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Llewellyn: The Common Law Tradition- Deciding Appeals

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RECENT BOOKS

THE COMMON LAW TRADITION—DECIDING APPEALS. By *Karl N. Llewellyn*. Boston: Little, Brown & Co. 1960. Pp. xii, 565. \$8.50.

The author's central theme, on which he plays innumerable variations, relates to his observation, extensively documented by random samplings of appellate opinions from many different jurisdictions, of a strong and accelerating trend in the last decade or two away from a style of decision and opinion-writing which he calls "The Formal Style," and toward general use of a "Grand Style" once familiar but for some decades forgotten. The "Formal Style" is that mode of decision and opinion-writing which proceeds from the "orthodox ideology" of a closed system of pre-existing law applied mechanically by judges who disclaim creation in the process and think of their technique as involving mere deduction from ascertained premises. The "Grand Style," in contrast, assumes a duty on the part of the court to carry on a continuous judicial review of judge-made law, to "view precedents as welcome and *very* persuasive, but . . . to test a precedent almost always against three types of reason before it is accepted": the reputation of the opinion-writing judge; principle, which means "no mere verbal tool for bringing large-scale order into rules, it means a broad generalization which must yield patent sense as well as order"; and, finally, policy, "in terms of prospective consequences of the rule under consideration, comes in for explicit examination by reason in a further test of both the rule in question and its application" (p. 36). The author's skepticism of the effectiveness of "mere law" is pervasive. As every Llewellyn reader has long known, in any case which merits appeal a letter perfect case on the law alone can be made for each side, and will be if both are competently represented. The big question, therefore, is why does and why should the court choose one proffered solution rather than the other; *follow* one line of authority and *distinguish* the other? If this question is answerable, and Llewellyn now believes that it is, a platform may be established from which prediction and advocacy can operate with reasonable assurance despite the ambivalence of doctrine.

Since the answer is not to be found in the law alone it may perhaps be found in the facts; not the unique facts of the case at hand, but the factual description of the type-situation of which the problem is a special instance. The "Grand Style" is centered upon a conscious effort by the court through the application of horse sense and reason to adduce, to understand, and as accurately and pungently as possible to describe in the opinion the *true nature* of the type-situation with which the case is concerned. When the court finally pins a label on the situation the solution is just around the corner, for the basic premise of the argument relating to court technique is expressed by a quotation from Levin Goldschmidt that "every fact-pattern of common life . . . carries within itself its appro-

priate, natural rules, its right law. . . . The highest task of law-giving consists in uncovering and implementing this immanent law" (p. 122). Each problem is an instance of a type-situation which has been described in earlier cases, but the problem case always calls upon the court for a re-examination of that type-situation, and a further effort to understand and to describe it more accurately than before. The process typically produces, by interaction between past authorities and present facts, an ambulatory category responsive both to changed conditions and to new knowledge. All this is made more or less inevitable by leeways in the use of precedent which have been legitimized by long usage, and are so much a part of the common law lawyer's conditioning that he is scarcely aware of their existence. The principal difference between a "Grand Style" and a "Formal Style" opinion, therefore, may be in the court's awareness of what it is doing, and in its candor in exposing and describing the reasons for doing it.

The book was written not merely for academic reasons, but as an attempt to exorcise a "crisis in confidence" in the work of our appellate courts which Llewellyn finds exists particularly among members of the bar, to whom it is most hurtful because of its effect upon their self-regard. As he sees it, the loss of confidence arises from a feeling that court decisions have become unreckonable, leaving the lawyer no basis for pride in craftsmanship. It is unjustified, however, for it results from the lawyers' failure to keep track of what the courts are doing; their failure to become aware of the new style of decision and its implications. To the initiated there is in fact much less unreckonability than there was when the "Formal Style" was the rule; less unreckonability than that which is deemed entirely tolerable in the formation of normal business judgments. The reason lawyers have failed to keep pace with the developing "Grand Style" is that they have had their eyes riveted on doctrine, on the "rules" of law, when they should have been watching the decisional *process* to detect factors which were bothering or helping a given court in reaching its decisions. The lawyer should study his court as assiduously as he studies his "law," and his cases in historical and functional groups rather than as single precedents. He must come to understand that rules of law come equipped with widely variant horsepowers, that if application of the seemingly appropriate rule is compatible with "sense" reckonability of result is great, but that if the contrary is true the *rule* comes without warranties and prediction must depend on other factors. To achieve reasonable effectiveness as a prophet the average lawyer needs only to be able to determine how *his* court will see the *sense* of the situation, and utilize this as his guide to whether the "rule" and his application of it are likely to stand up.

The discussion relates, then, to two techniques, that of the court and that of the lawyer advocate-counsellor. While in his view of *court* technique Llewellyn argues that each type-situation has an "immanent law," a

situational sense, he freely concedes that his own estimate of the situation frequently differs from that of the court, even when the court follows the "Grand Style." This suggests that a given situation may have more than one "immanent law," that the light of good sense which halos the result may well be a reflected light having as its source the observer's own values, or his interest. There is, in other words, a degree of ambivalence in the "immanent law" as well as in the doctrine. For this reason the lawyer's *predictive* technique is based on a study of the values of the particular court wherein his problem will arise. When the lawyer has made such a study, Llewellyn argues, he will find that the unreckonable has become reckonable, and his confidence in the courts will thereby be regenerated.

Llewellyn does not make clear his position on the more violent judicial changes in existing law. The continuous change which is a condition of the "Grand Style" is for the most part the kind of adjustment which I would suppose lawyers generally consider normal, which is made more or less inevitable by the character of our precedent system. When the tempo and amplitude of creation are greatly increased, however, when the court faces situations in which a choice must be made between existing doctrine and a solution *clearly* beyond the pale of that doctrine, the little twist that is within the accepted leeways of "following" precedent will not do the job, and the court nevertheless *repeatedly* decides that the job ought to be done, that the legislature has not done it, and that it, the court, therefore *will*—this, I believe, is not a pattern of behavior that either lawyers or the general public in this country expect from their judges. One of his reviewers has interpreted the "Grand Style" as a method which calls for the rule to be tested against experience, and if it does not square with experience, to be discarded or reworked.¹ I am not certain that Llewellyn's position is as swashbuckling as this interpretation would indicate. Of the "Grand Style" he says that "touch with the past is too close, the mood is too craft-conscious, the need for the clean line is too great, for the renovation to smell of revolution or, indeed, of campaigning reform" (p. 36). It may be his fate again to be misunderstood, for like the realist writing from the beginning, the "Grand Style" will surely become the explanation for further flexing of judicial muscles.

Llewellyn seeks to establish, by comparing techniques in use today with those used in our courts up until the later decades of the last century, that the "Grand Style" is nothing new, that it is essentially the same today as it was then, and therefore has the full blessing of tradition, is not a departure from what the public *should* expect of its judges. He denies that the nineteenth century "Grand Style" was merely the way in which courts worked in the "formative era" of our law, and argues its superiority

¹ Breitel, Book Review, 61 COLUM. L. REV. 931, 937 (1961).

in any era. Nevertheless the situation is different now from what it was then. Then there existed a necessity, if the courts were to resolve the disputes laid before them, for the formulation of principles for the disposition of those disputes without help from a code or from a comprehensive body of case law. The "Formal Style" was a response of lawyers and judges to the development of a mature, or at least a comprehensive, body of local doctrine. The period through which we are now passing presents a different picture. We have a mature body of doctrine which lawyers feel to be comprehensive, but which is felt by many to be obsolete. Tension results from the fact that existing doctrine commands the loyalties of many lawyers and of much of the community *because* it is law, and because the entire mystique of the republic calls for major, conscious change to be accomplished in accordance with the accepted democratic-representative forms. The tension will continue to exist, in all probability, unless we develop a thought-construct of our republican system which confers upon judges, if they are to be the ones who will exercise major legislative powers, the appearance of legitimacy in their exercise. We may be discussing a constitutional problem, or one which involves only a matter of education. If it is the latter, I doubt that Llewellyn's course, illuminating as it is, will accomplish the objective which he has in mind. The lawyer's image of the political system is formed long before he finds out anything useful or realistic about the work of appellate judges and the part they play in that political system, hence the contradiction which is felt when he does find out. If Llewellyn seeks to *eliminate* this crisis, it seems to me he must teach his course in the secondary schools.

The book will be a text for judges, a handbook on prediction and advocacy, and a rich source of information and understanding to a layman or a law student who has the good sense to study it thoughtfully. It will have its greatest influence, however, by refraction through the minds of law teachers, for it is an attempt by description to raise to the level of consciousness an understanding of methodology which conventional curricula assume must be achieved mainly through conditioning. It is the teacher's task to initiate that conditioning, and his fond hope to shape it so that technique may be improved, or at least its development hastened. But he can scarcely help yearning for the day when the technique has been so well described that it may be directly taught. For him, therefore, Llewellyn's unmatched gifts for seeing a situation clearly, for cleanly verbalizing what others only feel, and for describing the obvious so that it may become noticeable, are uniquely useful. It would not be possible frequently to match the thought-clearing and breath-saving characteristics of such an idea as his *Bramble Bush* insight into the double-valued nature of our precedent system, but there are herein many gems of similar quality if not of equal weight. One which I cite as an example because it tickles my fancy is his reference to "the curious nature of our

case law rules and concepts, which (we keep forgetting) are in essence Platonic; somethings whose reality and essence exist 'out there' somewhere, felt more than grasped, indicated rather than bounded or gripped by any form of words at all, so that 'the same rule' can be found and recognized in or under seven divergent and only *more or less* coextensive formulations. In our law, 'the' rule rephrases of itself, almost, to adjust a notch or three, a compass point or four, to the call of sense, in what even when almost automatic is nonetheless highly *creative* 'application' " (pp. 180-81). Imagery such as this, in which the book is rich, fastens upon the mind of the reader and guarantees, if that reader be also a teacher, a direct transference through his own outlook to his classroom work. Further than this, the rationale here presented of the judge's approach to a problem case is in fact a paradigm for the casebook teacher's image, often enough mere fantasy, of what he himself does in the classroom day by day. A feeling of kinship, of self-recognition, reinforces the utility of the Llewellyan descriptions to guarantee a maximum effect upon the mind of the pedagogue.

Another of the book's reviewers has ventured the judgment, probably sound, that first-year law students who try to swim this stream will drown in the attempt.² Some of their seniors would share their fate, for Llewellyn's ideas do not march past in serried ranks with measured tread. They flow over and engulf the reader. If they could but be lined up in systematic and less overwhelming form, they could be a large part of the antidote to another crisis than the one to which he has referred. His main pitch is that the acres and acres of shelves of appellate reports are gold mines, not wastelands; that there still is much to be learned from the study of appellate opinions, not only about law but also about life; that there is material here easily and inexpensively available to all and sundry which challenges the intellect and imagination of any scholar, including the one whose claim is an interest not in "doctrine" but in "society." The passion with which the claim is made burns upon the page. Would that I could find some way to infect first-year law students with the same excitement; to get them to see their study of *cases* as something more than a defense against the call to recite and a source of outlinable two-line propositions; to have them experience a few times the thrill of dissecting with care a verbose and opaque opinion to find lying beneath the surface a reasoned solution, moving step by step from appellate problem to its disposition, dealing along the way with the adversary contentions, and with the accuracy or inaccuracy of the court's logic and the extent of its consideration of "sense" and "policy" exposed to view; to have them see the case as something more than a key word surrounded by a hiatus.

The appellate opinion is not only excellent material for social research, it is also *still* the optimum unit for the study of law, but it is one thing to

² Prosser, Book Review, 13 J. LEGAL ED. 431, 433 (1961).

have this conviction and another to impart it. If the student is to be nourished by the fruit he must pluck it himself, and this he invincibly refuses to believe. Conviction is a product of personal experience, and the great mass of law students never see in any case what Llewellyn finds in the *general run* of cases. They fail to see, because they have not learned to focus. Consequently their "study" of cases soon becomes drudgery, meaningless drill, devoid of intellectual challenge. If they could be brought to see the process of decision as Llewellyn sees it, and then be made to understand a technique by which they can themselves *observe* the process in operation, many of the law schools' problems would be on their way to solution. For this reason I cannot help wishing for a synoptic version of Llewellyn, one which could be viewed as a whole, comprehended in one piece, and studied en masse. What this country needs is a good C students' Llewellyn.

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