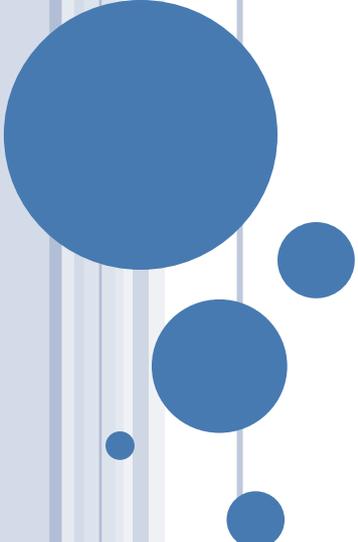


法理學經典導讀系列

KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE*

《法理學：理論與實踐中的唯實論》



黃丞儀（助研究員/中研院法律所）

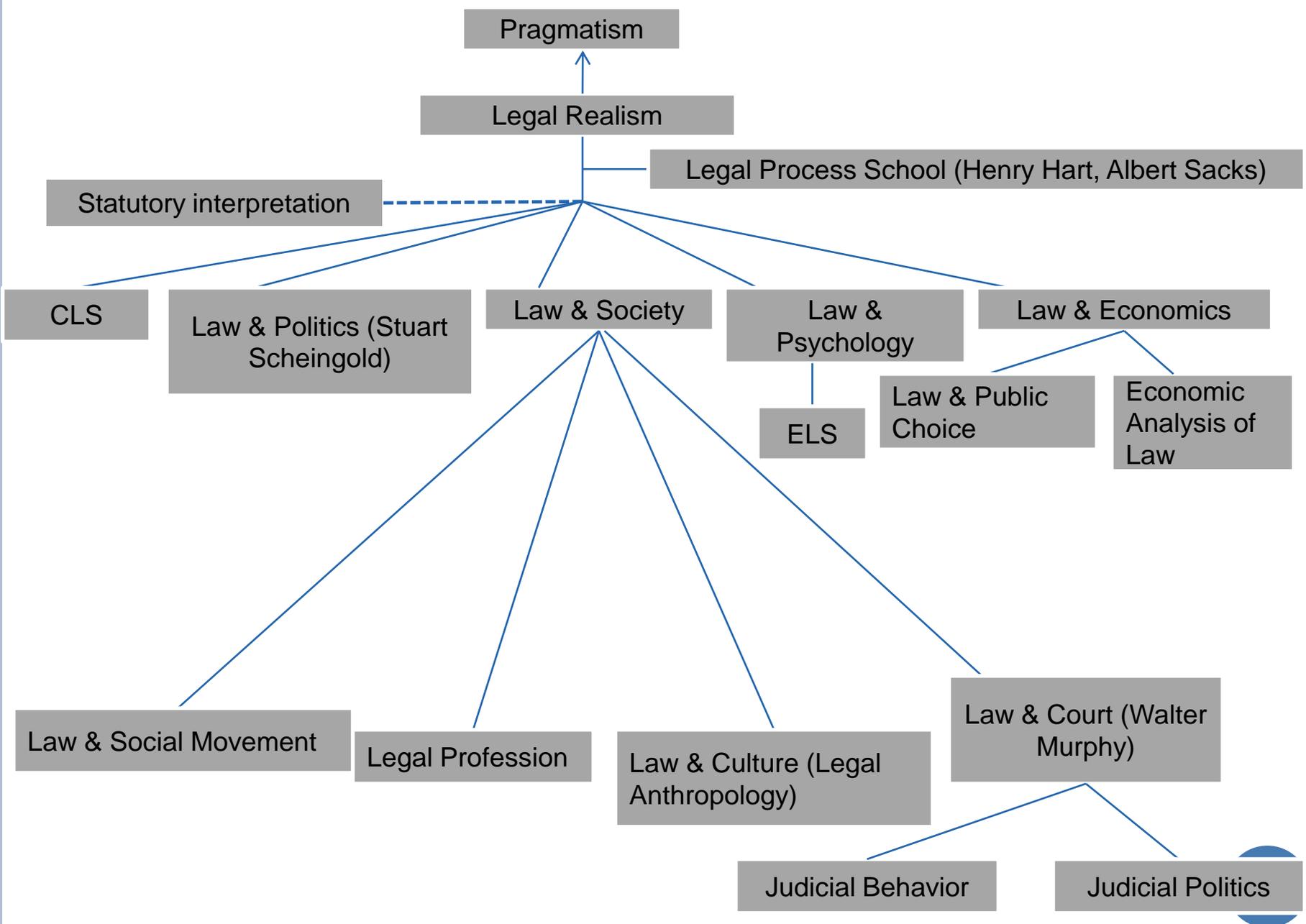
為何要研究美國「法律唯實論」？

- 名詞翻譯：法律唯實論？法律現實主義？

從Legal Realism重視法律在實存社會關係中的意義來看，應該與國際關係理論中的「現實主義」較為接近。如譯為唯實論，恐與哲學上唯實論與唯名論之區別，產生混淆。但目前台灣法理學界以「法律唯實論」為常用譯法，約定俗成，亦無不可。

- 美國法律唯實論對於後來我們所熟知的許多法學研究項目有重大的影響。可以說這些法學研究項目的與法律唯實論分享了共同的知識論基礎。





Pragmatism

Legal Realism

Legal Process School (Henry Hart, Albert Sacks)

Statutory interpretation

CLS

Law & Politics (Stuart Scheingold)

Law & Society

Law & Psychology

Law & Economics

ELS

Law & Public Choice

Economic Analysis of Law

Law & Social Movement

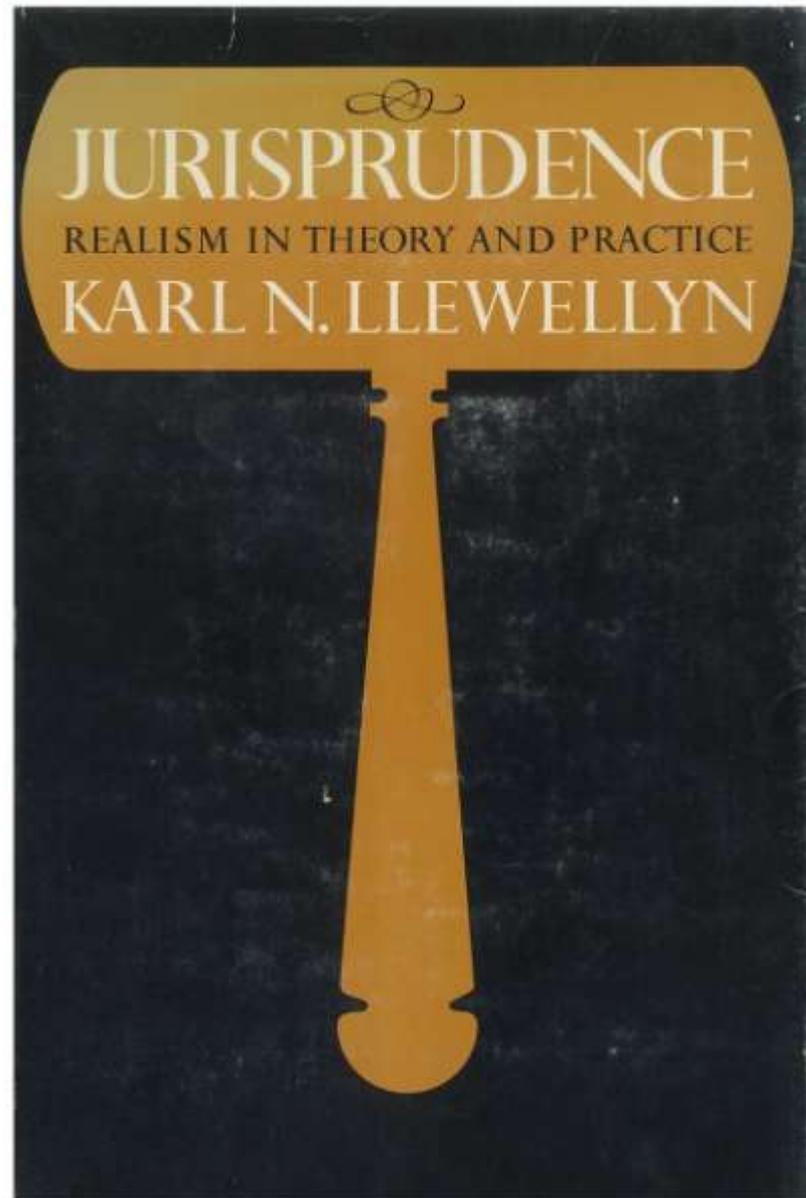
Legal Profession

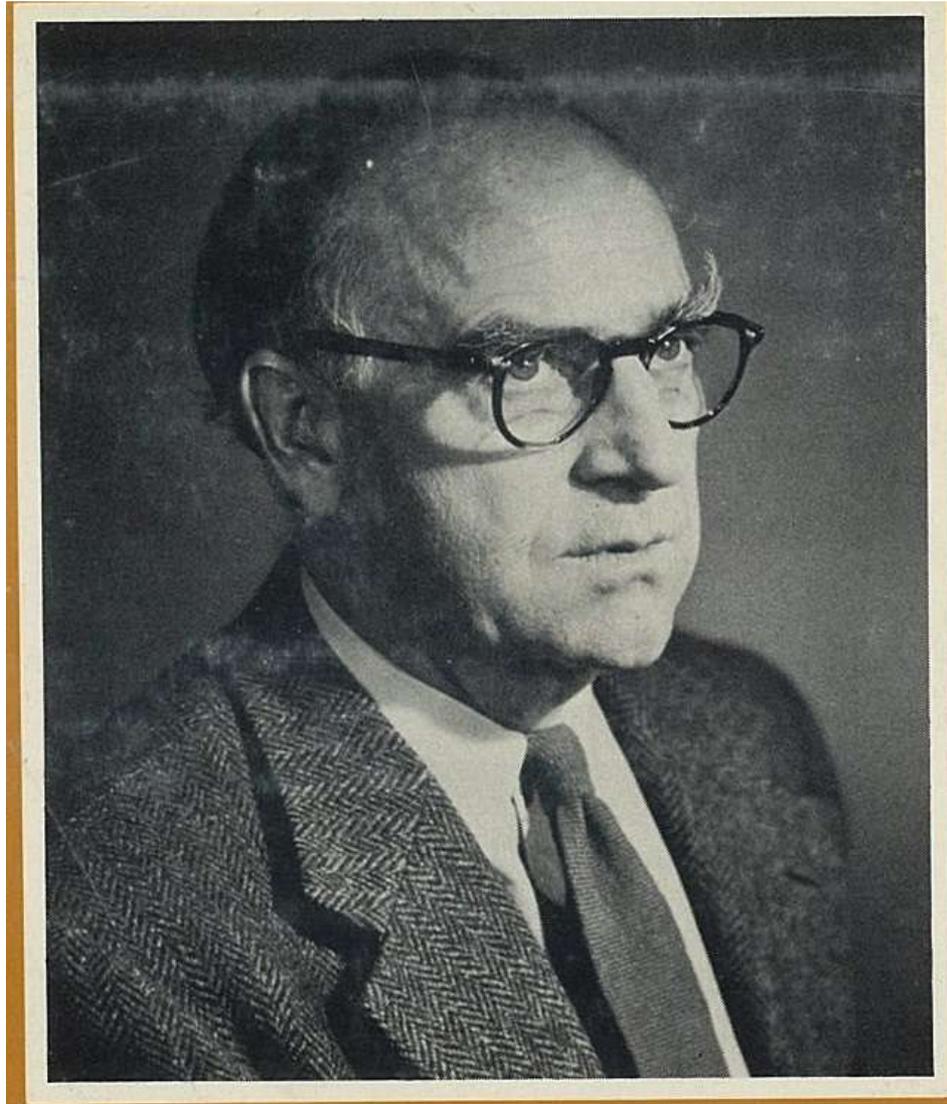
Law & Culture (Legal Anthropology)

Law & Court (Walter Murphy)

Judicial Behavior

Judicial Politics





BIOGRAPHY (I)

- 1893.5.22 生於 Seattle ，長於 Brooklyn。
- 1909-1911 (16-18歲) 至德國 Mecklenburg就讀 Schwerin中學 (Realgymnasium)。
- 1911-1914 (18-21歲) 返美就讀 Yale College。
- 1914春天至法國 Sorbonne學習法律、拉丁文與法文，後因第一次世界大戰爆發，至德國加入普魯士第78步兵團，同年十一月受傷入 Nürtingen醫院療養。
- 1915 (22歲) 因傷退役，獲頒鐵十字二等勳章，返回 Yale就讀 Law School。
- 1925 (32歲) 進入 Columbia Law School任教。



BIOGRAPHY (I)

- 1930 (37歲) 出版 *The Bramble Bush: On Our Law and Its Study* (2009年Oxford Uni. Press 新版) 。
- 1933 (40歲) 出版 *Präjudizienrecht und Rechtsprechung in Amerika: Eine Spruchauswahl mit Besprechung* (英文版 : *The Case Law System in America*於1989年出版) 。
- 1941 (48歲) 與人類學家E. Adamson Hoebel共同出版 *The Cheyenne Way*。
- 1942 (49歲) 受美國法律協會(American Law Institute)任命為美國統一商法典 (Uniform Commercial Code, UCC) 之起草召集人(Chief Reporter)。



BIOGRAPHY (III)

- 1946 (53歲) 與 Soia Mentschikoff結婚。
- 1951 (58歲) 進入Univ. of Chicago Law School任教。
- 1952 (59歲) UCC第一版完成。
- 1960 (67歲) 出版 The Common Law Tradition: Deciding Appeals。
- 1962.2.13 (69歲)因心臟病發逝於 Chicago。
- 1962.5. 出版 Jurisprudence: Realism in Theory and Practice。



本次導讀重點

1. A Realistic Jurisprudence: The Next Step (1930)

(1) 1930年代的美國法學理論

(2) Llewellyn v. Pound

(3)

1. The Theory of the Rule (2011, edited by Fred Schauer)



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A REALISTIC JURISPRUDENCE: THE NEXT STEP (1930)

- How Judges Work?
- 19th Century Jurisprudence:
 1. Analytical Jurists: case law
 2. Historical Jurists: law v. other social control
 3. Philosophical Jurists: the end of law
- Remedy-Rights-Interest 均無法解釋法律的本質
- Paper Rule v. Real Rule



REMEDY-RIGHTS-INTERESTS

- Rights: words only (空洞的話) ; suggests non-legal rights
- Interests: substantive rights exist only for purpose – protection of interests
終究還是涉及主觀的價值判斷 (value judgments)
- “Remedies exist as means to effectuate the substantive rights, to realize the substantive rules”
仍舊無法有效解釋法律的本質。



WORD V. PRACTICE

- 以司法行為為觀察中心：Different rules have totally different relations to the behavior of judges, of other officials, and of the particular persons “governed.”
- The significance of the particular rule will appear only after the investigation of the vital, focal phenomenon: the behavior.
- 對於Roscoe Pound提倡的Sociological Law的批評：Attack on “Law-in-Books and Law-in-Action”: ad hoc, conceptual only

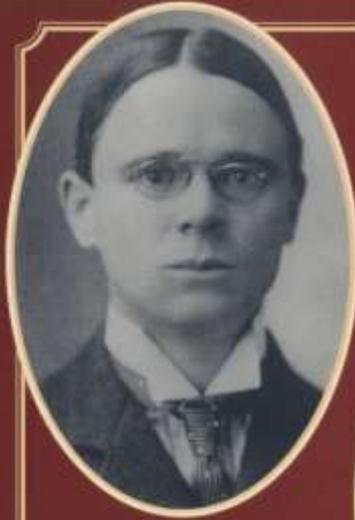


ROSCOE POUND

中研院法律所圖書館
3 0660 40002567 7

-8-

KARL LEWELLYN



Searching for
an American
Jurisprudence



N. E. H. HULL



ROSCOE POUND, THE CALL FOR A REALIST JURISPRUDENCE (1931)

- [B]ut a science of law must be something more than a descriptive inventory.
- The new realists have their own preconceptions of what is significant, and hence of what juristically must be. Most of them merely substitute a psychological must for an ethical or political or historical must.
- (Jerome Frank, *Law and the Modern Mind*)



KARL LLEWELLYN, SOME REALISM ABOUT REALISM: RESPONDING TO DEAN POUND (1931)

- There is no school of realists. ... There is, however, a movement in thought and work about law.
- The temporary divorce of Is and Ought for purposes of study.
- Distrust in traditional rule as well as traditional prescriptive rule-formulation
- Grouping cases and legal situations into narrower categories
- Evaluation of any part of law in terms of its effects
- Consistently, persistently, insistentlly to carry them through...
- Legal rules rarely made a substantial difference in actual litigated or appellate cases.



The Theory of Rules

KARL N. LLEWELLYN

Edited and with an Introduction by

Frederick Schauer



KARL LLEWELLYN, THE THEORY OF RULES (ED. FREDERICK SCHAUER; 1938, 2011)

- H. L. A. Hart對Legal Realism的批評：規則懷疑論者 (Rule-Skeptic)
- 早期盧埃林(extreme): Frank – rules as inert, no effect on judicial decision-making
- 晚期盧埃林: The Common Law Tradition
- The consequences of legal rules is an empirical question
- The effect of paper rules on judicial decision ought to be treated as an empirical question subject to empirical examination. → external descriptive examination of the actual grounds



- Legal rules as commands: not only to citizens but also to judges
- Reorienting to emphasize the human and institutional dimension of rules: how judges applied the rule
- Rule is a prescription about what ought to happen with respect to some class of conduct; what ought to happen and what in fact does happen is rarely a function of a single rule, but is **instead a function of a complex arrays of rules, practices, conventions, professional skills, most of which are devoted to raying to achieve a rule's purpose.**
- Propositional form of a rule v. Real rule



- Ideal Rule: Pathologies of Interpretation, enforcement → actors and institutions
- Criticism on Civil Law: outrageous cost
- Elasticity of Common Law
- Stability: Craft of Law
No 2 situations are entirely alike, the craft of law often involves making the best decision in the full context of a particular case



- Rules as tools that are used by advocates to buttress their desired outcomes
- Deployment of rule depends on the moment!
- Rules are instruments, in the service of the lawyer's persuasive and argumentative goals
- Stabilities within the Leeways: shared Craft of lawyers and judges produce predictability
- Rules served as ex post rationalization for results reached on other grounds, otherwise unorganized chaos



- Paper rules were “a factor” in determining the real rules that genuinely explained what judges were really doing --? Judicial behavior
- Words, rules and precepts should not be the center of reference for those who were teaching, writing about, or studying law.
- Rules are not decision-producing, but rather the devices used to justify or rationalize decisions already made on other grounds.



- What is Rule? Something decision-makers can (but not necessarily do) use to guide their decisions.
- A rule the judge understands as a rule and which the judge uses to guide her decision, but which does not exist in canonical form on a piece of paper – in the vicinity of a similar canonical formulation without being identical to it – distinction between paper rules and real rules
- Rule v. Standard: Entrenchment/Regularity produced by craft of law – purpose of the rule



結語

- Karl Llewellyn對於法律作為一門學科所採取的研究取徑
- Legal Realists真的是規則懷疑論者嗎？
- 如何去「發現」法律？
- 「法律與社會」等研究取徑的方法論問題



謝謝聆聽，敬請指教

