

PELAGIUS

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PERSONS OF THE DIALOGUE

LLEWELLYN

A PHILOSOPHER

TRENT, an assistant
professor of law

THE NARRATOR, a middle-aged
jurisprude

Place and Time of the Narration: a jurisprudence seminar at an
American law school, spring semester, 1962.

IT WAS last winter, and Professor Llewellyn was staying with us overnight. He was late getting back from the meeting and a little tired from answering questions, so the four of us sat around singing folksongs until my fingertips were too sore to hold the chords much longer. We did one more verse of the “Buffalo Skinners” and all the verses of the “Common Law Tradition,” the Philosopher and young Professor Trent joining sturdily in the “rowdy-dowdy-doodle-ee-oos” this time. I put the guitar away, Llewellyn drew in a deep breath, and we sat back in our chairs.

Trent was the first to speak up. “Would you write it that way now, Professor Llewellyn?” he asked. “Ruffin, Burch, Shaw and the others. Would they still be your honor roll?”

“It’s an exclusive club,” Llewellyn answered, “but always open to deserving new members. I would have some new names now, new to the song, anyway. There are a lot more like that around nowadays, and that’s a source of joy to us all! But I wouldn’t demote any of my old-timers. You write the new verse, Trent. Put them all in.”

Trent thought for a moment. “What about an All-American appellate court, Professor Llewellyn? Of the moderns, I mean, since they are the ones whose work I know best. How would you have made it up, if you could have brought them all together? Let’s see now, as I remember your book: Stern, Rutledge, Fuld, Douglas, Traynor, Breitel, Schaefer. Who else, Professor Llewellyn, if we’re going for nine?”

“Cluck,” said Llewellyn, “good old, earnest, thick-headed Judge Cluck. Put him on, not too many of him, but you can’t do without him. An all-star court would be an abomination in the face of the common law! You haven’t established the authenticity of a legal tradition until it gets under the skin of the Clucks, until they share it, respond to it, and start turning out good craftsman’s work that they really shouldn’t be capable of. Would the Ninth Symphony be any good to us if its violin section had to be all Menuhins and Heifetzes?”

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Llewellyn paused and then went on. "And, you see, the Cowens and the Hands need the Judge Clucks across the conference table from them. The Clucks don't see everything right away; you have to explain the fine points to them. That is good for the Clucks, and it's good for you, and it's good for the law! I know no test of the rightness of a decision that is quite as searching as having to explain it so that Judge Cluck will see its rightness, too. If old Cluck sees it, so will the people outside, and that may be the most important thing of all. Trent, your All-American bench would be like a law class made up entirely of A students. I wouldn't teach a bunch like that if you gave me the Victory of Samothrace as a bonus!"

"All right, Karl," said the Philosopher, "we'll leave Cluck, J. where he is. Not that there is much danger of his disappearing from the judicial scene in your and my lifetime. Would you change anything else in your ditty?"

"Apart from some new names, I wouldn't change a word of it! It's there in the nutshell, all my gospel, and most of it in four lines." Then, beating the time with the edge of his hand and chanting slightly off-key, Llewellyn hit his four lines hard:

No Rule was ever enough to halt
Corruption or ambition
Till manned by lawyers who earn their salt
In the Common Law Tradition.

He looked over at me and spoke very deliberately: "*That's* what you wandering minstrels have to get across to the new boys in the starting-out countries! It's not your blessed 'Rule of Law' they need, and you fellows are throwing them off by prattling about that in terms of formal institutional arrangements. What they have to have is a Tradition with a capital T, and that isn't something you can transplant to Leopoldville from Foley Square or the Inns of Court! A tradition has to grow from native roots. Justice is both faith and works, and you cannot achieve it without steadiness and reckonability."

Young Trent had been lost in his own reflections. "Professor Llewellyn," he said, "I really don't know all of your work. But we did read *Some Realism About Realism* in our Jurisprudence course a few years ago, and now I have just finished your big book. Perhaps I shouldn't ask this, but isn't your book profoundly inconsistent in spirit and substance with your great legal realist articles of the early Nineteen-Thirties?"

"Inconsistent?" Llewellyn replied. "Now I doubt that very, very much! It may be different, conceivably, in some matters of detail and emphasis. John Austin was the only 100 per cent consistent man in the history of jurisprudence, and look how far that got him—or got Kelsen either, for that matter! But my work inconsistent in spirit? No! It's the same line of merchandise. Holmes planted it, Cardozo nourished it, and Llewellyn, please God, gave it just a little increase."

"Now, Karl," said the Philosopher, "you can't brush our young friend off

as easily as that." The Philosopher turned to me. "You have read everything in the Llewellyn canon if anyone has. Hasn't he changed sides, changed tunes, at least? Here he is, the heretic of the Thirties installed as the case-law bishop of the Sixties. Steadying factors, indeed! Fine talk from a rule-skeptic! It's as if Duns Scotus had written his later work in praise of universals."

Llewellyn was looking quizzically at me, so I took it up. "There is something to that, Karl. You were the one who really put Holmes' cynical acid to work in the wash basin. Your realist manifesto was a kind of *credo* for my generation of beginning law teachers. You know, I can still quote two points in it. Thesis One: 'We distrust the theory that traditional prescriptive rule formulations are *the* heavily operative factor in producing court decisions.' Thesis Two: 'There is less possibility of accurate prediction of what courts will do than the traditional rules lead us to suppose.' You ran that one with your own underlining, too."

Llewellyn sat forward in his chair, so near the edge that we thought he might fall out of it. "How sharper than a serpent's tooth," he reproved me with wagging head, "and after all I tried to teach you about reading things *through*, all the way through. Tell me, Mr. Interlocutor, what did I say next, in that very passage you are quoting from?"

"Good Lord, Karl!" I said, "It was hard enough to memorize all the versions of your hymn. I can't quote your scripture, too."

"Get it!" he demanded. "The article is in your materials. Get it out and read us what comes next!"

It took a while to locate the passage, and Llewellyn grinned, shaking his shoulders in delight as I skimmed over the mimeographed pages. "Here it is," I said at last. "I was right almost word for word in what I quoted."

"Don't stall," rasped Llewellyn. "And what comes next, right after the bit about 'less possibility of accurate prediction than the rules would lead us to suppose?' Go on from there."

"The next clause is in parentheses," I replied. "It reads this way: 'and what possibility there is must be found in good measure outside these same traditional rules.'"

"Isn't that exactly what I did from then on, extend the quest for predictability beyond the conventional rules and into wider and more rewarding fields?" Llewellyn turned back to young Trent. "Now do you have your answer? Do you see the continuity between the heretic's work and the bishop's? The heretic debunked the rules, the traditional rules, mind you. . . ."

"Oh, oh!" interrupted the Philosopher. "The *traditional* rules, Karl?"

"All right, Herr Splitter!" Llewellyn grinned again and conceded the little point. "Strike that one word. Make it 'paper' rules; that is what I called them the next time out. But my continuity case stands. Debunking was fun, we had to do it to clear the air, but it wasn't enough for me. Because I knew all along

that court decisions were more reckonable than we had any right to expect them to be, and I knew that a good lawyer's careful prophecy was a lot more reliable than my barber's guess on the Belmont Stakes. If the paper rules couldn't account for that, there had to be an explanation somewhere. I have it now, at least a good healthy piece of it."

"And the explanation, Karl?" the Philosopher inquired.

"Would you have me try to condense twenty years of hard work into a few after-dinner sentences? You've read the book, and you know what I am talking about: my steadying factors, fidelity to the law of leeways, and, above all, the ingrained sense of the situation coming through to the judge and illuminating his choice and deliberation. If a lawyer understands all that, he is in a pretty respectable position to appraise the possibility of accurate prediction. More than that, he can start making some predictions of his own that will stand up under fire."

"I think I follow it all, Karl," said the Philosopher, "except the content of your notion of situation sense. As I understand you, you are addressing yourself at this point to the tensions that exist, in any legal or ethical order, between the demands of the general rule and the appeal of the concrete human situation. Am I right so far?"

"No," Llewellyn answered flatly, "not the concrete situation, if you mean by that the individual case before the court. Let's say that the judge thinks Mrs. Murphy is a nice woman and a good mother and that the insurance company can spare the money better than she can. Those are just the fireside equities, and you can't run a depersonalized legal system that way. When I talk about situation sense, I mean the *situation-type!* When the judge is groping for situation sense, he is thinking not just of the individual case in front of him but of all the other, factually indistinguishable cases of which this one is prototype. Do you get it now? It isn't simply what is fair between this Mrs. Murphy and this insurance outfit, but what makes sense in the situation-type that the Murphy case represents. That, as far as I can see, is the kind of generality that counts in any working legal order."

"In other words," the Philosopher observed, "you aren't against rules. You simply want new and better ones."

"I'll accept that," said Llewellyn, "if you have to think in those terms. Sure, I want rules, but rules that leave room for horse sense and responsible pragmatic choices. Glance through the Commercial Code some time, and you'll see what I mean, rules that block out the guide lines and invite the court to come in and finish the job right."

"'A rectification of law where law is defective because of its generality.'" The Philosopher was quoting now. "'For what is itself indefinite can only be measured by an indefinite standard like the leaden rule used by Lesbian builders; just as that rule is not rigid but can be bent to the shape of the stone.' Your point, Karl?"

"I knew you would have to bring Aristotle into this," Llewellyn said wryly. "It's good, but it's not quite right. I'm not talking about the special circumstances of one individual case, remember, but about an emerging rule that responds to the sense of the situation-type. With that amendment, I'll cheerfully take your builders' leaden rule, if they are honest builders and have a tradition to which they are accountable. In fact, your leaden rule is not too far from the doctrine of precedent as it exists in life, at least in the hands of a Grand Style court."

The Philosopher relit his pipe. "Karl, I'm still not sure that I quite understand you. So far it seems to turn, more than on anything else, on what you call situation sense. Let's try that out for a minute or two. You three fellows are all lawyers. Suppose that the three of you are sitting together as a panel of one of the Courts of Appeals. Are you any more likely to agree on the 'sense'—whatever that is—of the situation before you than you are to agree on the applicability of one or another legal proposition to the facts of that situation? When you talk about situation sense, aren't you letting subjectivity, *Gefuehljurisprudenz*, in under an assumed name?"

Llewellyn had listened to this closely, and he thought a moment before he replied. "That was a good try, my friend, but you have it all backwards. You don't impress the sense on the situation. It is there, immanent and indwelling. All you have to do is recognize it."

"I thought so!" Now the Philosopher moved forward to the edge of his chair. "The Natural Law according to Saint Levin Goldschmidt!"

Llewellyn chuckled and winked at young Trent before he answered. "Just about, and what is the matter with that?"

"So you bring us to an act of faith?" the Philosopher insisted. "That there is a kind of logic to reality after all, an immanent structure to which the mind has ready access? This is loaded, Karl. I think your situation sense conceals some pretty risky metaphysical and epistemological assumptions."

"Assumptions to you, perhaps," Llewellyn answered cheerfully, "but not to me. Not any more. Situation sense is there for the looking. I find it in almost any case. Judges find it, too, the great ones, the good ones, even the pretty good ones. Yes, and the dumb ones get there more often than not, if counsel gives them a decent hand-up."

The Philosopher shook his head in mock despair. "And suppose that I look at and-into one of your type-situations and don't discover any sense immanent in it, one way or the other? What then?"

"Then you haven't read enough common law cases, or haven't read them well enough. You couldn't read an engineering blueprint either, or fill a prescription. Sense is to the sensitive, and the ways of law are a subtle technology. Dilettantes need not apply."

"So that," said the Philosopher, "is what you teach in the law schools, the apprehension of situation sense?"

"I wish we did," Llewellyn answered, "but we do so desperately little of what we ought to do! Oh, we use cases, and what lovely stuff they are! But your well trained law professor, even more than the ones before the War, spoils the cases by telling the cubs what to find there. They never quite see the conflicting premises that might have been cited in justification, they never quite grasp the leeway the deciding court had, and so it's not very often that the kids discern the situation sense that made the court choose one premise, one interpretation, rather than the other."

This was a bit too much for me, and I protested. "That isn't fair, Karl. Opposed views are set back-to-back in any good casebook nowadays."

"Yes," Llewellyn roared with laughter, "the Cook's Tour through forty-eight courthouses, or is it fifty now?" He waved his hand as if addressing a large class. "Michigan adheres to Restatement, Section 133. Massachusetts casts sixteen votes for Williston. Minority view, seven States. Majority view, three states, weighting Schaefer as four and assuming that the New York Court of Appeals next time will follow Fuld's dissent last time." Llewellyn sighed deeply. "What the cubs don't get is the real show, a court working with its own precedents, stretching one here, cutting out the bad spot there, working from and with the precedents to make sense." He shook his head once more. "No, to see the permissive aspects of *stare decisis*, you have to study one court at a time. Any court will do, any appellate court at all, but study one at a time!"

Trent, who had been nodding his head in approval, took this occasion to re-enter the conversation. "That is exactly what we do in my fields, Constitutional Law and Administrative Law. Nine-tenths of the decisions in the case-book are from the same court, the Supreme Court of the United States. So the students get it there, at any rate."

"Now Trent, 'fess up." Llewellyn smiled at him. "Do you or any of your brethren teach so-called public law courses the way I am talking about? They aren't the right cases! They are too distracting in their current events implications. To study juridical method that way is like studying painting from a series of pictures of heroic or villainous characters in the National Portrait Gallery. You get so interested in the fact that it is Wellington that you never look to see how it was painted."

"You seem to look, Professor Llewellyn," Trent replied. "I gather from your book that you don't grade the Supreme Court too high on juridical method at the moment."

"Now don't overstate my views on that," said Llewellyn, almost sharply. "Put two or three first-stringers from a highest state court up there, and I would be happy with the Court. There's nothing the matter with the Court that an infusion of common law technology wouldn't cure up in a hurry."

Trent looked shocked at this. "Really, Professor Llewellyn, would you like to see a group of case-law technicians on the Supreme Court of the United States?"

Llewellyn clapped his hands over his eyes and half rose from his chair. "Have you any idea, Brother, what a common law technician is? Giotto was a technician! Would the Scrovegni chapel be worth looking at if some theologian had painted it? What is a technician, anyway, except somebody who knows his job? And when the work of the Supreme Court ceases to be a great common law job—a reckonable, responsible, Grand Style job—you can turn those nine big swivel chairs over to the professors of political science!"

The Philosopher intervened: "But justice, Karl? Can you count on your common law technology for that?"

"Is justice more than situation sense?" Llewellyn responded.

"Now," said the Philosopher, "you are going out on that limb I warned you against. Does justice have objective reality, too? Is the just result *immanent*, as your friend Goldschmidt puts it, in any collision between man and man or man and the state? I'm not heckling, Karl, but isn't justice one of Dabin's 'constructions,' at least something in the eye of the beholder?"

Llewellyn pondered this for a moment. "I think I have already given you my answer to that. A good judge is a powerfully accurate beholder, my friend, and he's a helluva tough man to sell on an illusion. If he looks at a situation-type and thinks he sees the justice immanent in it, it could be that what he sees is there, by golly, and was before he looked, too!"

"But," continued the Philosopher, "on either theory it is the judges that count in the last analysis. That is what you meant thirty years ago, isn't it, when you kept hammering away at what you called 'the importance of personnel'? You know, Karl, you are the fellow who should have written *In Praise of Judges*. Not just good judges, either, but all of them, for what they symbolize."

Llewellyn cocked his head towards the Philosopher. "That much we will have to concede to old Savigny," he said. "The jurist represents the ongoing part of our tradition, the clean craft part of it that nobody else cares about, like an accused's right to get up on his hind legs and be heard in open court and a judge's obligation to pay attention to what the claimant says and give him what he asks for, or a good reason why he shouldn't get it. I would go farther than that. The judge not only represents justice; he is justice, living justice there for everybody to see."

"Now who is quoting Aristotle?"

"But that's another time he was right," Llewellyn answered. "He could be now and then, just as Pound is right about five-eighths of the time. The fault I have to find with Aristotle is that he tried to make a science out of law-government. He was too sure that there were answers, single right answers, formulary solutions to everything. He would have been a bad judge, much worse than Cluck. He lacked the anxious heart. He wasn't troubled enough."

The Philosopher thought he saw an advantage, and he moved in to press it. "Is that your prescription for the great judge, that he be troubled at decision time?"

Llewellyn snorted. "Not the only attribute, but a pretty good one, isn't it? How else would you read: 'Judge not, that ye be not judged?' Every tough case, until its sense comes clear, is another dive into the bramble bush. When you have thought it out, scratched your eyes back in again, you are not troubled any more. Then you are in control. Serenity isn't something that happens; you work for it, fight through to it."

Trent had been listening intently. "The law teacher, too, Professor Llewellyn?"

"Meaning me? Why not? I was troubled long enough. Law was everything that mattered to me, and I had to understand why I believed in it. No peace is worth a tinker's dam unless it comes from the resolution of doubt and the release of tension. I had to scratch my eyes in the hard way, my way. They are back in now for good, and, boy, is it fun to see what you love with understanding eyes!"

"Your *Nunc Dimittis*, Karl?" I asked him.

"And if it were? Could you do better, my jovial friend? 'Lord, now lettest thou thy servant depart in peace, according to Thy word. For mine eyes have seen Thy salvation.' If they came to book me, I would go quietly."

My throat felt a bit dry, but I had another question: "Is that the way you see your book, Karl, as 'a light to lighten the Gentiles?'"

"If they will work at it, doggone it!" Llewellyn looked out the window at the neon sign across the street. "*You* won't, I know that, none of you essayists and chair-holders! You're too far along the manicured garden path to go back now and cut your way through the honest-to-God woods. Einstein, when he was sixteen, already had every idea he ever developed later on. Even in law, where the jobs are tougher and the notions less tractable, a man gets his whole bag of ideas before he knows what to do with them. The kids are the Gentiles I was writing for, kids like Trent here and the even fresher ones, the cubs in the law classes."

We were all silent for a full half-minute. Then Llewellyn scowled, grimaced and went on: "Do this for me! See that the cubs don't miss it, put my stuff in their hands. Let them try following my tree-blazes, not with your eyes or even mine, but with their own! They will see it better, get farther than I did, because they won't have to spend forty years acquiring a sense of direction. Even now, after all these painstaking years, I still come up with results that my factors are not sufficient to explain. But I got pretty far, you know. The cubs can take it from there."

Llewellyn got up and stretched. "I want to call Soia," he said, "and then I think I'll turn in for the night." He shook hands with each of us. "It was fun, gentlemen. Don't forget what I said about the cubs."

That was the last time I saw Karl Llewellyn, concerning whom I may truly say that of all the legal scholars of his time whom I have known, he was the earthiest, the least scornful and the one most in love with law.