

Introduction

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The purpose of a book is never entirely justified. In any event, no one is required to display his motives or to entangle himself in a confession. To attempt it would be self-delusion. Yet, more than anyone, the philosopher cannot refuse to give his reasons.

(Ricoeur 1970: 3)

This project has a distinct provenance, and so it might be instructive for the reader to know this history before engaging with the lively and diverse essays in this volume. On the other hand, it is always the case that a project outstrips its humble beginnings and takes on a life of its own; this is particularly true when the project involves thirty-seven individuals. I recognize that my effort to tell the story of an undertaking such as this book is, in the end, fanciful. Nevertheless, I must give my reasons.

I have long admired Karl Llewellyn's irreverent and sweeping prose. Llewellyn cast aside received wisdom about the nature of law in favor of looking at what really goes on in the activities that constitute law. In many ways he was similar to Nietzsche in form and attitude: incisive in his analysis, unique (sometimes odd) in his delivery,¹ committed to clearheaded investigation but rejecting scientism, tortured in his personal life, and maddeningly frustrating both to those who would erect a logical system of thought around his legacy and to those who would deride his efforts as an intellectual blind alley.² Llewellyn was committed to

¹ One of Llewellyn's reviewers made this point in a pithy manner while still extolling the value of Llewellyn's work, commenting that there "are many Gothic structures worth half a trip around the world – and this book is one of them" (Levy 1961: 1051).

² William Twining describes Llewellyn in a manner that could easily be applied to Nietzsche. Llewellyn, Twining (1985: 113–14) explained,

imprinted his personality on everything he did, and even if it were desirable, it would be virtually impossible to exclude the strong flavour of the Llewellynesque from any study of his work. Few people could be indifferent to Karl Llewellyn. He frequently stimulated admiration and enthusiasm, but there were also non-enthusiasts. There is some consistency in the respective reactions of those who were definitive Karlo-phobes or Karlo-philes. The former tended to consider him a vulgar exhibitionist, sometimes brash and insensitive, sometimes

Dennis Patterson offered very helpful comments on an incomplete draft of this Introduction.

reforming American commercial legal practice as a Nietzschean “great lawgiver” who disdained the effete practice of academic philosophy, but he was enmeshed in the most vital discussions of his day regarding the philosophical problems posed by law. Llewellyn helped to pioneer modern legal anthropology in his work with the Cheyenne, he wrote a book in German that adopted a comparative law focus, and he was a central figure in the creation and adoption by the states of the Uniform Commercial Code. Simply put, he was deeply engaged in the real world of law but also was always informed by a critical assessment of what paraded as knowledge in this real world. Musty academics hiding in their book-lined offices have no easy task if they wish to dismiss the larger-than-life Llewellyn and his legacy.

Llewellyn’s essay, “On Philosophy in American Law,” is particularly interesting because it uses his customary succinct and clipped prose to explore far-reaching themes. In a period of great jurisprudential ferment Llewellyn produced a suggestive and wide-ranging essay in an impossibly concise format. This short piece is worthy of emulation because Llewellyn captured the moment in jurisprudential thinking in an arresting manner and also outlined a path of productive development. The origin of the present book can be traced directly to my embarrassing epiphany while reviewing Llewellyn’s essay to check a quotation for use as an epigraph for a forthcoming book. Simply put, as I finalized my own lengthy monograph I doubted that I could match Llewellyn’s example of speaking about the jurisprudential moment so abruptly and provocatively. A simple idea followed quickly on the heels of my prepublication self-doubt: wouldn’t it be fascinating to charge a diverse group of scholars to present their own summations of the current status of jurisprudential thinking in Llewellyn’s manner?

I am gratified that so many talented individuals have taken this task to heart in response to my call and have contributed such excellent essays to this volume. In doing so, they have inspired me to try to meet the same challenge. It must be emphasized that the subject of this book is neither Llewellyn nor his essay. The book addresses the connections between philosophy and law at this point in American legal history; Llewellyn serves as inspiration in form only. The diversity of approaches that claim to be working at the intersection of philosophy and law

perverse, lacking in self-discipline and too erratic to be taken seriously. His admirers tended to emphasize his combination of humanity and brilliance: warm-hearted, gay, tolerant, uninhibited and vital as a person, stimulating and inspiring as a teacher, perspicacious and wise as a thinker. Taken together such judgments suggest a volatile genius. There is truth in this image, but on its own it is too facile.

There is a strange aura about Llewellyn’s writings which is unique in juristic literature. It fascinates some readers, repels others and perplexes most. This strangeness is often attributed to his prose style, which at its best is picturesque and memorable, but is often mannered, irritating and obscure. His use of language is idiosyncratic but it is quite clear that by itself Llewellynesque does not explain the Llewellynesque. It is beyond my competence to try to emulate the brave biographer who seeks to give a rounded account of the relationship between the personality and the ideas of his subject. The pitfalls are too many and this study is, in any event, not intended to be in any sense a ‘complete’ biography. However, there are two aspects of Llewellyn’s private life which have a direct bearing on his work as a jurist: his supposed ‘artistic’ qualities and his personal credo.

Twining did not intrude on the truly private dimensions of Llewellyn’s life, but there are reports of his troubled relationships, depression, and alcoholism that suggest that he lived a life not wholly unlike Nietzsche’s (Connolly 1998).

might suggest that this area of inquiry is so fractured as to be incoherent, and so it seemed helpful to invite a broad range of scholars to provide focused and straightforward articulations of the role that philosophy might play in American legal thinking. Each contributor was limited strictly to no more than 4,500 words and footnotes were discouraged. As a result, the book brings together succinct articulations of diverse assessments of the intersection of law and philosophy in a manner that makes the whole greater than the sum of its impressive parts. By asking leading scholars to deliver concise accounts of the relationship of law and philosophy and to offer their suggestions for future productive work, the book should focus and stimulate ongoing work in the field. By offering a side-by-side comparison of different perspectives presented in crisp and direct terms, the book should also prove useful to a wide audience. There was a risk of cacophony or radical polarization, but in the end the book presents a range of views in the manner of a vigorous and nonlinear dialogue. Perhaps the most important contribution of this volume is what lies between the essays – the unstated connections, disputations, and elaborations – that must be supplied by the reader. This book opens a fruitful conversation; it does not pretend to provide the last word.

LLEWELLYN ON PHILOSOPHY IN AMERICAN LAW

The volume begins with Llewellyn's essay, published seventy-five years ago. Llewellyn (1934: 205) makes clear that he adopts a pragmatic and functionalist view of philosophy, arguing that theoretical efforts gain traction with "life-in-action" only when they meet social needs. He sets out to investigate how we grow "into ways of doing which comport with some one philosophy and not with another . . . a process dependent largely on the felt needs of the persons concerned" (206). Philosophy is part of our lived reality – often plural, messy, and inconsistent – rather than an intellectual exercise that can bring clarity to social practices and issue definitive guidance about how to reform those practices (206). Llewellyn suggested that philosophers might help to shape social reality, but only by tapping into a "felt need of which no one had been conscious before" either by inventing a new philosophy or adapting the philosophical underpinnings to a changing society (206).

Working from this conception of philosophy, Llewellyn brashly describes the tides of legal philosophy over the previous two hundred years in terms of the adjustment of philosophy to social need. From natural law to Holmes and Cardozo, legal philosophy has found its resonance by answering the challenges posed by contemporary society. Llewellyn's description of the past is a breezy romp of half-sentences and allusions, but he ends with the serious questions that undoubtedly motivated him to write the article: why is legal realism the correct philosophy for American society in the 1930s, and why hasn't society expressly recognized its "felt need" for this changed philosophical outlook (211)? During the previous four years Llewellyn had battled for the realist camp in the great intellectual debate of his day, but his functionalist view of philosophy required him to consider – even if somewhat elliptically in this short essay – why the realist cause had not quickly succeeded. By acknowledging that law's leaders remained beholden to the ideology of business rapacity that had dominated the end of the previous century,

Llewellyn faced the possibility that the legal realism propounded by the professors was simply irrelevant to the practice of law.

Llewellyn's response to this dilemma is not unlike Nietzsche's: messianic yet coldly analytical. Nietzsche knew he was condemned to be a posthumous philosopher; although he could see clearly that God had already died, that the moralism of his peers was utterly decadent, and that scholars were blind to the vitality of will to power that animated life, he knew that it would be years before his lessons could be understood by the philosophers of tomorrow. Similarly, Llewellyn suggested that the "spear-point" of legal realism had "advanced" in the work of Pound, Frankfurter, Brandeis, Dewey, and others, and had been accepted in "the actual behavior of the better bar" despite its "hopelessly unorthodox" character; nevertheless, he acknowledged that legal realism remained on the fringes of conscious legal life. Legal practice would have to grow into legal realism, because there was as yet no expressly felt sense of the need to do so.³ Just as Holmes slowly developed a cynical realism that even more slowly won over the Supreme Court in public law, Llewellyn (1934: 210) predicted that there would be a "lag" between insight into a vaguely felt need in private law and the instantiation of a new philosophy.

Moreover, Llewellyn understood that philosophies do not appear and disappear in a flash. Instead, they tend to cumulate and provide a heterodox account even as one or more become ascendant at a particular time. He argued that while the "profession at large" is still influenced by natural law, and even more by the positivism of the robber-baron era, nevertheless it was then beginning to incorporate realism into its practices (Llewellyn 1934: 212). Legal realism is not the better philosophy because it can tell practitioners how to go about their business, Llewellyn emphasized, but because it provided the orientation for practitioners to address the rapidly changing needs of society. Legal realism is the philosophy that will answer future needs, rather than the philosophy that will create the future.

LLEWELLYN'S REALIST CRITIQUE OF LEGAL PHILOSOPHY

Llewellyn's essay is cast in the context of the debates of the 1930s, but he raises fundamental questions about the nature of philosophy and its relationship to social practices such as law. Llewellyn's attitude about potential connections between philosophy and law is explained in greater depth by his biographer, William Twining. Llewellyn plainly evidenced a "dislike of professional philosophy and philosophers" (Twining 1985: 93) and rejected "what might be termed the Royal Tennis Tradition in jurisprudence" (173). But Llewellyn was equally adamant that his jurisprudence course was the most important course offered in the law school, with many of his students subsequently agreeing with this assessment. Llewellyn was not playing

³ "We are all legal realists now" is a well-worn phrase that suggests that Llewellyn's assessment was correct, and that to some extent he was fated to be a posthumous jurist. But as Joseph Singer (1988: 467, 504) – perhaps the first theorist to endorse the phrase – suggests, the statement is true only with qualification. Although legal realism, as channeled through such diverse forms of modern legal theory as law and economics and critical legal studies, certainly holds sway in the modern academy, it has not yet succeeded as a philosophy that can describe legal practice satisfactorily (Singer 1988: 467–8). Perhaps the theoretical "spear-point" has not been advanced much since Llewellyn's day, although our lived experience has clearly become more realistic.

semantic games. He believed that legal theory should be simplifying rather than esoteric or specialized, and he considered jurisprudence the bringing to bear of “general serviceable life-wisdom” to issues facing lawyers and judges (Twining 1985: 116).

While it is not uncommon for theorists to seek a *rapprochement* between “theory” and “practice,” Llewellyn’s persistent urge to operate at the level of participant working theory is rare in jurisprudence, if not unique. Many of those who have revolted against the Royal Tennis Tradition have rejected all jurisprudence as being esoteric and useless; few, if any, have rivalled Llewellyn’s consistency in seeking to provide for participants usable theory, drawing on the best modern thought available in a variety of disciplines, whilst maintaining a broad perspective and liberal values. . . . With some justification Llewellyn considered this line of thinking to be his most original contribution to jurisprudence (Twining 1985: 370).

Llewellyn avoided the problem of relating theory to practice by steadfastly refusing to sever them at the outset of his inquiry.

Llewellyn was a legal realist but he adamantly dismissed the idea of a finely tuned realist school of thought, eschewing the reductionist sociological and psychological approaches taken by some of his colleagues. He embraced the powerful potential for modern social science to clarify pressing issues in law, but he consistently rejected a scientistic ideology that would commit the same mistake as the stultifying ideologies of an earlier day. “In short, he favoured a commonsense strategy for research, based on a realistic appraisal of the obstacles in the way of quick advance, such as the cost, the lack of glamour in much of the work, and the shortage of personnel with appropriate training. . . . [His] was a pragmatic and sensible approach which could form the basis for a rounded strategy for developing the subject, giving due regard both to the importance of theory and to likely practical difficulties” (Twining 1985: 196). Of course, the social sciences have made tremendous strides in the intervening years, leading Twining to wonder whether Llewellyn’s cautious approach had, by the end of his career, become “complacent and unambitious in relation to the possibilities and the needs” (196).

There is good reason not to cast Llewellyn as a precursor of wholly empirical approaches to law. Dennis Patterson (1990: 577–9) has argued persuasively that the substance of Llewellyn’s philosophical views anticipated Wittgenstein’s later work. Patterson contends that Llewellyn firmly believed that philosophy leaves legal practice as it is, but that nevertheless there is important work to be done within the practice. “Like Wittgenstein, Llewellyn believed that we can never escape the realm of linguistic understanding. What this means for the critique of law is that the ground of critique must be internal to legal practice itself. The impossibility of transcending the (linguistic) limits of the practice and reaching a point outside the practice from which to critique it leaves only those within the practice as sources – and evaluators – of criticism” (599–600). It is this orientation that led Llewellyn to reject the stereotypical realist view that law should be subsumed into the social science departments of research universities (Ansaldi 1992: 711; Llewellyn 1962: 375–94).

We can sharpen this account of Llewellyn's approach to philosophy and law by turning to his (still untranslated) 1931–2 lectures on law and sociology that he delivered in Germany. Llewellyn emphasized the integrity of legal practice and its connection to sociological jurisprudence in ways that illuminate the brief remarks that he would write in the following year in "On Philosophy in American Law." He argued that philosophies arise to render developed practices such as law into a "science," by which he meant a reflective practice that is both descriptively accurate and critical (Ansaldi 1992: 746–9). Reflections on practice, Llewellyn contended, "generally lead to attempts to draw together everything theretofore learned about a particular branch of knowledge, to a 'science' in the old-fashioned sense of the term, a somewhat organized collection and classification of prior knowledge, but one that jumbles knowledge with beliefs, with value judgments and prejudices, a 'quasi-science.' This philosophy coexists with, but does not supplant, the skills by which people earn their living" (Ansaldi 1992: 747). Llewellyn (1932: 38) wrote that "in this topsy-turvy world the central problem of all of law has to do with this still almost completely neglected descriptive science, with this 'legal sociology,' this natural science of living law," but Llewellyn would have no truck with crude efforts to subordinate legal practice to the social sciences narrowly construed (Ansaldi 1992: 748). He regarded legal practice as a normative enterprise that could not be explained solely by sociological laws, although sociological inquiry was a necessary first step toward sharpening the outmoded legal philosophies of his day. Thus, one of his important tasks was to describe how judges decided cases, and to link this practice to broader perspectives that offered critical insight into legal practice.

Critics who allege that Llewellyn was an ivory-tower relativist who believed in law's absolute indeterminacy badly misread his work. Llewellyn found ample stability within the practice of law while at the same time acknowledging room for critique and reform (Patterson 1990: 580–1, 598–9). Llewellyn (1989: 11–12) wrote that the totality of the practice of law was one of the most "conservative and inflexible" of social phenomena, and yet every case offered the opportunity for the judge and lawyers to shift the direction of thinking. Llewellyn anticipated the central tenet of contemporary legal hermeneutics, arguing that the meaning of a legal rule is known only in its use, which always constitutes a reformulation of the rule (either by expansion or contraction) even when the case feels like a simple matter of deductive reasoning.

Thus, the task of the judge is to *reformulate* the rule so that from then on the rule *undoubtedly* includes the case or *undoubtedly* excludes it. "To apply the rule" is thus a misnomer; rather, one *expands* a rule or *contracts* it. One can only "apply" a rule *after* first freely choosing either to include the instant case within it or to exclude the case from it. . . .

Matters are no different, only more sharply highlighted, when a new case is such that one first must mull over whether to include it within an existing category, or must choose which existing category to include it in. . . .

For we all, lawyer not least, are mistaken about the nature of language. We regard language as if words were things with fixed content. Precisely because we apply to a new fact situation a well-known and familiar linguistic symbol, we lose the *feeling* of newness about the case; it seems long familiar to us. The word hides its changed meaning from the speaker (Llewellyn 1989: 74–5).

His message was philosophically radical, but he was no linguistic skeptic, cultural nihilist, or political revolutionary.

Llewellyn argued that the impasse between the philosophical interest in achieving justice in the individual case and the practical interest in achieving regularity resulted in a “leeway, a space admittedly bounded, within which a judge may act freely” (Ansaldi 1992: 755), but this realm of freedom was not beyond the scope of jurisprudential assessment. Llewellyn’s realist inquiry did not shun normative questions precisely because the practice under consideration was normative, and one of the goals of legal sociology was to better understand what law ought to be. “Accurate scientific knowledge of what legal rules ‘deliver’ in real life is desirable not just because it satisfies a disinterested spirit of inquiry, but also because such knowledge is an indispensable element in devising effective answers to questions about what the law in the real world ‘ought’ to be” (749n162).

CONTEMPORARY PERSPECTIVES ON PHILOSOPHY IN AMERICAN LAW

In philosophy, opposing points of view must be heard, whatever their nature or their source. This is a fundamental principle for all philosophers who do not believe that they can found their conceptions on necessity and self-evidence; for it is only by this principle that they can justify their claim to universality.

....

As no criteria are absolute and self-evident, norms and values invoked in justification are never beyond criticism. . . . for philosophy there is no *res judicata*. (Perelman 1980: 71, 75)

Llewellyn’s instrumental conception of philosophy and his prescient approach to language provide a rich starting point for thinking about the connections between philosophy and law today. The nature of philosophical inquiry, the nature of legal practice, and the general relationship between theory and practice are as contentious today as they were seventy-five years ago. This volume provides a comprehensive, concise, and diverse collection of essays by some of the leading contemporary theorists working at the intersection of law and philosophy. The result is not a carefully organized department store in which one can hurriedly find the precise object one seeks. Instead, it is much more like a bazaar or open market, in which it is best to wander, circle back, and change one’s mind about what looks appealing and merits a second look. Because of space limitations, these essays all point outside their borders to the work already completed by the author and by work proposed for completion. This open market is not convened to make a quick sale, then, but to invite the reader to join the contributors in an ongoing and festive spirit of inquiry.

Karl Llewellyn and the Course of Philosophy in American Law

This book is not just about Llewellyn, but several contributions discuss Llewellyn’s contribution to, and continuing effects on, American jurisprudence. Jan Broekman draws from competing accounts of Llewellyn’s life to consider the connections between life and law, and he situates Llewellyn’s interventions in a historical story that has yet to come to fruition. The realist tendency is to assume

a pragmatic subject who regards the strings of case names as real objects of reference rather than as nonrepresentational signs, and Broekman urges realism to take the next step by embracing the semiotic life in law. David Caudill argues that Llewellyn suffers from the same natural law hangover that he diagnosed in American jurisprudence. Caudill extends Llewellyn's insights by bringing him into conversation with Herman Dooyeweerd, a Dutch legal philosopher writing within the natural law tradition but in a critical vein. Caudill draws the lesson that we cannot avoid our hangover of pretheoretical commitments, but we can argue about these assumptions productively.

Three contributions seek to continue Llewellyn's effort to chart the broad course of philosophy in American law. Brian Tamanaha describes the deleterious effect of Llewellyn's realism, arguing that the instrumental view of law as a tool of social policy has displaced the rule of law. Without guiding agreement about what "good" social policy entails, the law has become a battleground for interest groups promoting their parochial visions, and to the victor go the spoils of power. Consequently, Llewellyn's belief that realism would unshackle law from the ideology of the robber-barons has not been achieved. Steven Winter embraces realism and notes that it grew and prospered in a variety of forms through the 1980s, but he argues that during the past thirty years things have gone "terribly wrong" in jurisprudence. The post-Soviet era has witnessed the decisive triumph of rule of law formalism, capitalist private law, and liberal constitutionalism, but Winter contends that this development has set jurisprudence back a century. Finally, Larry Backer offers an alternative to Llewellyn's historical narrative, arguing that the quest for perfection is the unifying theme in American jurisprudence. Competing accounts of law have been competing accounts of how to achieve perfection in the American social experience; Backer contends that this unifying quest below the tides of jurisprudential change is religious in character rather than strictly philosophical.

Philosophical Perspectives on Law

Several essays argue that one or more broad philosophical themes are important at this stage of the relationship of philosophy and American law. Robin West contends that questions of normativity – what makes a law good or bad – have not been prominent in recent analytic or critical jurisprudence and that this omission is for the worse. Arguing that natural law thinking became too thin, legal positivism began attending only to law after insisting on its separation from morality, and critical theorists have focused on the relationship of law and power, West counsels a reinvigoration of normative jurisprudence in the vein of work by Martha Nussbaum. Jack Balkin argues for a renewal of critical legal theory to attend to law's ambivalent character: law renders power legitimate by containing it within the legal structure, but it also legitimates the exercise of power after the fact. A critical legal theory must attend to law's plasticity and ambivalence, and in turn must be self-critical of its tendency to regard law just as a mystifying legitimation of unauthorized power. Penelope Pether locates in the widespread practice of courts to decertify opinions for publication an emergent crude realism that equates law with judicial fiat, and thereby yokes the realist impulse to atavistic politics. In

response, she charts a more sophisticated approach to law, social science, and the humanities that can make good on Llewellyn's view of the liberating effects of realism.

George Taylor calls for an inquiry into creativity that moves beyond the simple model of applying a constant legal principle to a new set of facts by analogy. Guided by the hermeneutical principle that meaning occurs in application, Taylor draws on Ricoeur's argument that application is metaphoric and imaginative. There can be no methodology for ensuring a productive imagination: imagination always threatens to undermine progressive goals even as it promises to advance them, but it is only by engaging in metaphoric imagination that we can claim to make these distinctions. Robert Hayman and Nancy Levit champion the "new legal realism" that eschews a crude empiricism and focuses on the narrative dimension of law. Extending the work of Llewellyn and other realists requires attention to the elements of narrative truth, and so they call on critical storytellers to attend to the truth as they seek to undermine the officially sanctioned stories appearing in judicial opinions.

Areas of Philosophy and Their Relationship to Law

Philosophy is neither a unidimensional nor a univocal discipline. A number of essays connect specific schools of philosophy or areas of philosophical inquiry to law. Brian Bix argues that American thinkers unfairly have marginalized the British tradition of analytical legal philosophy despite the growing number of American theorists doing sophisticated work within this tradition. American tendencies to demand pragmatic cash value leads to undervaluing careful philosophy, but Bix argues that the analytic clarification of legal concepts and the philosophical foundations of various substantive areas of law does provide some useful connection to legal practice, even if philosophical inquiry should not always be judged instrumentally. Austin Sarat and Connor Clarke contend that contemporary political philosophy sheds light on the particularly vexing problem of prosecutorial discretion. Agamben's work on the state of exception provides the lens for understanding prosecutorial discretion as a political question rather than a question of administrative bureaucracy.

Matthew Adler notes that legal theorists inexplicably have neglected contemporary moral philosophy in their work, and therefore have failed to incorporate the substantial developments in this area during the past twenty years. This inattention leads to skewed understandings, given that prior borrowing of lessons from moral philosophy might now be challenged within the field. Perhaps qualifying this indictment, Lawrence Solum heralds the development of virtue jurisprudence to overcome the antinomies of contemporary legal theory just as moral philosophy has looked to Aristotelian conceptions to overcome its roadblocks in recent decades. He discusses the judicial virtues, the virtue of justice, and the virtue of practical wisdom as a means of demonstrating how the aretaic turn can advance the philosophy of law.

Adam Thurschwell suggests that Llewellyn's essay follows the form of Continental philosophy in the post-Hegelian tradition, and that reading it in this manner restores its critical edge. Using the example of affirmative action, he reveals how

we can reframe debates and locate the ethical impetus for change by attending to the lessons of contemporary Continental philosophy regarding finitude and historicity. Jeanne Schroeder and David Carlson argue that freedom is the core issue in legal theory, and that a psychoanalytic jurisprudence derived from Lacan illuminates the legal character of the subject and law's inability to quell subjective desire. It is precisely this insight that reveals an inescapable freedom to choose and act despite the inability of law or philosophy to direct action in a determinant manner.

Philosophical Examinations of Legal Issues

A number of essays provide intriguing philosophical analyses of legal questions. Frank Michelman addresses the perennial question of the relationship of law and morality in a unique manner, suggesting that in some instances law may be the premise for moral commitments. In particular, he suggests that socioeconomic rights may be grounded in the morality of law in the sense that these commitments depend on the premise of a certain legal order. In the next essay, David Fisher examines how justice never fully achieves its goal of rising above the deep-seated urge to seek revenge. Working from Ricoeur's later work on justice, law, and ethics, Fisher calls for a nonbinary thinking that understands how law can join the goal of living in mutual reciprocity with others with the need to build institutions that can foster the use of practical wisdom in resolving conflict. Eugene Garver asks why we privilege freedom of thought over freedom of action now that the religious justification that salvation depends on one's beliefs has receded. Drawing on the Platonic dialogues for guidance he contends that love can explain this puzzle, that tolerating another's thoughts can be part of friendship and not just indifference.

After acknowledging the difficulty of making predictions, especially in light of the chastened aspirations of contemporary philosophy, George Wright outlines a number of complex problems including free will and the implications of artificially enhanced personhood that might become the focus of future thinking. He cautions that a new philosophical humility might have an overriding effect on how these issues are addressed. Finally, Anita Allen provides an antidote to the prevailing ideologies – what Llewellyn terms the atmospherics of a guiding philosophy – of maternalism and paternalism that shape the legal treatment of abortion rights. Accepting the reality that the law might justifiably protect some women from self-harm and cruelty does not justify contemporary atmospherics.

Law, Rhetoric, and Practice Theory

Philosophy and law might find more common ground, several contributors argue, if we draw on the traditions of rhetoric and practice theory. Eileen Scallen challenges the traditional philosophical quest for foundational truths by acknowledging that plural ground truths are experienced in practice, drawing from the traditions of ancient rhetoric, legal realism, and pragmatism. Scallen insists that this is not a move to irrationalism or skepticism, but instead is an effort to develop a more complete account that might better serve the ends of justice. My essay contends