**ON THE ROLE OF BELIEF IN LAW AND LEGAL THEORY**

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**Introduction: Dooyeweerd and Llewellyn**

The great Legal Realist Karl Llewellyn (1893-1962), in a 1934 essay on the state of philosophy in American law (Llewellyn 1934), identified a sense in which we were, and I believe still are, all natural lawyers. (It is only a sense, because we are obviously not all formal adherents of the natural law tradition. But natural law, in a sense, is the fallback position for all of us.) And that sense on Llewellyn’s part provides an unlikely link to Llewellyn’s contemporary, the Dutch legal theorist Herman Dooyeweerd.

Herman Dooyeweerd (1884-1977), a professor at the Vrije Universiteit te Amsterdam from 1926-1965, developed (in over 200 articles and books) a complex philosophical system based on the neo-Calvinism of Abraham Kuyper (1837-1920) but also influenced by Neo-Kantianism and Phenomenology. However, like Llewellyn, Dooyeweerd was trained in law, not philosophy. As Llewellyn was writing “On Philosophy in American Law” (Llewellyn 1934), Dooyeweerd was completing *De wijsbegeerte der wetsidee* (Dooyeweerd 1935-36) (translated into English as *A New Critique of Theoretical Thought* (Dooyeweerd 1953-58)). Dooyeweerd’s 4-volume work has a lot in common with, and offers exhaustive support for, some of the philosophical concerns in Llewellyn’s 8-page essay.

**Philosophy as a Belief-System**

Despite its brevity, Llewellyn’sessay is overflowing with concerns about philosophy. But because of its brevity, the essay does not clearly define the term “philosophy.” Llewellyn begins with the term “theory,” quoting Pareto, as something that a “man” makes and that “men” accept (Llewellyn 1934: 205); later in the essay Llewellyn will say philosophies are also “invented” and sometimes adopted in society. Then Llewellyn says there is no shortage of theories *or* “of philosophies,” but later on he conflates the philosophy of natural law, natural law thinking or approaches, and the theory of right reason. Ambiguities aside, Llewellyn discusses philosophy in one of its traditional senses as a centralized and foundational discipline, preceding more specific theories and functioning as an organizing theory of *theory* itself. Even as Llewellyn focuses on legal philosophy, he explores its influence as a generalized source of fundamental values and ideals, like justice and morality – it supplies “needs,” and it tells us what is right or sound or desirable when difficult choices are made. And a legal philosophy has legs – it provides an atmosphere and has influence without regard to whether its “adherents” recognize or can give an account of it. This seems to add another level or feature to the Realist claim that legal decisions often involve extralegal factors, in addition to doctrine or precedent, such as a judge’s personal bias, economic interests, strategically employed language, social class, or political views. Each of these factors, Llewellyn suggests, can probably be traced to an explicit or implicit philosophical orientation that merits our attention. This is not to say that the forces affecting law that are identified by social scientists, psychologists, or language theorists are not significant, but rather to say that philosophy is also an important enterprise.

I agree with the Realists that law and legal doctrine are indeterminate, and that other factors are in play. I even agree with Llewellyn that Realism is closer than any other jurisprudence to the actual behavior of the best lawyers, who know that precedents are incomplete and flexible, and that judicial personalities as well as their political, economic and moral prejudices are influential in the decision-making process, even when veiled by doctrinal rhetoric. Critical Legal Studies (“CLS”), which updated Realism in terms of Neo-Marxism and French critical theory, likewise highlighted those aspects of law. And even as CLS splintered into some versions of feminist legal theory, critical race theory, and postmodern approaches, its enduring legacy was the disclosure of ideology, belief-structures, and presuppositions that functioned as faith-like commitments in all legal-theoretical thought. In Llewellynian terms, all jurisprudence has a natural law hangover, in the sense that it cannot avoid recourse to norms, values, or principles grounded in something that looks like a religious commitment, even when God is replaced by Reason, common sense, self-evident truths, or any understanding of the way things are and should be.

That was the view of Herman Dooyeweerd. Having acknowledged his own religious starting point (Reformational Christianity), Dooyeweerd went on to construct a normative theory of law that is both part of the natural law tradition and highly critical of many natural law conceptions. For purposes of comparison to Llewellyn, however, Dooyeweerd’s critical method parallels the Realist effort to reveal the “heavily operative” factors (Llewellyn 1931: 1237) – apart from legal doctrine, itself indeterminate – that produce court decisions. Like Llewellyn, Dooyeweerd felt that philosophy mattered, and that a philosophical orientation is inevitable. As a practice, Dooyeweerd defined philosophy as theoretical reflection directed toward “cosmic” coherence (Dooyeweerd 1953- 58: 4); but Dooyeweerd also acknowledged the cultural power of philosophical orientations even when they are unconscious and unacknowledged. His theory of Western *ground-motives* is a theory of implicit philosophy or philosophy-in-action, which Llewellyn defined as the “premises, albeit inarticulate and in fact unthought, which made coherence out of a multiplicity of single ways of doing” (Llewellyn 1934: 206). Philosophies, for Llewellyn, become “established in the habits and attitudes” of social groups. Such analyses have numerous parallels in contemporary theory, from the ideology critique of neo-Marxian social theory and the postmodern critique of Enlightenment foundationalism (both of which inspired many critical legal scholars), to post-structuralist literary theory’s sense of language as a social force, and to the history, philosophy, and sociology of science:

Michael Polanyi’s theory of the scientist’s indwelling in his framework of commitment, Jürgen Habermas’s theory of the role of the human interest in science, Gerard Radnitzsky’s theory of steering fields internal to science, and Thomas Kuhn’s theory of the role of paradigms are all prefigured in the way Dooyeweerd worked out his theory (Hart 1985: 145).

Interest in the “role of extraconceptual factors in theoretical inquiry,” and the “connections between theory and the ultimate commitments of those who theorize” (Ibid., 150), is as evident today as it was in the work of Llewellyn and Dooyeweerd.

**The “Natural Law” Impulse**

Just as Llewellyn identified the natural law “hangover” in sociologist of law Roscoe Pound’s recourse to social values, Dooyeweerd’s student and successor (on the law faculty in Amsterdam) H.J. van Eikema Hommes saw in the sociological approach to law a

*social-normative prognosis* [that presupposes the norms of social life] *and is meaningless without them*. In other words a prognosis of probable legal conduct, as well as the true expectations of the legal subjects presuppose legal norms and their real normative validity. If these norms were lacking the expectations would be baseless and the prognosis unfounded (Hommes 1979: 292).

And even as some Realists tried to “eliminate the normative character of law and [attempt] to reduce law to the actual conduct … of judges,” Hommes argued, legal norms “happen to occupy an essential and undeniable position in legal life” – they cannot be reduced to facts (Hommes 1979: 312). Recourse to social well-being, the ideal of justice, human needs, or normative generalizations – each of them highly contested conceptions – only serves to revive the natural law impulse identified by Llewellyn in the history of American legal philosophy.

And yet Llewellyn wants to avoid, in his Realist methodology, the *contamination* of value judgments, and the term “natural law” obviously has a pejorative connotation throughout his brief essay on legal philosophy. Llewellyn admires Justice Holmes, who said that

jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere (Holmes 1964: 82).

I understand that natural law adherents might claim a universal validity for their deep-seated preferences, while Realists concede the social and historical relativity of their deep-seated preferences, but both sets of preferences function in the same manner. I even understand that a Realist might be more self-critical than a naïve natural lawyer, and therefore call upon social science, concrete data, and empirical studies to back up policy decisions, while remaining alert to rhetorical strategies in legal discourse. But in Dooyeweerdian terms, self-critical reflection will reveal that such knowledge

is not simply a direct and neutral given of observation, but … is in part a subjective cultural *product* of our subjective selves with all our underlying philosophical assumptions (Hart 1985: 147).

Llewellyn’s warning, to those who scorn philosophy, that they cannot escape the necessity of living “in terms of some of them,” applies to Llewellyn and the Realists, and to all of us.

The sense in which Dooyeweerd is a Realist is that self-evident truths, Reason, the “essential” nature of government, the ideal of justice, social values, principles of soundness, and so forth are belief-structures – to view them as foundational is an uncritical prejudice. Dooyeweerd, and impliedly Llewellyn, level the playing field by suggesting that every theorist should reflect upon and become aware of his or her assumptions. Unlike Holmes, who said that “deep-seated preferences can not be argued about” (Holmes 1964:81), Dooyeweerd thought that his transcendental critique could “pave the way for a real contact of thought among the various philosophical trends” (Dooyeweerd 1953-57: 70). He recommended a “merciless war against the masking of supra-theoretical prejudices as theoretical axioms” (Ibid.), and he claimed no monopoly on truth for his own inquiry:

As a *philosophy* it does not in any way demand a privileged position for itself; on the contrary, it seeks to create a real basis for philosophical dialogue among the different movements … in terms of their own respective deepest spiritual backgrounds (Dooyeweerd 1996 (*Christian Philosophy*…): 4).

Dooyeweerd therefore saw a lot of room for dialogue and argument about deep-seated preferences – identifying assumptions, challenging their status, inquiring about their sources, and defending their results as good for everyone.

To the likely distress of actual natural law philosophers, Llewellyn’s (and my own) use of the term “natural law” to refer to any determinable value judgment or preference, including Reason in the armchair, is probably unfortunate. In Llewellyn’s defense, he does describe these phenomena as “echoes” of, as approaches “along the line of,” and as “hangovers” of the philosophy of natural law (Llewellyn 1934: 209, 211). “Natural law” is just a catchword for a decadent tendency to pretend that personal preferences are somehow in accord with higher Reason or immutable principles. Dooyeweerd would have referred to this move as the uncritical dogma of the autonomy of reason, reserving the term natural law for his own style of jurisprudence (Dooyeweerd 1996 (*Calvinism*…): 19-25). But Dooyeweerd would also have referred to all jurisprudential movements as “religious,” in the sense of their inevitable faith in pre-theoretical assumptions, and he was of course not being pejorative.

The targets of Llewellyn’s critical essay, and Dooyeweerd’s critique of theoretical thought, are sometimes the same. Both are suspicious of Reason as an allegedly universal source of guidance, because both see its relativistic foundation in a philosophical orientation. Llewellyn thought that such an orientation should be replaced by another orientation – one that would insist on concrete data, that would see words as mere tools, and that would be grounded in social needs and validated by results. That new orientation, Dooyeweerd would point out, cannot avoid pre-theoretical commitments. Every philosophical orientation involves claims that it is “natural,” that it describes the way things are and should be. In that sense, every philosophical orientation is a belief-system, based on faith, such that a “religious” aspect of law and legal theory is inevitable.

**Dooyeweerd’s Contribution to Multi-Aspectual Thought**

One of the many features of Dooyeweerd’s so-called “Philosophy of the Law-Idea” (“*De Wijsbegeerte* *der Wetsidee*”) was his effort to identify the mutually irreducible *aspects* of reality, including the historical, economic, aesthetic, juridical, pistical (i.e., the “belief” or “faith” aspect), and so forth. For example, a rose is a biological entity, but it also “functions” as an aesthetic object *and* as an economic object in the marketplace.

My focus in this essay is on Dooyeweerd’s controversial view that human beings are necessarily “believers,” even those who do not belong to a traditional “religious” faith or community. Dooyeweerd used the term ground-motives (*grondmotieven*) to describe the various philosophical orientations that provide ideals and motivation in culture generally. As to theoretical thought, there will always be *pre*-theoretical commitments that function like religious beliefs, that ground theory in any field of inquiry. According to van Eikema Hommes, Dooyeweerd’s transcendental critique confirmed that theoretical thought is always “subject to fundamental, centrally religious motives which dominate a thinker at heart ….” (Hommes, 1979: 1). In his popularized formulation of that view, Nicholas Wolterstorff, a philosopher influenced by Dooyeweerd, calls these fundamental motives “control beliefs,” which function alongside data and “data-background beliefs” in theoretical thought:

[O]ne remains cloaked in belief – aware of some strands, unaware of most ….

For one thing, there will always be a large set of [data-background] beliefs such that one’s holding them is a condition of one’s accepting as data that which one does ….

[I]t is even more important to bring to attention a second component in the cloak of beliefs … while weighing a theory. Everyone … has certain [control] beliefs as to what constitutes an acceptable *sort* of theory on the matter under consideration …. Because we hold them we are led to *reject* certain sorts of theories – … control beliefs also lead us to devise theories …. We want theories … that comport as well as possible with those beliefs (Wolterstorff 1976: 62-64).

In a more sophisticated formulation, Hendrik Hart, a philosophical heir and friendly critic of Dooyeweerd, highlights the challenge

to look for the extratheoretical factors needed to complete theory. Over twenty years before … Polanyi’s … *Personal Knowledge* [1958] …, Dooyeweerd forcefully advanced the conviction that knowledge … is personal …., [which] reinforces the concept of the relativity of the rational aspect of human experience. Dooyeweerd never subscribed to the view which treats our conceptional faculties as autonomous, isolated and substantivized …. (Hart, 1985: 151).

Hence Dooyeweerd’s exhaustive critique of “the pretended autonomy of reason”; because of the relativity of rational knowing, reason is not the “measure of the truth about … the world” (Ibid.).

**Kuyper and Dooyeweerd**

An important feature of Abraham Kuyper’s thought that is reflected in Dooyeweerd’s work is

the strong commitment to pluralism—Kuyper’s view of “law and the state was in good measure

shaped by the question of how people of diverse worldviews can live together in peace and justice

within the same polity” (Wolterstorff, 2005: 299). Kuyper’s answer, predictably, was not based

on some notion of neutral principles or “public reason”—a belief-system for Kuyper is not a

dispensable add-on. Rather, for Kuyper, “a person’s worldview pervades and comprehends his or

her thought in general” (Ibid., 300). Legal or political theory is therefore never neutral—the

parallels with perspectivalism are evident—so disagreements are inevitable. Nevertheless, we

engage in learning as who we are, with whatever our particularities; and then,

as part of that engagement, we engage each other in dialogue, each trying to

show the other where he or she has gone wrong and listening to the other as

he or she tries to show where we have gone wrong. Engaged pluralism, one

might call it (Ibid., 305).

Dooyeweerd, in his analysis of law and politics, is engaged in a pluralistic task—he is writing as

a Christian, but he is not doing theology or biblical exegesis. Rather, he is engaged in conventional, or “mainstream,” political and legal argumentation. Because of his neo-Calvinist

orientation, he does not see things exactly as everyone else does, but no theorist sees things “as

they are”—everyone has a perspective. In Kuyperian terms, as explained by Wolterstorff, “De

facto what we find in theoretical learning is a plurality of particularistic perspectives; but we are

not to rest content with this fractured actuality. . . . Bodies of learning shaped by different worldviews are not incommensurable on account of being so shaped” (Ibid., 304-05).

Thus Dooyeweerd is first and foremost a theorist, not a “Christian” theorist if that adjective is meant to suggest a unique bias among other theorists who have no pre-theoretical commitments.

For Kuyper, moreover, the “goal of Christian social and cultural action is not to confessionalize society” by establishing a state church or an official religion— he wanted “a strong confessional church but *not* a confessional civil society [and *not*] a confessional state. . . . [The] secularization of state and society is one of the most basic ideas of Calvinism” (Ibid., 312). Indeed, Kuyper was averse to authoritarian churches and governments, by which he would have meant their exercising authority outside their own “spheres” of authority (Kuyper, 1943: 63, 65). The government, in particular, is not supreme over the family, business, science, or the arts, each of which have their own “sphere” of authority (Wolterstorff, 2005: 314). In the name of justice and the common good, the government should protect individuals from abuses of power, ensure the stability of societal relationships and the unity of the state, and otherwise acknowledge the freedom of non-governmental social “spheres” (Ibid., 319-20).

These views are re-articulated and developed by Dooyeweerd, who believed that Kuyper had properly discerned a Christian view of state and society based on biblical norms and principles. A certain arrogance is suggested by such theorizing—“I think this is how God would see things”—but such confidence is not unlike the confidence of any theorist who, on the basis of strongly-held beliefs, argues for progress or reform in politics and law. Dooyeweerd’s work serves as an example of such confidence, beliefs, and arguments for reform. More specifically, Kuyper’s view that certain social, organizational structures should be identified, recognized as legitimate, and granted independence from the state is the unifying theme of Dooyeweerd’s work. For example, in his analysis of modern law, Dooyeweerd notes that the concept of free associations is missing from: (i) traditional individualistic or communitarian accounts of law; (ii) the legal regimes in earlier, undifferentiated societies; and (iii) the notion that public law and private civil law that are the primary and exclusive categories for a formal legal system.

**A Theory Of [Christian] Theorizing**

Nicholas Wolterstorff, in his brief book entitled *Reason within the Bounds of Religion* (1976), offers a useful account of how a religious person—indeed, any person—engages in theoretical inquiry. At the outset, Wolterstorff confirms that for Christians the Bible does not provide a foundation, in the sense of foundationalist perspectives among philosophers, for theorizing: “Scripture does not provide us with a body of indubitably known propositions by reference to which one can govern all our acceptance and nonacceptance of theories” (Wolterstorff, 1976: 55, 58). Because “the Bible cannot function as a black book of theories for the Christian scholar,”

the Christian scholar “arrives at the data for his [theory-weighing or testing] by using the same strategies as everyone else—by observing and reflecting on the world about him” (Ibid., 74, 76). Yet any theorist arrives at the data not only with a large set of “data-background’ beliefs, but with “control beliefs” about, for example, the requisite logical or aesthetic structure of a theory (Ibid., 63). Religious beliefs function as control beliefs, which might lead the theorist to reject some theories or to devise theories consistent with the theories of others (Ibid., 64, 66). While the control beliefs resulting from an authentic Christian commitment are “relative to persons and to times,” certain beliefs typically arise from being a follower of Christ, including a belief in human freedom and responsibility (Ibid. 68, 70, 73). And because theoretical disputes exist among Christian theorists, one cannot simply claim that “the reason I hold this view is I’m a Christian.” Theory entails going beyond and doing something with beliefs, including not only collecting data and proposing an explanatory framework, but also revising one’s views, harmonizing one’s views with other compelling views (even those of non-Christians), and applying one’s own and others’ theories for Christian ends (Ibid., 75-76). The point is that Christian theory looks like theory generally, with the distinction that the control beliefs of Christians will not all be shared by all other people.

What can we conclude? First, Christian legal theory is neither necessarily theocratic nor

based on the positivisation of scripture into law—Dooyeweerd is a pluralist, and the scriptures function at the level of control beliefs. Second, Christian legal theory may be unique insofar as it is grounded in Christian belief, but it is not unique in methodological terms—legal theory always proceeds from pre-suppositions that are ideological, value-laden, and “faith-like.” And third, therefore, Christian legal theory is not uniquely biased or sectarian—it may not be compelling, and it is vulnerable to criticism for any over-generalizations or over-simplifications, but those potential problems accompany any legal theory. In short, Christian legal theory is in Dooyeweerd’s case just another theory.

**REFERENCES**

Dooyeweerd, Herman. “Calvinism and Natural Law.” Trans. A. Wolters. In *Essays in Legal*,

*Social and Political Philosophy.* Eds. John Witte, Jr. & Alan Cameron. Lewiston: The Edwin

Mellon Press, 1996.

*De Wijsbegeerte der wetsidee* (3 vol.). Amsterdam: H.J. Paris, 1935-36.

*A New Critique of Theoretical Thought* (4 vol.). Philadelphia: Presbyterian and Reformed

Publishing Co., 1953-58.

*Christian Philosophy and the Meaning of History*. Trans. J. Vriend. Lewiston: Edwin Mellon

Press, 1996.

Hart, Hendrik. “Dooyeweerd’s Gegenstand Theory of Theory.” In *The Legacy of Herman*

*Dooyeweerd*: *Reflection on critical philosophy in the Christian Tradition.* Ed. C.T. McIntire.

Lanham: University Press of America, 1985. Pp. 143-66.

Holmes, O. “Natural Law.” *The Holmes Reader.* Dobbs Ferry: Oceana Publications, Inc., 1964.

Pp. 81-84.

Hommes, H.J. van Eikema. *Major Trends in the History of Legal Philosophy*. Amsterdam:

North-Holland Publishing Company, 1979.

Kuyper, Abraham. *Lectures on Calvinism*. Grand Rapids: Wm. B. Eerdmans Publishing Co.,

1943.

Llewellyn, K.N. “On Philosophy in American Law.” *Univ. Pa. Law Review* 82:3 (1934): 205-

12.

“Some Realism About Realism – Responding to Dean Pound.” *Harvard Law Review* 44 (1931):

1222-56.

Wolterstorff, Nicholas. *Reason Within the Bounds of Religion*. Grand Rapids: William B.

Eerdman’s Publishing Co., 1976.

“Abraham Kuyper.” In *The Teachings of Modern Christianity on Law, Politics, and Human*

*Nature.* Ed. J. Witte & F. Alexander. New York: Columbia Univ. Press, 2006.