather, I have in mind views closer to the "pretty playthings" position, and thus to the position that canonically inscribed rules, legal texts, formal legal doctrine, and previously decided cases have little (but not no) causal effect on judicial outcomes. For a noncaricatured explanation of this position, see Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 15–118 (Oxford 2007); Brian Leiter, *Legal Realism*, in *A Companion to Philosophy of Law and Legal Theory* 261 (Dennis Patterson, ed, Blackwell 1996). See also Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* 124–47 (Harvard 2009).

guarded statements in Jerome Frank's *Law and the Modern Mind*.[14] It is to be hoped that the publication of *The Theory of Rules* will make the sophisticated but strong Realist perspective on rules, as well as Legal Realism in general, much more difficult to ignore.

Thus, and third, *The Theory of Rules* draws some of its importance from its analysis of the operation of rules in general and legal rules in particular. Apart from what the book adds to Llewellyn's biography and to Legal Realism's historiography, it constitutes an independent contribution, as its title announces, to the theory of rules. At times Llewellyn's analysis of rules in the book may seem clumsy by contemporary jurisprudential or philosophical standards, but a charitable reading yields a harvest of important insights about the relationship between rules and their formulations, between rules and their enforcement, and between rules and their interpretation, while also offering a challenging account of the relationship between legal rules and the nature of law in general.

The Theory of Rules is thus significant for what it tells us about Llewellyn, about Realism, and about rules. The balance of this Introduction, after a brief overview of the contents of the book, will explore each of these themes, with the aim of exposing different dimensions of the context that will enable us fully to appreciate and understand Llewellyn's major but hitherto largely unknown contribution to the literature on legal rules.

I. The Book

The Theory of Rules was planned as a book of ten or eleven chapters, of which Llewellyn had more or less completed eight at the time of his death.[15] But he

14. Jerome Frank, *Law and the Modern Mind* (Brentano's 1930). Among others whose penchant for rhetorical excess has fostered a dismissive attitude about Legal Realism are Thurman W. Arnold, *Institute Priests and Yale Observer—A Reply to Dean Goodrich*, 84 U Pa L Rev 811 (1936); Fred Rodell, *Goodbye to Law Reviews*, 23 Va L Rev 34 (1936). The failure to take Legal Realism seriously has different manifestations. In Great Britain and much of the rest of the common law world, Legal Realism is taught mostly as a joke, or at least as a convenient foil for demonstrating the wisdom of H.L.A. Hart. Excerpts from *Law and the Modern Mind* and *The Bramble Bush* are read and mocked, largely as a precursor to moving on to more serious jurisprudential themes. By contrast, in the United States, it is common for academics to observe that "we are all Realists now"; see Gary Peller, *The Metaphysics of American Law*, 73 Cal L Rev 1151, 1151 (1985); Joseph William Singer, *Legal Realism Now*, 76 Cal L Rev 465, 467 (1988) (book review), while then proceeding to teach and write in a way that ignores most of the important lessons of Realism. Casebooks are still dominated by cases, for example, and still organized according to traditional doctrinal categories, while commentary on Supreme Court decisions criticizes judges whose decisions the commentators object to on ideological grounds as simply making analytical doctrinal blunders.

15. It is highly likely that the manuscript in Llewellyn's papers at the time of his death was the same manuscript as it existed in 1940, for there is no evidence that Llewellyn ever returned

left an outline of his thoughts about the uncompleted chapters, and there is little reason to believe that there was much that Llewellyn wanted to say in this book that was not said in the completed eight chapters, especially because Chapters Nine and Ten appear principally to be elaborations of the themes in Chapter Eight, and Chapter Eleven was envisaged by Llewellyn largely as a summary and conclusion.

Llewellyn seems to have devoted much time and thought to planning the book. We know this in part because of the various outlines he left, and in part because of the way in which the book proceeds by means of a systematic and progressive deepening and elaboration of themes introduced in earlier chapters. Thus, Chapter One is an introduction and overview, establishing at the outset Llewellyn's goal of offering an account of legal rules as inextricably connected with the individuals who interpreted and enforced them, and with the institutions in which they did so. Consistent with Llewellyn's lifelong preoccupation with seeing a rule as something other than, or at least more than, the words on a printed page, his opening chapter seeks to persuade the reader from the beginning that a rule is not just the text of a statute or part of a common law decision, but is rather what the interpreters and enforcers of those texts actually do with it.[16] "Law in action" has always

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to it after setting it aside. There is thus a plausible claim that *The Theory of Rules* is not a work, especially in this form, that Llewellyn would have published. Whether it is appropriate or desirable to publish works that an author did not (yet) deem publishable at the time of his or her death is an important and fascinating issue, involving intractable questions about the balance between respecting a creator's wishes and respecting the advance of knowledge, about the extent to which a creator's wishes survive his death, and about whether a creator might have preferred publication of an incomplete work to non-publication. Many of these issues arise in the context of the decision, for example, to publish H.L.A. Hart's unfinished "Postscript" to *The Concept of Law* (cited above, note 2), and surface even more commonly in the context of decisions about what do with uncompleted works found in an artist's studio at the time of his death.

16. The point is not novel with Llewellyn, and indeed even Jeremy Bentham stressed the distinction between "the law" and "the statute." Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 301 (J.H. Burns and H.L.A. Hart, eds, Athlone Press 1970) (first published 1789). (I am grateful to Stanley Paulson for the reference.) But for Bentham "the law" in this context was the "logical," "ideal," and "intellectual" "whole," which is a far cry from believing, with Llewellyn, that the real rules existed not in overarching or deeply embedded legal principles, but rather in the behavioral inclinations and regularities of rule-appliers, rule-enforcers, and rule-interpreters. If we were to search for the earliest precursors of Llewellyn's concerns, we would look less to Bentham and more to Bishop Hoadly, who famously observed: "Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law Giver to all intents and purposes, and not the persons who first spoke and wrote them." Benjamin Hoadly (1676–1761), Bishop of Bangor, sermon preached before King George I (1717), as quoted in John Chipman Gray, *The Nature and Sources of the Law* 172 (Putnam 1909).

been a Legal Realist rallying cry,[17] and from the beginning Llewellyn makes clear that advocates, judges, and institutions are as important to his account of rules as are the naked words with which they deal.

Having foreshadowed the basic theme of the entire book, Llewellyn in Chapter Two attempts to connect his analysis with two of the major jurisprudential themes that were dominant at the time. The first is the understanding of legal rules as commands of the sovereign, an idea with its provenance in Jeremy Bentham[18] and John Austin,[19] and an idea which in 1938 represented a common, and probably the mainstream, jurisprudential ideology.[20] H.L.A. Hart was later to cast much doubt on this understanding of law and of legal rules,[21] but at the time when Llewellyn was writing *The Theory of Rules*, Hart's major contributions were still more than two decades away. In 1938 the Austinian conception of law held sway, and it was a conception to which Llewellyn more-or-less substantially subscribed. In describing legal rules, Llewellyn started from the premise that those rules were commands, and thus were intended and designed by the rule-maker to control, through the use of sanctions, the behavior of others, largely as Austin had elaborated a century earlier. Moreover, Llewellyn expanded the reach of the idea of a command in a way that was reminiscent of (and perhaps influenced by) his contemporary Hans Kelsen.[22] Legal rules were not only commands to citizens, as with the command not to drive a car at more than sixty-five miles per hour on an interstate highway, but were also commands (and, more importantly, empowerments, which is emphatically

17. See Laura Kalman, *Legal Realism at Yale, 1927–1960*, at 9 (North Carolina 1986).

18. Jeremy Bentham, *Of Laws in General* (H.L.A. Hart, ed, Athlone 1970).

19. John Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble ed, Cambridge 1995).

20. John Salmond's *Jurisprudence: or the Theory of the Law* (7th ed, Sweet and Maxwell 1924), had questioned the command account of law well before Hart, but Salmond's challenge had made only limited headway by the time that Llewellyn was writing. Indeed, Edwin W. Patterson, Llewellyn's colleague and friend, had in his 1940 materials on jurisprudence (Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law* (First Printed Edition, Foundation 1953)) discussed Bentham, Austin, and the command theory extensively (for example, pp. 82–92), but made no mention at all of Salmond's challenge to it.

21. H.L.A. Hart, *The Concept of Law*, cited in note 2; H.L.A. Hart, *Commands and Authoritative Reasons*, in *Essays on Bentham: Jurisprudence and Political Theory* 243 (Oxford 1982). For the view that Hart may have cast somewhat too much doubt on parts of the Austinian conception of law, see Frederick Schauer, *Was Austin Right After All?: On the Role of Sanctions in a Theory of Law*, 23 Ratio Juris 1 (2010).

22. Hans Kelsen, *Pure Theory of Law* (Max Knight trans, California 1967). In 1938 Kelsen's major work existed only in German as *Reine Rechtslehre*, but the German-fluent Llewellyn certainly knew of Kelsen's work, and was both admiring and contemptuous of it. See Twining, cited in note 7, at 499–500.

not the same thing) to judges (and other enforcers of the law). Just as the citizen is commanded not to drive at more than sixty-five, the judge is the "target" of the law that empowers him or her to impose such-and-such a sanction when people are found to have done just what the law says they should not.

Although seeing rules as commands is hardly exclusive to Realism, Llewellyn's attention to prediction, with due acknowledgment of Holmes,[23] is a more characteristically Realist theme.[24] After delving into the question of rules as commands, Llewellyn reorients the discussion to emphasize the human and institutional dimension of rules, and he does so by following John Chipman Gray[25] as well as Holmes in stressing the importance to the lawyer, if not to the judge of a highest court, of being able to predict what a law enforcer or interpreter will do. And thus to Llewellyn figuring out what the rule actually *is* will necessarily involve determining not just what the language of the rule says, but, more importantly, how that language is actually used by those in power. Accordingly, the language of prediction is really Llewellyn's way of emphasizing that for him the rule is what the judges actually apply, rather than how the book of rules actually reads.

Having expressed some sympathy with the command understanding of rules in Chapter Two, Llewellyn devotes much of Chapter Three to moving away from it. He maintains that a rule is a prescription about what ought to happen with respect to some class of conduct, but he then proceeds to insist that what ought to happen, and that what in fact does happen, is rarely a function of a single rule,[26] but is instead a function of a complex array of rules, practices, conventions, professional skills, and, at times,[27] idiosyncrasies, most of which are devoted to trying to achieve a rule's purpose (or "reason"), rather than just following its letter. As Llewellyn puts it, the propositional form of a rule is one thing, what the rule actually does (and,

23. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv L Rev 457 (1897).

24. Although Holmes wrote most famously about law as prediction in *The Path of the Law*, 10 Harv L Rev 457 (1897), he was writing about this theme as early as 1872, and its subsequent propagation by Frederick Pollock prior to 1897 was likely a product of Pollock's reading of and correspondence with Holmes. See Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* 119–27 (Oxford 2004). For an account placing greater weight for the development of a prediction account of law on Pollock and others than on Holmes, see Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* 72–84 (Princeton 2010).

25. John Chipman Gray, *The Nature and Sources of Law* (Putnam 1909).

26. On the importance of multiple rules to the Realist outlook, see Hanoch Dagan, *The Realist Conception of Law*, 57 U Toronto L J 607 (2007).

27. But only at times. Llewellyn was not Jerome Frank, and was not a particularist about legal decision making even though he believed that many of the nonparticular influences on legal decisions were not to be found in the formal language of a legal rule.

thus, *is*) is another. But although Llewellyn draws this distinction—a distinction central to Realist thought, and to his own contributions to it—he makes clear at the end of the chapter that he is no nihilist about rules or about meaning. He does believe that there is an ideal-type of rule in which the propositional form of the rule is clear in the overwhelming majority of cases, and in which following the propositional form alone will further the rule's purpose and the legal system's function in virtually every instance. But although this is the ideal-type, he says, it is rarely found in practice. Real rules suffer from pathologies of drafting, pathologies of interpretation, and pathologies of enforcement, and thus to locate the real core of real rules we need to look beyond the propositional form to what the relevant legal actors and institutions are doing in actual practice.

With this distinction between propositional form and real rule having been announced, Llewellyn explores and embellishes it in Chapter Four. Using language that will seem to modern readers somewhat misleading, he labels the precise, easily interpreted, and absolute rule a *rule of thumb*.[28] The rule of thumb, he acknowledges, can serve to guide conduct and limit the discretion of interpreters and enforcers, but such rules rarely exist. Moreover, any attempt to create a legal system entirely with such rules will founder on the variability of the human condition and the imperfections of human enforcers and interpreters. Here Llewellyn demonstrates the comparative law competence most prominently exhibited in his *Präjudizienrecht und Rechtsprechung in Amerika*,[29] and takes the occasion to criticize the civil law ideal as embodied by the codes of Frederick the Great and Napoleon. "[T]here is at least one kind of certainty and precision which cannot be had consistently by way of rules of law in a world like Nineteenth and Twentieth Century Europe; and too great an approximation of that kind of certainty and precision comes at an outrageous cost in social discomfort." Thus Llewellyn sees the *elasticity* of the common law and of the round-edged statutes prevalent in the common law world not just as pathologies of poor drafting,

28. The label is misleading to modern readers because in the philosophical and jurisprudential literature a rule of thumb is now understood as a useful heuristic whose strictures should be followed when there is no better information, but which should be ignored when the agent is confident that a different course of action is more desirable. See Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon/Oxford 1991); J.J.C. Smart, *Extreme and Restricted Utilitarianism*, 6 Phil Q 344, 353 (1956). Thus, the modern understanding of a rule of thumb stresses its lack of strong normative force as a rule, which is just the opposite of the way in which Llewellyn uses the term.

29. Based on a series of lectures Llewellyn gave in Leipzig in 1928, *Präjudizienrecht und Rechtsprechung in Amerika* was published in Germany in 1933, and has now been translated into English. Karl N. Llewellyn, *The Case Law System in America* (Paul Gewirtz, ed, Michael Ansaldi, trans, Chicago 1989).

but instead as a necessary accommodation to a complex and unpredictable world, a world that, at least in Llewellyn's opinion, the classic theorists of the civil law persistently refused to accept.

Recognizing that the idea of elasticity is simply too, well, elastic, Llewellyn turns in Chapter Five to trying to specify both the vehicles of elasticity and the accompanying sources of stability in legal rules. This chapter is simultaneously among the most important and the most elusive, for it is here that Llewellyn attempts to explain, with less than complete success, the way in which legal training, acculturation, and various other dimensions of professional craft serve to move rules away from their literal propositional content while at the same time providing, for sociological and not logical reasons, the degree of stability that Llewellyn was later to label "reckonability." That Llewellyn thought this chapter important is implicit in many of his own marginal notes, but he recognized as well that the ideas still were in need of a better presentation—one that was to come in Chapter Eight—referring to some pages as NSG ("not so good") and scribbling marginal notes to himself on an especially large number of the remainder.

In Chapter Six, Llewellyn deepens these themes, introducing the idea of "situational concepts" that was to play a significant role in his later writings. Again he is not entirely clear about just what a situational concept is, but at numerous places in the chapter he flirts with a strong particularism, suggesting that no two situations are entirely alike, and that the craft of law often involves making the best decision in the full context of a particular case. In later work, and indeed in subsequent chapters of this work, he softens this attitude a bit, talking more about situation-types than situations, but in this chapter of *The Theory of Rules*, there emerges what is not only a prominent Realist theme, but also a theme somewhat in tension with what Llewellyn says about rules and generality earlier in the book.

Much of the early portions of *The Theory of Rules* focus on judges in particular and legal decision makers in general, but in Chapter Seven, arguably the most rule-skeptical chapter in the book, Llewellyn turns from the judge to the lawyer. Here he sees rules as tools that are used by advocates to buttress their desired outcomes, and it is here that Llewellyn, pretty much for the first time, introduces a theme he was to make famous more than a decade later in his penetrating and witty analysis of the canons of statutory construction.[30] In discussing the "advocate's leeway" in *The Theory of Rules*, Llewellyn explains the way in which advocates have various argumentative

30. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand L Rev 395 (1950).

devices available to them—modern jargon would call them "moves"—that can be selectively deployed depending on the needs of the moment. Sometimes it is the letter of the rule, but sometimes it is its spirit. Sometimes it is a rule in isolation, but sometimes it is the purpose of a fuller collection of rules. And sometimes it is what a rule seems to require, but at other times it is the larger equity of the situation. Rules are instruments, Llewellyn argues, but instruments in the service of the lawyer's persuasive and argumentative goals, and not nearly as constraining to the good and creative lawyer as the traditional account of rules would have it.

What Llewellyn "grants" in Chapter Seven, however, he takes back, at least partially, in Chapter Eight, which he entitles "Stabilities within the Leeways." Here he distinguishes between desirable legal change, which he acknowledges comes at the cost of some certainty, and erratic change, which has even greater cost and far fewer benefits. But because of these costs, erratic change, he argues, must be cabined by stability. That stability, however, is not, he insists, produced by rules of law. It is produced far more by the craft and mores of lawyers and judges, and by the way in which good lawyers and good judges, disciplined by—and internalizing—the conventions of their roles, maintain a stable system based on the deeper purpose of the law.

It is at this point that the manuscript (mostly) ends. There are fragments of a Chapter Nine on the way in which lawyers and interest groups place pressure on existing rules, and thus on the way in which most legal change takes place within the existing rules rather than by the creation of new ones. Llewellyn's tentative title for this chapter included the phrase "Law My Way," a phrase whose elusiveness is matched by the references in a proposed Chapter Ten to the "Going Whole." And then Llewellyn was intending to summarize the entire book in a chapter on "Rational Rationalization," plainly an attempt to reconcile the core Realist belief that rules often served as ex post rationalizations for results reached on other grounds with his view that rules brought a degree of rationality and stability to what would otherwise appear to be unorganized chaos.

The manuscript as Llewellyn left it is in some sense complete, because it contains largely finished chapters on all of his main themes. But it is also incomplete, not only because the concluding chapters are only fragments, but also because Llewellyn made marginal notes to himself, obviously anticipating further revision. Moreover, there is no reason to believe that Llewellyn did not plan to take account of the numerous marginal comments and challenges from his Columbia colleague Edwin Patterson, a distinguished scholar of insurance and contract law who for many years also taught jurisprudence and whose unpublished teaching materials on jurisprudence were

published in 1953.[31] But there is no indication that a manuscript responding or adapting to Patterson's marginalia ever came into existence, so what we have is almost certainly not what Llewellyn would have published had he ever returned to work on this book.

Yet although the manuscript was never completed, even as it stands it represents a substantial contribution to understanding the development of Llewellyn's own thinking, to appreciating without caricature the basic themes of Legal Realism, and to deepening our knowledge of rules in general and legal rules in particular. The balance of this Introduction will examine these themes in turn.

II. The Place of *The Theory of Rules* in the Development of Llewellyn's Thought

There is a tendency among many who have tracked Llewellyn's thought to find strong traces of the moderation and subtlety of *The Common Law Tradition* in Llewellyn's much earlier work, especially in the 1933 *Präjudizienrecht und Rechtsprechung in Amerika*.[32] And a careful reading of his two well-known responses to Roscoe Pound's criticisms of Legal Realism,[33] as well as *The Bramble Bush* itself, confirms that from the beginning Llewellyn did not come close to believing that legal rules were of no consequence.[34]

Yet just as it is important not to characterize Llewellyn solely by reference to law as prediction and to the "pretty playthings" phrase, it is equally important not to domesticate the early Llewellyn excessively. In 1930, in "A Realistic Jurisprudence—The Next Step," he first introduced the idea of a "paper rule," and distinguished paper rules from the "real rules" that he believed described actual judicial decision making. Although Llewellyn acknowledged that the paper rules were "a factor" in determining the real rules that genuinely explained what judges were really doing, that factor had a decidedly subordinate role. It was "rare" for the paper rules accurately to

31. Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law*, cited in note 20.

32. See especially Twining, cited in note 7; William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. Miami L. Rev. 119, 124 (1993).

33. Llewellyn, *Some Realism about Realism*, 44 Harv L Rev 1222 (1931); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum L Rev 431 (1930). Compare Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 Harv L Rev 697 (1931).

34. In 1931, Llewellyn commented that he thought Frank's view of the uncertainty of law was "exaggerated." K.N. Llewellyn, *Frank's Law and the Modern Mind*, 31 Colum L Rev 82 (1931). Much but not all of this view was based on Llewellyn's opinion that lawyerly and judicial craft provided certainty even when rules did not, but some was also based on Llewellyn's belief that legal rules were not quite as inconsequential as Frank and others imagined.

describe judicial behavior, he wrote, and while paper rules sometimes influenced decisions, more often they were either of comparatively little effect or were something to which judges merely paid lip service. The actual effect of the paper rules—the verbal formulas—should be the subject of genuine empirical analysis, Llewellyn argued, but even in this early work he made it clear that he was "skeptical" that the empirical analysis would show paper rules to have much significance in law. It was for this reason, he insisted, that words, rules, and precepts should not be the center of reference for those who were teaching, writing about, or studying law.

Similar views can be found in *Some Realism about Realism*, which was published in the *Harvard Law Review* almost at the same time that *The Bramble Bush* first appeared. And in *Some Realism about Realism*, Llewellyn again made clear that his skepticism about the role of paper rules was significant. Announcing at the outset that he considered Jerome Frank in essence a coauthor of the article, he argued that rule-applying, while admittedly part of what lawyers and judges do, was only a part, and a relatively unimportant part at that. Llewellyn here expressed his "distrust" of the traditional view that written legal rules, whether in statutes or in common law decisions, were very accurate descriptions of what judges were actually doing, or that they were the "heavy operative factor" in producing court decisions. Indeed, he claimed, as he had in *The Bramble Bush*, that "in any case doubtful enough to make litigation respectable," there will almost always be legally legitimate and "impeccable" arguments on both sides. The qualification about litigated cases is vital, but there can be little doubt that throughout *Some Realism about Realism* Llewellyn made clear his agreement with the stronger Realist position that the propositional form of legal rules rarely made a substantial difference in actual litigated or appellate cases.

Llewellyn's scholarly outpouring during the early 1930s was large, and it came during the heyday of Realist enthusiasm. In 1931, a year after publishing *The Bramble Bush*, Llewellyn wrote *Some Realism about Realism* and participated in a *Columbia Law Review* symposium about Frank's *Law and the Modern Mind*. In his contribution Llewellyn distanced himself from Frank's infatuation with psychoanalysis, but otherwise announced that he found Frank's position "essentially sound."[35] Moreover, Llewellyn empha-

35. There is a tendency these days to treat Frank as an idiosyncratic figure whose importance to Realism was marginal. See, for example, Michael Ansaldi, *The German Llewellyn*, 58 Brooklyn L Rev 705, 775–77 (1992); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 Texas L Rev 267, 268–69, 283–84 (1997). It is certainly tempting to have little patience for rhetorical and argumentative excess and consequently to discount Frank's significance, but that is a mistake. In arguing that the motivations for judicial decisions were different from and

sized again, as he had in *Some Realism about Realism*, his sympathy with the "rationalization" position—the view that legal rules were valuable not so much as decision producing, but rather as the devices that were used to justify or rationalize decisions already made on other grounds.[36]

So although Llewellyn's early 1930s scholarship was more guarded than some have supposed, there is little doubt that he was then closer to many of the allegedly extreme Realist positions than some of the commentators have imagined. Paper rules made a difference to judicial decisions, Llewellyn thought, but not much of a difference, and not often, at least as compared to a large number of human and institutional factors that Llewellyn, along with many of the other Realists of the time, believed were far more causally consequential.

We can thus situate *The Theory of Rules* as an important bridge between Llewellyn's earlier and often less guarded positions, on the one hand, and the later moderate views in *The Common Law Tradition*, and in the *Law in Our Society* materials, on the other. Far more in *The Theory of Rules* than in his later work, Llewellyn emphasizes the gap between the paper rule and the real rule, but far more in *The Theory of Rules* than in *The Bramble Bush* does he begin to elaborate on the non-rule-based sources of stability that were to characterize so much of his writing.[37] Llewellyn did talk of the stability that comes from legal craft even in the 1933 *Präjudizienrecht*, but the discussion there was, even for Llewellyn, especially vague and metaphorical. Yes, the shared craft (and "office") of lawyers and judges could produce predictability (Llewellyn often misleadingly called it "certainty"), he acknowledged, but just how this occurred was not discussed in any depth until the later chapters of *The Theory of Rules*. Even here Llewellyn is far from a paragon

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prior to the search for their justifications (and see also Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Role of the "Hunch" in Judicial Decision*, 14 Cornell L Q 274 (1929)), in discussing the particularistic and fact-specific character of many legal rulings, in stressing the compatibility of formal legal sources with a wide range of results, in recognizing that the personal characteristics of the judge might be relevant to judicial decisions, and in identifying the holistic or gestalt character of judicial behavior, Frank was a pioneer with respect to many important Realist themes that others later developed with more subtlety and qualification.

36. Richard A. Wasserstrom, in *The Judicial Decision—Toward a Theory of Legal Justification* (Stanford 1961), distinguishes the logic of decision from the logic of justification.

37. Although some commentators may underestimate the differences in emphasis and tone between Llewellyn's earlier and later writings, the view that Llewellyn's identification of legal craft as a late life transformation to conservatism (see Morton J. Horwitz, *The Transformation of American Law, 1870–1960*, at 250 (Harvard 1992)), does not stand up in the face of the evidence. Llewellyn was talking about the stability brought by craft and mores as early as 1928, when he first delivered the lectures that became *Präjudizienrecht*, and although these ideas became more prominent in *The Common Law Tradition*, they were plainly part of Llewellyn's thinking from the beginning.