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A Study of "The Common Law Tradition: Deciding Appeals"

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lieves "her voice (to be) the harmony of the world," and one has the strong feeling that he would not dissent too much from the rest of the statement:

> [A]ll things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power: both Angels and men and creatures of what condition soever, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy.

A Study of 'The Common Law Tradition: Deciding Appeals' —Arno C. Becht*

"I preach the neglected beauty of the obvious."[1]

The chief object of this review is to give an accurate idea of the contents of Professor Llewellyn's book, *The Common Law Tradition: Deciding Appeals,* thus supplying a general background for the other articles. The perfect review, for this purpose, would eliminate all personal reactions of the reviewer, but there are reasons why this ideal is impossible. The mere processes of selection and emphasis require some exercise of discretion, and, moreover, the book provokes responses which will probably show through to others even though they are unconscious. I have tried to compromise with the problem in this way: Part I is devoted to a quite extensive survey of the book, and in this I have suppressed my reactions as much as I could, (not entirely) and have let the author speak for himself a good deal of the time. In Part II I have tried to convey some impression of the book as a whole, an operation that obviously requires more subjective methods, and Part III is a collection of frankly personal comments which are offered for what they are worth and which may also serve to discount the less overt evaluations that have affected the rest of the review.

As the book, excluding the index, is 535 pages long, a review of the contents can only be a skeleton. Skeletons appeal to hardly anyone's sense of beauty, and they look a good deal more alike than complete bodies do. Hence, so far as the book has attractiveness and individuality, this review will inevitably misrepresent it unfavorably. Since the professional audience to which the Law Quarterly is addressed will allow for this as a matter of course, I would say nothing of it, but the problem is more complicated than condensations usually are.

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1. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 339 (1960) [hereinafter cited only by reference to page].

Professor Llewellyn has courageously addressed himself to a task of systematic evaluation, an undertaking so full of pitfalls that scientists pride themselves on avoiding it, and this review must emphasize the various steps in this evaluation. But the evaluations as they appear in the book are illustrated, documented, backed up—the skeleton has a lot of flesh on it—and all this is, unfortunately, what the reviewer who is producing a summary must leave out. Without it, Professor Llewellyn may appear as a dogmatist, a generalizer, given to purely personal value-judgments, which are then represented as truths for all times and circumstances. I must ask the reader not to attribute to Professor Llewellyn what is only a book reviewer's necessity. The error would be only a little more if one tried to form an impression of *Hamlet* from a reviewer's statement that the Prince had a time making up his mind to kill his stepfather, but finally managed to do it.

PART I

The book begins upon a depressing theme, the failing confidence of all of us in our courts, and not merely in the Supreme Court of the United States, but in the courts of the states as well.[2] This disease is *not* the same as the criticism that has always attached itself to courts, and, worst of all, it has new and disastrous effects on the practicing lawyer:

> In most it no longer inspires healthy fighting reaction to effect its cure; for most it has come to lay a pall and palsy on heart and hand because it goes to whether there is any reckonability in the work of our appellate courts, any real stability of footing for the lawyer, be it in appellate litigation or in counseling, whether therefore there is any effective craftsmanship for him to bring to bear to serve his client and to justify his being.[3]

He immediately explains, however, that this crisis has no justifying cause, that the courts in their daily work earn and deserve confidence which lawyers withhold because they do not fully appreciate how law develops in a case system. His brief statement of reasons for this conclusion is also his outline or table of organization of his book.[4]

The author begins his principal exposition by recalling briefly how developments in logic and psychology destroyed the image of legal certainty in the 1920's and 1930's, without, however, contributing much to the reconstruction,[5] pauses to emphasize that "certainty" is a matter of degree,[6] and passes to the study of fourteen factors which

2. Pp. 3-7.
3. Pp. 3-4.
4. Pp. 4-7.
5. Pp. 11-16.
6. Pp. 17-18.

constantly exert pressure toward steadiness in the work of appellate courts.[7] Here he discusses, for example, "legal doctrine"[8] and "a frozen record from below,"[9] factors which from day to day channel the decisions of a court and curb tendencies toward uncertainty, carelessness or bias in its work. It is characteristic of the author's mind, that almost every one of the discussions has its "per contra" section, a recognition of other qualities that reduce the steadying effect. "Legal doctrine," for example, often affords authority for a decision either way, and a court sometimes senses and reacts to facts not reproduced in the "frozen record." The demonstration, in short, is not a Euclidean proof, holding good for all cases, but a careful practical assessment.

The thirteenth factor, "The General Period Style and its Promise,"[10] introduces a contrast between the "Grand Style" and the "Formal Style" in deciding cases and drafting opinions, which, as it is one of the pervasive themes of the book, is worth special notice. The "Grand Style" (the phrase refers to the work, not to the writing)[11] obviously cannot be described easily, but it refers to the practices of trying to satisfy both the written rule and the justice sensed in the occasion, of refusing to put a case under a rule when the reason for the rule does not comfortably fit the case, and of constantly improving the rules as the cases provide new insights.[12] This style prevailed in American judicial work in the period of "Marshall, Kent, Cowen,"[13] and others. In the "Formal Style," which began to develop in the 1880's:[14]

> [T]he rules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law. Opinions run in deductive form with an air or expression of single-line inevitability.[15]

The clarity and certainty which appear on the face of the opinion in the formal style actually create confusion and uncertainty, because they conceal the necessary creative work of the judges, and force them to do it hit-or-miss.[16] This manner of work, which long dominated American law, began to decline, in some places as early as

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7. Pp. 19-61.
8. Pp. 20-21.
9. P. 28.
10. Pp. 35-45.
11. P. 36.
12. Pp. 37-38.
13. P. 36.
14. P. 38.
15. *Ibid.*
16. Pp. 38-40.

1905;[17] in the period since it has largely lost its authority. But the courts, though they have rejected the formal style, have no clear notion what ideal they are aiming at, while the bar in general does not understand the change and attributes it to arbitrary action in office or to incompetence.[18] Actually, the possibilities of accurate prediction have greatly increased, once the bar understands what to look for.[19]

The most important of the steadying factors is the influence of "Professional Judicial Office" on the man who holds it.[20] Though this has also its "semi-contra"[21] in the vastly differing personalities of our judges, the office exerts a constant pressure toward faithful handling of the precedents, toward honesty, and toward impartiality. Perhaps the most striking component of the forces creating this pressure is the fact that the judge is not expected to be "passive." "[T]he judge must be *seeking*, as best he can, to see the matter fairly, and with an eye not to the litigants merely, but to All-of-Us as well."[22]

It is time to recall the sentence from the book with which this review begins: "I preach the neglected beauty of the obvious."[23] For most of the other individual points in the book are obvious in the sense that these factors are. That is, they are as obvious, and as forgotten, as the pressure of the atmosphere, without which our bodies would explode, but whose cumulative effect we take for granted. And, since we are dealing with ideas, there is more; even the man who is consciously aware of them, rather than thoughtlessly reacting to them, is not apt to articulate their effects and values with precision. The author's turning over familiar stones and calling attention to what lies under them is one of the book's greatest merits, and the one that it is easiest to overlook.

The establishment of the steadying factors only begins the author's work, for the bar's doubts about our courts persist in spite of them. It is best to quote the author's own summary and comment:

> Here, then are ten to fifteen clusters of what we may see as flywheel factors making for steadiness and reckonability in American appellate judicial deciding in contrast with any general type of group-deciding, factors which if they have any power should be expected to produce a degree of depersonizing in the deciding far beyond that when such flywheel factors are not

17. P. 41.
18. Pp. 42-44.
19. Pp. 44-45.
20. Pp. 45-51.
21. P. 49.
22. P. 46. (Author's emphasis.) See pp. 46-47.
23. See text accompanying note 1, *supra*.

present. With such clusters at work one can, as has been repeatedly indicated, hope to get further down in than merely into the large and the long. "Steadiness" of our appellate judicial decision *over the decades,* as it has been so often praised, is good for historians of culture or of government, but it affords to the person with pending litigation comfort as chilly as that which an economist's secular trend offers to a businessman contemplating a particular venture. Our factor-clusters whisper hope of something vastly different: a wherewithal, perhaps, of wrestling *in prospect* with the outcome *of the concrete appeal in hand.* We thus set ourselves against the wail of bar and public which has been waxing steadily stronger, in anger or in anguish, over forty years.[24]

There follows a discussion of the arguments which are used to show that court work is arbitrary and unpredictable, and an explanation of the way in which the author proposes to meet them.[25] The fundamental materials of the answer are found in judicial opinions, but there is one thing that the author does not expect to find there: "of course, only by happenstance will an opinion accurately report the process of deciding. Indeed, I urge flatly that such report is not really a function of the opinion at all. . . ."[26]

I think it is proper for a reviewer to enlarge a little here. Some of the venom in the attacks on judicial opinions was drawn from the contrast between the appearance of close reasoning in the opinions, and the trial and error processes by which difficult decisions, in or out of the law, are actually reached. Professor Llewellyn, I think, is dis-associating himself from attacks on this ground even when they are aimed at the formal style, little as he himself likes that style for other reasons. His position is that the opinion should, and now usually does, state the *grounds* (of fact, rule, principle and policy) of decision, and that it should usually not (and usually does not) recount the often blundering and tortuous *processes* by which those grounds were chosen.

What, then, does the author expect to find in the opinions? He contends that the comment on prior cases, the stating of the facts, the phrasing of doctrine, and many more things, give the "top bracket of the bar"[27] bases for predicting future action. These men, by 1925:

had begun to read any current case of interest not only for what it had laid down in words as doctrine or principle, nor only further (or in contrast) for what it had actually and narrowly

24. P. 51. (Author's emphasis.)
25. Pp. 51-61.
26. P. 56.
27. P. 57.

> decided, but for the "flavor" that could indicate how far that court, tomorrow, would stand to today's decision, or would expand it.[28]

The author explains that in his study of the cases he will bring out chiefly two things: (1) how they deal with precedents, and (2) "the importance in the deciding process of considerations of sense, decency, policy, wisdom, justice . . . ."[29]

"Justice" has an ominous sound in a lawyer's ear. It takes good nerves for one with Professor Llewellyn's drive for clarity in reasoning to admit this as one of his working concepts, and the more so when he is concerned with case law and not with general jurisprudence. He begins his approach to the concept by suggesting that the words "fair," "right," or the minimum "only decent,"[30] are closer to the appellate judge's work than "justice" is. Then he adds:

> What is of interest, what is crucial in this regard, is that such words and the idea they carry can hardly reach and register unless they come all impregnated with a *relatively* concrete *going* life-situation seen as a *type*. The next aspect of the crux is that, in a *going* life-situation, fairness, rightness, minimum decency, injustice look not only back but forward as well, and so infuse themselves not only with past practice but with *good* practice, *right* practice, *right guidance* of practice: i.e., with felt net values in and for the type of situation, and with policy for legal rules. The crux is completed by the obviousness that this drives the whole "justice" idea, inescapably in some part (I think, in prime part) forward, into prospect, not merely retrospect: into what one can perhaps call the quest for wisdom in the decision.[31]

This notion, not of *the* unique situation, but of the situation *type*, that is, of the aspects of this situation that are *typical* of others, is, I think, not merely the useful substance of the "justice" concept, but the key-concept of the book. Numerous questions of justification and definition are apt to occur to the reader at this point. I have some questions and comments which will be mentioned in Part III,[32] but the author does not so much concern himself with these problems as with illustration of the value of the conception in the critique and analysis of cases.[33] I think it is safe to generalize this far: the "situation-type" is not only a guide in determining how to decide the case, and how broad a generalization to rest it on, but also a warning

28. Pp. 57-58.
29. P. 59. See pp. 58-59.
30. P. 60.
31. *Ibid.* (Author's emphasis.)
32. Part III, headings 2 and 3, *infra*.
33. The only philosophic base suggested for the conception, I believe, is a brief passage from Goldschmidt, which is quoted in the text at note 63, *infra*.

not to judge the particular case too exclusively in the light of its special (non-typical) facts.

One of the characteristics of the grand style is its full awareness and use of the techniques available for handling precedents. In the next section, "The Leeways of Precedent," the author first explains that part of the discontent with the courts results from misunderstanding of the doctrine of precedent,[34] and then turns to a study of American courts in the period of the grand style. He considers cases from New York in 1842[35] and from Ohio in 1844,[36] which, though taken from consecutive pages of the reports chosen at random (except to make sure that Cowen's work was represented),[37] exemplify the method of the grand style at work. His conclusions about Ohio will show what he was looking for and what he found germane to his argument:

> It is a short sample: ten cases, only twenty-two pages of *opinion* in 13 Ohio (the rest of the report is counsel's argument). Yet in this tiny sampling we turn up (compare the modern varieties illustrated below at pp. 77 ff.).
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> 1. *Following*, in three or four varieties.
> 2. *Avoidance* clearly seen as a technique available, and *testing* by reason used (though no avoidance or restriction actually occurs *except on statutes*, and though no overruling is suggested).
> 3. *Expansion* or fresh start constantly in play.[38]

After noting earlier studies of the freedom inherent in the precedent system (Wambaugh and Black),[39] and explaining that the leeways make precedent, "a system of guidance and suggestion and pressure, and only on occasion a system of dictation-'control,' "[40] the author turns to one of the most valuable parts of his work. In a short passage of fifteen pages[41] he offers an organized collection of the ways in which precedent may be treated by a court. The complexity of what is often spoken of as a single doctrine is made plain by the listing of sixty-four separate techniques, while the author observes at the beginning that his list is "above all incomplete."[42]

The collection is broken into three main headings: (I) deals with "Following Precedent" and contains thirty-two techniques. These in turn are divided into four groups of eight each. One group shows the

34. Pp. 62-64.
35. Pp. 64-68.
36. Pp. 68-72.
37. P. 64.
38. P. 71. (Author's emphasis.)
39. Pp. 73-74.
40. P. 75.
41. Pp. 77-91.
42. P. 76.

controlling powers of precedent, another the choices a court retains while it abides by precedent, a third "the Simpler Types of Creation"[43] in which a court can indulge though staying within precedent, and the last the powers a court has to expand or change direction while not altering official doctrine expressly. Under (II), "Avoidance of 'The Decided,' "[44] the author collects sixteen methods under four headings containing four each; the first two of these have each four legitimate and four illegitimate techniques for avoiding a precedent without taking "Responsibility to the Future."[45] Then he has four methods of narrowing or limiting a precedent, and four more for "killing"[46] it. Under (III) he has sixteen methods, eight under the heading "Fresh Starts from Old Materials,"[47] and eight under "Enlarging the Standard Set of Sources or Techniques."[48]

This imposing gathering of methods for dealing with precedent gains by the fact that the author appends footnote references to illustrate each one, but the persuasive effect comes chiefly from the fact that the reader recognizes all as familiar, though he could not readily produce an illustration of many of them. The author himself appeals finally to this ultimate as his best evidence.[49] While no item in the list is unknown to a lawyer ("the neglected beauty of the obvious"), the cumulative impact of the *collection,* its implications about the amount of freedom that exists inside the doctrine of precedent, may be quite new and may require a re-examination of his fundamental attitude toward both courts and law, with further implications for his own practice. The point is driven home by brief summaries of recent cases in three states, Pennsylvania in 1944, New York in 1939, and later, and Ohio in 1953.[50] The conclusion is best expressed in the author's own words:

> *The little case, the ordinary case, is a constant occasion and vehicle for creative choice and creative activity, for the shaping and on-going reshaping of our case law.*[51]

All of this emphasizes the point that precedent does not *decide* cases independently of judges or even force them to their conclusions, but rather channels them, confines them between rather wide (comfortably wide) banks. But channels are boundaries. They influence

43. P. 80. See pp. 80-82.
44. P. 84.
45. *Ibid.*
46. P. 87.
47. P. 88.
48. P. 90.
49. P. 92.
50. Pp. 92-100.
51. P. 99. (Author's emphasis.)

and limit action. In a random sample from Illinois the author notes that there were thirty-nine simple citations of earlier cases as authorities, and only fifteen illustrations of the other techniques.[52] Test samplings showed that the simple citations of earlier cases as authority were accurate[53] and that settled doctrine has, for many reasons, a strong power to control the courts.[54]

The crucial point is now ready to be made: even as the courts follow precedent, they create from day to day:

> For the long haul, for the large-scale reshaping and growth of doctrine and of our legal institutions, I hold the almost unnoticed changes to be more significant than the historic key cases, the cumulations of the one rivaling and then outweighing the crisis-character of the other.[55]

Within the technique of "following," a court can not only create new law,[56] but it can reverse a trend,[57] it can shift the meaning of a word or concept[58] or change its attitude, especially in the classifying of the facts of cases.[59]

> Beneath what looks on the page as "mere" following, beneath what I shall argue to feel and seem, in the main, to the very deciding court itself to be such "mere" following, there swirls a constant current of creation.[60]

Professor Llewellyn's reasons why this creation is either unconscious or quickly forgotten are interesting but not vital to the argument.[61]

For further pursuit of his thesis the author now recurs to his key concept, the "situation-type."[62] This is the means by which he believes that courts can and do adjust the law to individual situations without making bad law:

> Much less frequently phrased is the differential impact of the facts of the individual case and the facts of the situation taken as a type, the distinction on which I have already insisted, and which I shall have to stress throughout. . . . I doubt if the matter has ever been better put than by that amazing legal historian and commercial lawyer, Levin Goldschmidt: "Every fact-pattern of common life, so far as the legal order can take it in, carries

52. Pp. 100-01.
53. Pp. 101-06.
54. Pp. 106-08.
55. P. 109.
56. Pp. 108-13.
57. Pp. 113-14.
58. P. 114.
59. *Ibid.*
60. P. 116.
61. Pp. 117-20.
62. Pp. 121-57.

> within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law."[63]

It happens that this quotation from Goldschmidt is the only explicit reference in the book to what I would call a "metaphysical" base or justification for the doctrine of the situation-type. This is not surprising, nor is it a ground for criticism of the author. For one thing, he did not set out to write a book on "legal philosophy," and for another, as long as the grounds for a position are made explicit, as they are here, a writer is not to be blamed for not attempting a demonstration of them. I shall hereafter refer to the doctrine of this extract from Goldschmidt as the doctrine of "immanent law." (I have something more to say of this in Part III).[64]

The first sentence of the last quotation (not translated from Goldschmidt) is a reminder of the importance of the distinction between the special facts of the case being decided and its typical facts. After the quoted passage, Professor Llewellyn uses three illustrations taken from developed bodies of law, not from his random samplings, to show how the situation-facts explain what may otherwise appear to be arbitrary decisions,[65] and, after some pages of further comment,[66] passes to a consideration of random samplings from New York in 1939, Pennsylvania in 1944 and Ohio in 1953.[67] In all of these he finds evidence of the grand style, though Pennsylvania lags behind the other two courts in its development and shows as yet no signs of understanding the importance of reflecting upon the type-situation before it attacks the case being decided.[68]

There follow a few pages of summary of the argument this far.[69] The latter part of this may usefully be quoted. After summarizing his illustrations of development even in the cases that merely follow precedent, he says:

> From this one might derive a first suspicion that the lines of any probable movement on the occasion and for the occasion

63. P. 122. The passage from Goldschmidt is apparently translated by the author, from the German.

64. See Part III, heading 3, *infra.*

65. Pp. 122-26.

66. Pp. 126-35.

67. Pp. 135-54.

68. Pp. 147-48.

69. Pp. 154-57.

might be given in, foreshadowed, almost forecast by the *situation* in suit. Argument and illustration then combined, to distinguish *type* or problem-situation and its sense and equity from the peculiar or "fireside" appeal of the individual controversy or parties, and to urge—though again on selected material—that the situation-type could sometimes be seen *by way of the opinion* to be at work in shaping the decision and the rule. But the argument was made and stressed that the situation, however eloquent, could operate only insofar as its eloquence could reach ear and understanding of the particular court or judge.

The question was then explored whether this appeal of the facts—distinguishing the type of situation from the particular case—could be traced by a blunt eye, producing homely and persuasive evidence available to most folk, as a usable tool in spotting what has been influencing certain appellate courts in their actual deciding. This time the cases were not selected, they were taken as they came: from New York, 1939; Pennsylvania, 1944; Ohio, 1953. And I remind that Ohio and New York had also been sampled from a century and more back, to make clear the honorable age of the tradition.[70]

It is clear that after this summary the author has completed one definable part of his task: he has isolated what ought to be looked for, he has proposed a criterion (the situation-type) that identifies it, and he has shown that what he is looking for can be found and recognized in varying degrees both in cases a century old and in modern cases. He has yet to show that the grand style and the use of situation-type reasoning are common enough phenomena amongst our courts to warrant a belief that an understanding of them will produce reasonably accurate prediction of appellate results. All of this, both exposition and criticism, might be dismissed as a set of evaluations that are merely personal to the author. But if one is convinced, as I am, that the criteria are valid, and that a reliable judgment on these questions is important, he might still hesitate over the question how the next demonstration is to be made. One common method, the statistical, seems impossible. It would either require so many delicately differentiated categories that its figures would be nearly meaningless, or a thousand crucial differences would be smothered by lumping cases into large groups, with implications that would mislead because of the concealed differences. The author's method seems the best possible one to me, though it is evaluative and thus open, of course, to attack on that score. He selected three eastern states, three southern states, three in the middle west, three on the west coast, and three from the center and southwest. He chose current series of cases from each state and read until he had found four "which overtly used situation-sense in the testing or shaping of

70. P. 157. (Author's emphasis.)

the rule applied."[71] How typical this sense was in a jurisdiction would be indicated by the number of cases it took to find four that used it. If four turned up before the court's judges had been reasonably represented, more cases were read. The studies of three of the states appear in full, in the body of the book,[72] and there are eight more full studies and four summaries in an appendix.[73]

In the text at this point the author finds substantial evidence of situation-sense in Mississippi, an unusually high degree of it in Washington, and little or none in Alabama. In the appendix he says:

> Of my current samplings I should regard only Alabama's supreme court as inconsistent with my basic thesis on constant overt use of sense to shape the rule . . .; I should regard Indiana, Missouri, and even Kansas as off-line for major persuasiveness. Each of these last is, nevertheless, entirely consistent, even mildly favorable. And there are eleven samples out of the fifteen which are striking and conclusive. Something is present, at work, and significant, in the appellate judging of our country.
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> On the ranging of the authority techniques, there is no exception.[74]

Missouri is one of the states treated in summary,[75] and the author finds it "for the general theses of this book . . . close to neutral, if one omits (as for purposes of *proof* one must) the pervading, persistent flavor."[76]

Professor Llewellyn turns now to a practical question: is this array of techniques actually available to the average practicing lawyer? For if it is not, its existence would help only a peculiar few. His conclusion is unequivocal:

> I submit that the average lawyer has only to shift his focus for a few hours from "*what* was held" in a series of opinions to what those opinions suggest or show about *what was bothering and what was helping the court* as it decided. If he will take that as his subject matter, I submit that the average lawyer can provide himself, and rather speedily, with the kit of coarse tools we have been discussing and with evidence, too, of his own ability to use that kit to immediate advantage.[77]

In the next section he generalizes from the data thus far presented: (1) that rules guide, but do not control decisions; that some, however, come closer to control than others;[78] (2) that when the rule applied

71. P. 158.
72. Pp. 160-77.
73. Pp. 469-507.
74. Pp. 469-70.
75. Pp. 505-06.
76. P. 506. (Author's emphasis.)
77. P. 178. (Author's emphasis.)
78. P. 179.

fits the situation-sense, the use of the sense as well as the rule not only makes the ground of decision clear, but indicates the direction of future development ("The Law of Compatibility");[79] (3) that when the rule applied does not fit the situation-sense, prediction "depends on factors apart from rule, sense, or both"[80] ("The Law of Incompatibility");[81] thus, "probability in prediction will vary with the technical excellence of the rule itself . . .";[82] (4) "A rule which wears both a right situation-reason and a clear scope-criterion on its face yields regularity, reckonability, and justice all together";[83] ("The Law of the Singing Reason").[84] But such rules are rare.

The rest of this passage is a profounder study of the causes of that "crisis of confidence,"[85] with a description of which the book opened,[86] but now in the brighter light of the data and studies developed in the book, and with strong insistence upon the point that the crisis is unjustified. In one passage the author says:

> What is the utter barebones for viable appellate judicial work is first fourfold and then threefold: (1) Uprightness; (2) a modicum of judgment—neither wild men nor fools must dominate the bench; (3) a modicum of reckonability of result; and (4) that reckonability must in some material degree transcend the persons of the personnel. That is the fourfold aspect, one of objective substance. The threefold is this, one of subjective attitude: not only (1) must these things be there and at work, to the knowledge and in the feelings of the judges, but (2) the general public and, perhaps especially, all but unreasonable litigants must *feel* their presence, and (3) the bar must *know* them to be there. The present crisis has afflicted in first instance the bar, but it has for at least a decade, perhaps for more than two, been seeping through the bar out into a much wider public which for lack of wherewithal to do constructive or remedial thinking is helpless and a bit pitiable in its trouble.[87]

A little later this description of criterion and fact is followed by this conclusion:

> The material shows, and I assert it shows beyond possibility of refutation, that *the crisis lies wholly in the second, the threefold, the subjective, the attitude area.* . . . On the objective side of how the work is being done, each one of the elements is open to huge betterment, of course, and needs the same, and needs it plenty;

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79. P. 180.
80. *Ibid.*
81. Pp. 180-83.
82. P. 181.
83. P. 183.
84. Pp. 183-84.
85. P. 198.
86. Pp. 184-99.
87. P. 195. (Author's emphasis.)

but not a single one of them is absent, and each stands well above the barebones level. Nor do I think that any other craft of our law, *taken as a whole and taken in the light of what is offered the craftsmen to work with,* is coming as close to turning out a proper job as is our appellate bench.[88]

The next section, "Reckonability of Result: Sense and Reason Again,"[89] recurs to the "steadying factors" which, operating upon the judge, tend to make him behave in predictable ways, and then stresses the power of counsel, by appealing to situation-sense, to induce judges to take new directions when these are shown to be desirable. His evidence in this section consists of analyses of the New York cases on sealed contracts,[90] and on foreign remittances,[91] in which the courts were persuaded to move away from prior decisions or language by the pressure of facts whose influence could have been foretold if one were sure that able counsel would present them effectively.

The various factors making for stability and change are brought together in a section entitled "Appellate Judging as a Craft of Law."[92] If "certainty," which is impossible and undesirable, is narrowed down to "*reasonable regularity* of decision,"[93] if judicial discretion is exercised "with a feeling, explicit or implicit, of willingness, of readiness, to do the like again, if, as, and when a like case may arise,"[94] if the leeways, broad or narrow, are used as much as they are needed, and not when they are not needed,[95] and if the lawyer reads with awareness of the "atmosphere" of the cases ("The Law of Fitness and Flavor"),[96] prediction with reasonable accuracy is possible. The various steadying factors now appear again in combinations, the known group on the bench, the record with "frozen facts and issues,"[97] with the qualifications upon their powers as prediction-guides; situation-sense remains the chief guide in hard cases:

For prognosticator and for advocate the principle remains: if sense looks in more than one direction, you have to capture the way in which the court will see and judge sense; and even then, if the choice before the court is a hard choice, it continues a chancy one.[98]

88. P. 199. (Author's emphasis.)
89. Pp. 200-12.
90. Pp. 206-08.
91. Pp. 208-12.
92. Pp. 213-35.
93. P. 216. (Author's emphasis.)
94. P. 217.
95. Pp. 219-22.
96. Pp. 222-23.
97. P. 226.
98. P. 232.

This entire passage[99] is a most instructive practical summary of the guidance that can be found in intelligent use of the factors previously developed.

The functional values of the points made are summarized and brought to bear differently in a short but useful section on the advocate's use of them in briefing and arguing a case.[100] I cannot forbear quoting one passage which, although the consideration of the advocate is outside the main stream of the book, illuminates the meaning of the situation-sense better perhaps than any other:

> [T]he sense of the type-situation, where it can be tapped, outranks and outshines any "fireside" stuff. It has been mentioned that situation-reason can normally come with credentials (though of course under handicap) even though no material has been inserted into the record below. It has also been suggested, and should now be stated roundly, that the strain and pull on emotion and on the sense for justice which a type-situation can exert has a flavor and effect like that of a smooth but strong ocean current in contrast to an undertow. Its steady pull may go unnoticed, in any event it is unresented and can readily go unresisted, for it speaks to what is the right rule of law, or the right legal concept, or the right application or a wise extension or limitation or subdivision: these are things traditionally proper for argument, and for pondering, in terms of probable results outside the immediate case; they are flavored with the court's own judicial quest for wisdom, they are familiar, their help is welcome. Against this, the passion or sentimentality of the particular case is as disturbing or upsetting as an undertow, an appellate judge feels moved to, and does, lean and dig in against it, if he can. It may prevail, yes; but it is not an advocate's business to jam resistors into his chosen circuit.[101]

In short, the advocate, when he can, should avoid stating his case in terms of fireside equity because this straightway reminds the court that hard cases make bad law. Of almost equal interest is the following passage considering the advocate's course when the settled rule, or even worse, a singing rule, is against him. His illustrations of the techniques that have been successfully used to overturn or avoid such rules is instructive.[102]

The next section is a long discussion[103] of "Conclusions for Courts." As this has twenty numbered sections and numerous related headings, summary is obviously difficult. (1) It begins with an attack upon the (probably rare) illegitimate conscious ignoring or misrepresentation of inconvenient authority, which weakens the confidence of the bar,

99. Pp. 224-35.
100. Pp. 236-55.
101. P. 245.
102. Pp. 245-50.
103. Pp. 256-398.

and which, in these days when re-working and even overruling precedent is accepted, is unnecessary.[104] (2) It passes to the observation that situation-sense has been developing as a technique,[105] to which he appends a warning that this "is not suggested as a cure-all. It is not a cure-all. No technique or method can ever be a cure-all."[106] Moreover, a court using it must constantly be on guard against misleading by clever counsel:

> Roughly speaking, the best safeguard against counsel's mispainting lies in visualizing the hands-and-feet operations in the picture, seen as a going scheme, a working setup. Such operating aspects are curiously hard to fake; one thinks of the standard advice of the old storybook detective to his junior: forget the impression, look at the *"roots"* of the "beard."[107]

He considers under this heading the managed series of cases, frequent now in the federal courts and not unlikely to develop in the state courts, indicates the merits of this practice in presenting cases to the courts in a meaningful sequence and against a pattern of background facts, but suggests that, to guard against misleading, the court, when it sees such a series developing, should assign one of its members to study the field especially.

(3) The next section,[108] with a wealth of illustrations, exhibits the advantages and the dangers of the situation-type as a form of reasoning. It is, first, the correct way to take account of and make effective the "fireside" equities of a case, if any allowance can be made for them at all. It is not merely an attempt to abstract from the facts of the particular case:

> It is instead to insist that a court should seek to *channel* the impetus from the concrete, to channel it into a search for a situation-pattern of significance which can be somewhat worked over for its general sense and tendency so as to test the wisdom of letting the equities of the fireside prevail or even count; and *if* they should be so permitted, *then* to capitalize their poignancy or illustrative power to produce a bit of sounder law for that whole situation.[109]

On the other hand, the situation-type is not simply a device for permitting the fireside to take over the case, and its use always involves the risk that the court may make a mistake in choosing the situation-type:

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104. Pp. 256-60.
105. Pp. 260-68.
106. P. 261.
107. *Ibid.* (Author's emphasis.)
108. Pp. 268-85.
109. P. 270. (Author's emphasis.)

> However, it will not do to leave the impression that under sound method the particular case equities simply do and should take a circuitous route through some convenient type-situation, only, at length, having all along been the material motivation, to realize themselves in a happy holding. Neither will it do to create the impression that adopting any type-situation which the case equities may happen to whistle into court will comport with the use of sound method.[110]

This means that the court may frame too broad a generalization, or one that is wrong in some other way; also, if situation-sense is properly used, the fireside equities may go unprotected. It may show that they should not be given any weight, or that they cannot be protected without undesirable consequences.

Once in a while, situation-type reasoning may lead a court to procedures which, though desirable, are uncommon. One of these is the "area clean-up,"[111] in which the court straightens out and if necessary codifies a series of cases which are apparently in conflict, or in which there is doctrinal confusion.[112] The other is to admit the defect in the rule that the trial court correctly followed (on the precedents), to make a change in the rule, but to find on other grounds no need for reversal in the case being appealed.[113]

In (4) the author contends that technical procedural errors should not be held reversible unless they affect substance, using "the whole case as the test."[114] In (5) he suggests that distinctions of prior authority should not be made unless they are sensible, and that "modification or . . . overruling"[115] are preferable to unconvincing distinctions. He then devotes some pages to the proposition that the *opinion* is one valuable tool for overcoming the present distrust of the judicial process. One of his practical suggestions is that the courts, generally faithful in pointing out to losing counsel why his points failed, should, more often than they do, indicate to winning counsel why his argument convinced, permitting him the public recognition which is his due for sound work.[116]

Under (6) constant "correction and recorrection"[117] of the rules, the author's own words should be quoted:

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110. P. 272.
111. P. 281.
112. Pp. 281-82. See State v. Chaney, 349 S.W.2d 238 (Mo. 1961), in which Chief Justice Hyde provided a neat "area clean-up" which, because of dissents and concurrences in result, obtained only two other votes. Judge Storckman, though agreeing in result, thought that the case demanded a "fresh start," and proposed a totally different method of approach.
113. Pp. 282-83.
114. P. 285.
115. P. 287.
116. Pp. 287-91.
117. P. 291. See pp. 291-94.

> The betterment thus has two phases, related always, yet rewarding separate consideration. The one is goal-stuff: to locate and focus for seeing the most significant working situation-types, and then to smell out and shape for seeing and thought the lines along which, in any situation-type, the rightnesses of conduct and solution travel, so as to further the immanent goals of that situation in its relation to the whole of man and culture. . . .[118]
>
> The other phase of the betterment is that of measures. Rare indeed is the situation in which our legal measures are as well adapted to our goals as we could wish: that fact will not down. Moreover, every slightest shift of goal throws up at once the question whether the measure also may not need immediate appropriate modification.[119]

After commenting on the conditions that oppose re-examination, he observes that he is not proposing radical investments of time:

> The cure does not lie in chasing far and further. Where it lies is in never failing, *each* time, to take at least one fresh look. The new prodding of the new facts may bring something better into focus. The queer subconscious may this time be ready to give up an out which has been cooking down in there since the last time the court walked through these legal sandburs.[120]

And finally, he gives it as his judgment that this attitude is a common one: "Once again, this seems to me to sparkle unmistakably from our samplings as what the appellate courts today are busy doing, and doing rather well."[121]

(7) There is, in fact, a collection of "procedures"[122] which the courts now follow sometimes and which, if they were followed all the time, would greatly improve the quality of the law.[123] Courts should search their own past cases, not merely for the rule, but for the instruction they can gain from the *facts* of past cases and from the reason or reasons for the rule. Study of the reasons given in other state courts is more valuable than " 'weight of authority' nose-counts."[124] Against the objections that these would add to the demands on the courts' time and also to the length of the reports, he urges that there are compensating economies that would more than make up the difference. The syllabus, if it were written first, and carefully, by the judge writing the opinion, would probably shorten the opinion.

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118. P. 292.
119. *Ibid.*
120. Pp. 293-94. (Author's emphasis.)
121. P. 294.
122. *Ibid.*
123. Pp. 294-98.
124. P. 296.

Moreover, the "area clean-up," or the less ambitious "*rule*-tidying,"[125] saves time for everyone by giving the law a "fresh start"[126] and making it unnecessary to labor through the earlier cases any more. For example, of Cardozo he says:

> As he grew more experienced, the drive grew in him to leave the older authorities *tidied up behind,* to make each little opinion, in its own little way, a *clean* fresh start. I find in the work of Holmes on the Massachusetts bench no such pervading flavor.[127]

Moreover, this kind of working over the authorities makes it less likely that a judge will violate the law of "fitness and flavor."[128]

(8) Another device for improvement is "advance notice of important change in doctrine."[129] This ranges from the warning often given in opinions that the court is not deciding a case or cases different in specified ways from the one at bar, to outright overruling. Much of the discussion in this section is a strong defense of the practice of prospective overruling, which protects the parties who have relied upon the old rule, while it warns all others that the rule will be changed. Perhaps the strongest defense of overruling, which I do not remember seeing before in a generalized form, is this:

> It may be that in 1840 or 1850 there was some sense in arguing and feeling that the decision about to be reversed was just a mistake, to be corrected. But that is not, four times out of five, why cases or rules are overruled today. Today they are overruled typically because although they were good law once, and in their day have served a decent purpose, conditions have changed around them until their service has run out. Today's overruling does not one time in five uncover the true rule the court should have seen two or three generations back. It consciously declares, instead, a *new* rule for *new* conditions, a rule which in the older days would have been dubious at best.[130]

(9) As a related technique, the author suggests that "when a ruling has novelty, or its desirable range is still cloudy, or no means has been found to cut the issue down to tolerable or comfortable scope . . .,"[131] the court should make "*deliberate provision of an alternative* ground for the decision."[132] This is advisable caution:

> Now the chanciness of light from the case is proverbial: beside every "leading case" which has illumined sit five or ten "cases

125. P. 294. (Author's emphasis.)
126. P. 297.
127. P. 298. (Author's emphasis.)
128. *Ibid.*
129. Pp. 299-305.
130. P. 305. (Author's emphasis.)
131. P. 306.
132. *Ibid.* (Author's emphasis.) See pp. 305-09.

> of first impression" which instead of being followed got themselves done over. The chanciness of light from counsel has not achieved proverb-status because its importance is not yet proverb-clear; but it is a chanciness which flickers like a candle in a fitful draft. Look: there are the overskilled counsel who slant the needed knowledge; there are the underskilled counsel who know not even that background, situation, and immanent law have meanings; and, worse than either, there are the bison who smash up the china in half-suspicion that it might be important.[133]

Next follows a series of headings which, as they chiefly concern the practical possibility of realizing these advantages in a court's work rather than the theoretical values of the advantages themselves, cannot be usefully summarized, though they should be referred to. Thus (10) points out that a judge, even under pressure of heavy work, can select some cases for special treatment,[134] and (11) suggests that a court as a whole should plan its work so that the areas which need clean-up or tidying surely get it.[135] In (12) he considers the ways of avoiding real or apparent inconsistencies when a court sits in panels,[136] and in (13) he recommends to supreme courts the practice of relying, entirely or in part, in opinions of lower courts when they are good. In this discussion he addresses himself to the related question whether a court should borrow language from a brief of counsel, and offers the following comment:

> As against the adoption of lower court opinions, that savings and profit which lies in the lifting of seductive passages from counsel's briefs is a more delicate business. But I do not see it as a dubious one, once the court has reached its conclusion about the soundness of the passage. Quite the contrary. On the other hand, here I see little or no gain to be had from overt acknowledgment, except by accident. Explicit credit for a course of thought, a line of argument, a body of material, is one thing: such credit is good to give. Counsel's phrasing seems to me another matter. It is offered to the court as a gift, but it may be a Greek gift, it calls for scrutiny. If such a gift, after scrutiny, proves acceptable, the court can properly assume dominion.[137]

In (14) he enthusiastically approves the rapidly growing institution of "the judge's law clerk."[138] The following section, (15) deals with the troublesome problem of the outside expert.[139] The "amicus brief" is considered here, but the problem, as he sees it, is broader.

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133. P. 309.
134. Pp. 309-11.
135. Pp. 312-13.
136. Pp. 313-17.
137. P. 321. See pp. 317-21.
138. P. 321. See pp. 321-23.
139. Pp. 323-32.

The Oklahoma Supreme Court once cleared a blocked docket by using members of the bar to prepare tentative opinions, and this spectacular innovation raises the greater issue of when and how much a judge can consult an expert out of court. One practical objection to such consultation, of course, is that counsel have no chance to argue new points that the expert may bring up. The author suggests:

> It seems to me therefore that a sound hedge, not wholly complete, yet adequate, offers by spreading the nature and effect of such material on the face of a *proposed* opinion, the court remaining open to reargument addressed to that material. Precisely the same holds, of course, for any decision which is placed in part on any basis dug up by the court itself, but which is theretofore new to the case. Reargument is indeed in my view wisely limited to situations where the showing of its probable value is cogent; but the entrance of such a new element surely lays a good foundation for such a showing.[140]

But what risks are there that the expert might be wrong? The author suggests four possible kinds of error.[141] In his discussion of the expert's possible "lack of balance,"[142] of which he has a splendid example,[143] he observes that the judge who consults must not, on account of this risk, limit the expert's function in "interpreting," which, indeed, is one of the prime benefits to be hoped for from the consultation, but must be on his guard against unconsciously biased interpretation.[144]

In (16) he concludes that "expert courts" (*e.g.*, Workmen's Compensation, Probate) are valuable for first hearings and first decisions.[145] But what seems to me to be one of his most important conclusions occurs in his discussion of a related point. He strongly favors a system that brings appeals, at least in the last resort, to the supreme court of the state:

> [I]t still seems to me that increasingly as technological complexity piles high, our ancient institution of ultimate review by those complete nonspecialists, the *general* Supreme Court, stands out as one of the wisest institutions man has thus far managed to develop.[146]

In a short but important section on rules (17),[147] he observes that a rule is not fully a rule unless "its sphere and criteria of application

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140. P. 325. (Author's emphasis.)
141. P. 327.
142. *Ibid.*
143. Pp. 328-30.
144. P. 331.
145. Pp. 333-35.
146. Pp. 333-34. (Author's emphasis.)
147. Pp. 341-45.

achieve a moderate clarity."[148] He attacks again the mental attitude revealed by the remark so commonly made in trouble cases, that the rule is clear and only its application gives trouble. The belief that this can be true only distracts a court from realizing that the rule is *not clear*. The author offers this generalization: *"A formula which does not guide its own application is not as yet a rule of law at all— . . . ."*[149] In such situations lists of factors for use in deciding application, and, better still, with indications which way each factor points, are real progress toward a rule—they are at least a beginning of exploration in the area in which the rule is needed.

In a long section (18) on the scholar[150] the author notices with approval the increasing willingness of courts to use texts and periodical articles in their decisions, but his characteristic determination to look at both sides nowhere shows to more advantage than here, where he himself has something at stake. First, it will be unusual when a book or article "wholly relieves an appellate court of its burden of creation."[151] Second, scholars, even scholarly judges, sometimes blunder as badly as anyone.[152] Third, the scholar may either (1) offer a mistaken suggestion that *seems* to follow necessarily from sound doctrine, or (2) pin on a conclusion that does not properly follow from his material. Careful reading will detect the latter error;[153] the former is apt to result from an overconcern for order, and is harder to allow for. The author points out that what may seem to be merely a "hard case" which should be prevented from making bad law, is more likely than not a "hard rule" which, even if courts may pay it lip-service, is apt to be avoided by one means or another, thus creating real uncertainty under a facade of certainty.[154] The cases that depart from the principle, at such times, should be carefully studied, for the scholar has probably missed situation-type points that need to be taken into account in framing the doctrine.[155] Incidentally, he warns of the perils of snobbery that beset scholars, and criticizes their too frequently supercilious attitude toward the courts.[156] The section ends with a strongly worded argument to lawyers that the reports are valuable

148. P. 343.
149. P. 344. (Author's emphasis.)
150. Pp. 345-62.
151. P. 347.
152. Pp. 347-48.
153. P. 348.
154. Pp. 349-52.
155. Pp. 352-53.
156. Pp. 354-55.

for them as literature, as instruction, and as a source of valuable fact-information about society.[157]

The section on scholars ends with the observation that they and courts are "allies willy-nilly"[158] in producing order in the law. In section (19) the author shows, using form or "boiler-plate"[159] agreements as an illustration, how far this alliance has been useful in solving very difficult problems, and how it might have been and might yet become more useful still.[160]

(20) One deficiency of this review which is known to the reviewer, is its failure to make clear to the reader the extent of the author's interest in the ways of courts with statutes. These ways are frequently considered in the discussion, but the book's chief concern is with method, which has made it difficult to bring out properly the occasions on which the methods are applied to statutory material, for the difference in material, after all, is of secondary importance. Fortunately the last of the numbered sections[161] is devoted to the treatment of statutes, which offers an opportunity partly to correct my error. It opens with the following passage:

> This book is not, as a book, about how our State supreme courts do deal or ought to deal with statutes. Yet again and again, in order to avoid misinterpretation, I have had to insist that the *range* of techniques correctly available in dealing with statutes is roughly equivalent to the range correctly available in dealing with case law materials.[162]

He refers at once to Appendix C[163] in which he reprints a collection of precepts for statutory interpretation arranged in neatly contradictory pairs. For example, the first pair has, on the one hand, the principle that "a statute cannot go beyond its text," and, on the other, the principle that, "to effect its purpose a statute may be implemented beyond its text."[164] To the earlier publication the author here has added another set of nineteen precepts from the federal courts, of which twelve deal with the use of legislative history and other materials in the interpretation of statutes. When one considers the court's power to invoke either partner of these pairs, with no stated guide to tell which of the pair will be used in any case, the general formula about legislative intent becomes illusory. The author, quoting from one of his own earlier writings, takes the position that when the

157. Pp. 356-62.
158. P. 361.
159. P. 362.
160. Pp. 362-71.
161. Pp. 371-82.
162. P. 371. (Author's emphasis.)
163. Pp. 521-35.
164. P. 522.

legislature is conscious of the error to be corrected, has a goal in mind, the "legislative intent" formula has a meaning, but not otherwise:

> On the one hand there are the ideas consciously before the draftsmen, the committee, the legislature: a known evil to be cured, a known goal to be attained, a deliberate choice of one line of approach rather than another. Here talk of "intent" is reasonably realistic; committee reports, legislative debate, historical knowledge of contemporary thinking or campaigning which points up the evil or the goal can have significance.
>
> But on the other hand—and increasingly as any statute gains in age—its language is called upon to deal with circumstances utterly uncontemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation.[165]

This is followed by a study of the statutory techniques shown in the Ohio cases of 1939, which concludes:

> I have not attempted to exhaust these three hundred pages. It is already clear that both in initial approaches to the meaning of a statute and in the ways in which the court's own prior construction are handled, this single sequence of cases, decided at a single term of court, displays a versatility of techniques which is strictly comparable to our familiar correct techniques with case law authority.[166]

The author's most interesting conclusion on this general question is, that the rigid manner of thought characteristic of most decisions in the formal period survived longer and more dangerously in the statutory cases. The courts are more likely, in his opinion, to produce decisional and literal nonsense in such cases on account of the notion that they lack power to take situation sense into account. He believes that the work of both Cardozo and Frankfurter shows the effects of this notion. The results are serious:

> This has three important consequences. The first, already mentioned, is a certain jerkiness in the handling of statutory material. It is much less easy than with pure case law to foresee whether, how, and how far situation-sense will break through; and the art of effectively accommodating needed sense-meaning to the given statutory material of authority is (as contrasted with the case law art) still a crude art, sometimes a rude one. It is indeed both sobering and saddening to match our boisterous ways with a statutory text against the watchmaker's delicacy and care

165. P. 374. (Author's emphasis.)

166. P. 377.

> of a theologian, or of a Continental legal craftsman, or even of a good American lawyer when the language he is operating with is that not of a statute, but of a document.
>
> The second consequence flows out of the first: *cumulative* shift seems in the statutory field to be harder to bring into order and relative forecastability than in the case law areas.[167]

The third consequence is that, in contrast to the relative freedom they have won from the formal style in case law, the courts revert to it in statutory cases, and thereby depart from the essence of their ideal.

> I cannot see how some of the things done to statutes (though in good causes) by noncitation or by disregard of word, phrase, or clause can fail to rasp the gullet even of the prescribing physician. If some horrendous result is treated as the letter seems to demand, that is a different matter: it leaves the high image of duty bravely but pitifully faced. But the duty of accounting which an appellate court owes to the given authorities cannot with either decency or wisdom be ignored; so that the responsibility for making situation-sense out of the statutes (an obligation which the appellate courts are insistently and with increasing regularity facing up to) carries with it a responsibility no less, both in the guild and in the individual craftsman, for developing the art of handling frozen language up toward a level comparable with the current art of handling case materials.[168]

The section ends with this conclusion: "For the rest, the court's work is not to *find,* any more than it is with case law. It is to *do,* responsibly, fittingly, intelligently, with and within the given frame."[169]

The first part of the book ends with a series of brief discussions of special points. The book's use to the counsellor, for example, is not as obvious as its use to the appellate lawyer, but it is useful, nevertheless, in planning his ground safely.[170] There is a careful, and very moderately phrased, critique of the Supreme Court of the United States in the light of the conclusions reached in the body of the book.[171]

Part II is a group of studies illustrating and documenting the points made in the previous discussion. It opens with a section on Mansfield,[172] in which his commercial insight into a negotiable instruments problem is shown, followed by an account of the later twisting and warping of his doctrine as his insight, the reason of his rule, was lost. As one of the principal errors occurs in *Swift v. Tyson,*[173] there is a

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167. P. 380.
168. P. 381.
169. P. 382. (Author's emphasis.)
170. Pp. 382-84.
171. Pp. 384-93.
172. Pp. 405-29.
173. 41 U.S. (16 Pet.) 1 (1842).

discussion also of the difficulties engendered by the overruling of the federal common law doctrine in *Erie R. R. v. Tompkins.*[174] And, in preparing for another consideration of situation-type, the author takes a decision of Judge Cowen (for whom he has a very high regard) which is very unpopular nowadays—his holding in *Hartfield v. Roper,*[175] that a child is barred in an action against a third person, by the contributory negligence of his parent—to show that even in this now repudiated decision Cowen carefully supported his rule with reasons drawn from the contemporary American situation. Even so, the rule might have been wrong when it was laid down—the important point is that its reasons accompanied it, which reduced the chance that it might be misunderstood or misapplied.

This account of Cowen in action introduces a further discussion of the situation-type, addressed to the question of how broadly the situation is to be taken by the court, in framing its rule or doctrine for the case. The difficulty of the situation-type as an instrument is that it has no definite principle for guidance in the solution of this problem. As the author points out:

> No rule or principle can ever, in such a choice, tell any court, in concretely definitive terms, what scope "the" problem-situation before it has, or, more accurately, is best made to have. There is a line of guidance, but it speaks only to conscience plus judgment. That line is: "the" problem-situation extends as far as you are *perfectly* clear, in your own mind, that you have grasped the picture fully and completely *in life-essence and in its detailed variants,* and therefore *know* it to present a *significantly single* whole, *and one over which your knowledge and judgment have command.* That far, it is wise to deal with it, and right to deal with it, because small things take on fuller meaning in the context of greater ones. And also because the law does well to trend into ever larger unities, *so long as they remain meaningful as they grow.* But those unities must be and remain meaningful, over their whole scope, in terms of life and sense, not merely in terms of formula and "sound," else they do harm. That is why a court is doing its duty when, contrary to the sense *you* see and desire, but with clear consciousness that it understands what it is doing and why, *and with clear statement of both,* it goes to bat on the whole of a broad situation.
>
> But that is also why any doubt about whether the court has the whole situation in sure grasp is to be resolved *by the court always in favor of a narrower* rather than a wider scope.[176]

This is followed by a section on Cardozo,[177] showing him once in his best form, and twice in bad. The purpose of this contrast is to show

174. 304 U.S. 64 (1938). See pp. 415-18.
175. 21 Wend. 615 (N.Y. App. Div. 1839).
176. P. 427. (Author's emphasis.)
177. Pp. 430-45.

how Cardozo's powers failed when he happened not to grasp the situation-type in the case he was handling.

The text of the book closes with a discussion of the current situation from several points of view,[178] which includes an anecdote from Justice Rutledge, a close consideration of the court's witness cases in Illinois, and some comments on dissents and on the style of written opinions. Of the three appendices, A[179] and C[180] have already been summarized, and I reserve comment on B till the second part of this review.

PART II

As part of the effort to see the book as a whole, I will begin with Appendix B,[181] in which the author considers the legal realist movement and its critics. He clearly affirms his attachment to the movement; in fact, more:

> And I put this book forward both in its plan and on its descriptive side as a solid and unmistakable product and embodiment of American Legal Realism. I should indeed like to use the book to shame either old critics of the movement or later ones.[182]

On the other hand, he immediately insists, realism was not a philosophy, and was never meant to be one, though some of its exponents may also have had philosophies of law. It was, and it is, a method only:

> Of all of these things, only "see it fresh," "see it clean" and "come back to make sure" are of the essence. They go to method. *That method is eternal.* That is point 1. The method may have come into first discussion among lawyers in relation to rules and judicial decision, but it is no more limited to that area than it is to matters legal. It applies to anything. That is point 2. But *the method* includes nothing at all about whither to go. That is point 3. *Realism* is *not* a philosophy, but a *technology.* That is why it is eternal. The fresh look is always the fresh hope. The fresh inquiry into results is always the needed check-up.[183]

And he goes on to show that some of the best products of realism are incorporated in regulations, briefs, casebooks, and even in the practices of an attorney general. These things are not regarded as "jurisprudence," and are not taken into account in assessing the movement. But they show that the contribution of realism was not

178. Pp. 446-68.
179. See text accompanying notes 74-76, *supra.*
180. See text accompanying notes 163-64, *supra.*
181. Pp. 508-20.
182. P. 509.
183. P. 510. (Author's emphasis.)

in its wilder declarations, and especially not in its denials of this or that, but in the clarifications and sound results that its practitioners managed to produce in their own work.

All this is consistent, for if realism is a method, and only a method, the only place to study it is in action. I do wonder a little whether all partisans of one or another variety of legal realism would wholeheartedly accept the author's resigning every claim to its being a philosophy. And, of course, he has made no effort in this book to canvass the literature and answer all the realist arguments that might be brought against him. But the point of chief interest is, that he intends his book as an exemplification of the only value that realism, in his opinion, should claim—that of method.

In the realist controversy Professor Llewellyn seems to be a moderate. On the one hand, the formal style appals him. Any compromise with that is unthinkable. On the other hand, he does not stand with Oliphant, for instance, who thought the judicial opinion nearly useless as a guide.[184] No, Professor Llewellyn believes that the judicial opinion is a very helpful guide if, but only if, it is read rightly, and he thinks that words can give a great deal of guidance if they are well chosen and arranged, and if they match with the facts they are supposed to deal with.

In spite of this, and in spite of its constant balancing of contrary factors, the book does not create an impression of moderation. On the contrary, it is an impassioned declaration of faith. I think that it is a personal attribute of Professor Llewellyn's that creates this impression, more than the substance of his position. What he holds he does not hold with indifference, but with fervor. Though he is a scholar, he does not think of scholarship as a discipline aloof from the practical affairs of life. His advocacy is blunt, sometimes violent; he insists on clarity, which makes unreal compromises (under the umbrella of a generalization which the compromisers understand differently) impossible. He holds his views of the judicial process with an almost desperate sense of their supreme significance to the pursuit of order through law. And this sense transmits itself into his vocabulary and his style.

The substance of these views has, I hope, appeared in the earlier pages of this review. What has probably not appeared is the rather strange impression which the book makes, as a whole, upon the reader. This is due, I think, to an unusual combination of attributes. A highly generalized study of a legal system and its disciplines represents its object as an inert body, laid out and partly dissected. On the other

184. See Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159 (1928), especially pp. 159 and 161. But he seems to have thought that there was *some* value in opinions. See Professor Llewellyn's anecdote of him, p. 391.

hand, a careful study of a line of cases, or even of a larger field, can, if it is well done, exhibit its object as a living body, with growth, almost with actions, of its own. Professor Llewellyn has made a very general study of the legal system, and has shown it, nevertheless, as a living body. The individual and miscellaneous cases appear as episodes in continuous processes, and the generalizations which they illustrate are themselves modes of action for lawyers and judges.

This stress on action and process may account for the structure of the book, which, at first sight, is peculiar. It is not organized according to an analytical outline like a text, nor has it a succession of chapters, each dealing with a different subject, like a theoretical explanation. It is built, rather, around certain themes which occur and recur like musical notes, sometimes alone, sometimes in varying combinations. Such an organization is not easy to follow in an intellectual discipline, however familiar it might be in literature. The reader's difficulty is increased by the fact that Professor Llewellyn's style is not lucid. He pays the reader the compliment on every page of supposing that he is an expert, which everyone should appreciate, however seldom he may deserve it. More important, the author's thought is complex, and he is professionally unwilling either to talk down to his readers or to water down his subject matter. Finally, he is concerned with the facts and ideas that stand behind words, and constantly chooses words, similes and metaphors that put these facts and ideas before the reader, and not some loosely outlined concept that also means a dozen other things. The resulting sentences are vivid, interesting, and hard to follow.

It is probably the emphasis on action and process that has enabled the author to accomplish several things at once with his book. It is, first, an answer to those inside and outside the profession whose criticisms are undermining faith in the courts. It is, second, a survey of legal techniques in a precedent-system—not a last will and testament, as surveys are apt to be, but a prospectus calling for further investment in the proved techniques that have emerged as an enduring contribution to the law. It is, in the third place, a careful study, partly of material specially chosen to illustrate particular points, and partly of cases taken at random from the state reports; this is the fundamental material out of which the author supports his conclusions on the first two propositions. But one could also describe the book in several other ways: it is a critique of current judicial process in America; a practicing lawyer's sophisticated guide, especially in time of trouble; a law teacher's manual of case-method (whatever he teaches); and, not least, a judge's conscientious and technical adviser. I do not doubt that it has other uses as well. But I think its greatest merit is that it is as specific as it is possible to be with legal subject

matter. Obviously the directions cannot be as concrete as those for removing tonsils; just as obviously, general urgings for "improvement" are a waste of paper if one assumes, as surely he can, that the bar and bench collectively want to do a good job. The value of this book is that it shows how.

PART III

In the first part of this review I usually, but not always, suppressed the desire to add personal comments. A few of them still seem to be worth the space these additional remarks will take.

First, I must admit that this book has opened my eyes to a truth so obvious that it is embarrassing to acknowledge help in the matter. This is, that the courts' daily creations—their slow, unnoticed accretions—are more important for the law in the long run than the spectacular innovating cases we all remember. Every man is entitled to his plea in mitigation, and what has concealed this for me, I think, is the large number of "footless appeals," as Professor Llewellyn calls them somewhere. In these there is, let us say, the smallest creation possible, so small that the advocate, if his eyes had been clear, would have seen that he was wasting time and money. I think, moreover, that it is difficult for law teachers to keep this clearly before them because, with the present "comparative" system of casebook construction, we build with cases from many jurisdictions that, in the main, are not troubled by each other's authorities. The line of cases in a single jurisdiction displays daily accumulating creations best.[185] The proposition is a sobering one because, if my suspicions are right, it is possible for students, even good ones, to miss this point. I remember the shock I had some years ago when a student, one of the best, told me that he had not really understood case law until he took Constitutional Law and had to handle a large number of cases decided by one court. This is not the place to discuss corrective measures, but I suspect that some are needed.

Second, in reading over Parts I and II of this review I feel that the situation-type may play an unduly large role in it. Certainly it seems fair to say, as I have said, that it is the key concept underlying the book; on the other hand, there is much that would stand without it (*e.g.,* the steadying factors, the leeways and much more which the reader will recall). The apparent overemphasis results, in part, from the fact that I have not summarized the author's explanations of and comments upon the very numerous cases which he discusses in the book. It was impossible to do this if the review was to be kept within any reasonable limits. The omission, however, has had, perhaps, a

185. See the series of English fright cases in GREGORY & KALVEN, CASES ON TORTS 860-80 (1959).

collateral effect: the situation-type may appear to the reader as a *deus ex machina,* a heroic (but blank) concept with which the author solves all his difficulties. I have countered this, in part, by including the author's warnings about the misuses to which it is subject; for the rest, the reader's doubts, if he has any, about the use of it would, I think, be resolved by reading a few of the author's discussions of specific cases or lines of cases. Finally, the reader, if he has not examined the book, may doubt that he understands what this "situation-type" really means. It may help if I admit that I do not, that I have only a tentative grasp of the concept. This is due, in part, to the nature of the concept itself. It is a little like Kant's categorical imperative, which, without any definite content of its own, nevertheless has important functional value in understanding ethical problems. With such a concept, constant use, in a great variety of situations, is the only path to understanding, and a solid understanding in consequence is not quickly gained, nor is it gained by reading alone. Thus the situation-type, though it is an important contribution to legal thinking, and is well explained and illustrated in this book, can be understood only when one has used it for himself.

Third, the fundamental importance of the thought embedded in the following extract from Goldschmidt will, by this time, be clear:

> Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.[186]

The reader will remember that this is the theoretical underpinning for the situation-type, which in turn is a vital criterion of right law. Now I know no more of Goldschmidt than this extract tells, which is surely not enough to found a critique. Yet, some limited observations seem to be justified.

The extract asserts that there is a "right law," for every fact situation, that there is then right and wrong law—a statement about values, not about facts. And it is fair to say also that it assumes that men can know what law is right and what law is wrong, at least sometimes. The statement and the assumption both are metaphysical propositions, and very controversial ones. A professional philosopher would have many questions to ask about this immanent law, which is founded on "what reason can recognize in the nature of man and

186. P. 122. See also text accompanying note 63, *supra.*

of the life conditions of the time and place." He might also be troubled by the negative qualities—that is "not eternal nor changeless nor everywhere the same."

What consequence would the demolition of this theory have upon the situation-type and the other devices upon which Professor Llewellyn has built? None, I think, so long as the reasoner believes that men have knowledge of ethical truths which can be usefully applied in a legal system. He could simply supply his own theory in place of Goldschmidt's, and would probably not be greatly inconvenienced by the change. Even the negative qualities are only ways of meeting the problem of change, and while different ethical theories have varying success in dealing with this problem, I think even the most rigid of them now show an astonishing flexibility when they are subjected to practical demands. Above all, the *methodical* principle of the situation-type, that light is to be sought by searching for the typical facts in the situation and clearly distinguishing these from the non-typical facts, would remain unchanged. The author's work, in other words, does not fall if Goldschmidt's theory should succumb to criticism. It happens to be the base he has chosen, though it is not emphasized, but it is not absolutely required to support his other positions.

Fourth, one of Professor Llewellyn's conclusions leads to some interesting thought about a well-known saying of Justice Holmes: "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[187] It is, as with many of Holmes' most pregnant aphorisms, difficult to pin this down; it might mean only that training in these sciences will become a part of the lawyer's standard equipment. But it might mean that practitioners of these sciences will decide what ends the law should reach and by what means. Taken in the latter sense, I think Professor Llewellyn, for all his devotion to Holmes, has shown how to refute it.

We may begin by saying that the black-letter man is not our choice. Professor Llewellyn has, throughout the book, paid off his grudge against the black-letter man. In fact, he shows that this need never be our choice, that we need to be rid not only of the black-letter man, but of the black-letter as well. But must we choose "the man of statistics and the master of economics"? Justice Holmes seems to be questioning the value of traditional legal training, and looking forward to something different and better, and solidly based on the sciences. I think that Professor Llewellyn's book has shown, whether he intended it or not, that Holmes' pair of choices was insufficient,

187. HOLMES, *The Path of the Law,* in COLLECTED LEGAL PAPERS 167, 187 (1920).

that the "man of the future" has turned out to be the lawyer still, and that this is the way it ought to be. Economics and statistics, along with other sciences, have become more useful to the law than they were; they are oftener used, and with more telling effect, but they remain the domain of the specialist, and the law, in its bulk, is still made by counsellors, advocates, and judges. The sciences may guide the situation-sense, and help the searcher find it for his case, but it is still legal technique and legal technicians that control the growth of the law. One of the author's most telling passages, I think, is his strong defense of the unspecialized supreme court, which, in the end, reduces all the experts to guides, and arrives at its own conclusions about ends and means.[188] The negative merits of the non-expert court of last resort appear in its refusals to turn over its functions automatically to green and untried scientific instruments. The book under review is the best example of its positive merits.

But these are only a few of the paths which open out from this book. The end of it all is, that it will stand reading, frequent rereading, and a lifetime of browsing, and repay all the study with interest.

Comment—Harvey M. Johnsen*

My interest in Llewellyn's book is naturally from the judicial side. He has done a notable job, I think, in his reminders, urgings and challenges to the appellate bench as to the approaches and processes of its opinion work.

In the book's concreteness and comprehensiveness, along with its currency, it will have a value and an impact over the previous general materials in the field. Also, Llewellyn's passion and provocativeness give it something of a searing flame, as against the embering glow of the writings, both lofty and unlofty, which have gone before.

His gathering and labeling of the many tools of the judicial workshop is a service that of itself is most worthwhile. These are things which judges for the most part know that their tool chests contain, but of which they do not often enough, perhaps, make a conscious inventory in the routine performance of their work. Certainly, room exists for some of these tools to be made to have a more objective "feel," and so a smoother use, in many judges' hands.

I should hope that every judge of an appellate court will take the time to read the book leisurely, and that the members of the court will

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188. Quoted in text accompanying note 146, *supra*.

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