BOOK REVIEW

A SYMPOSIUM


To discuss a monumental new book by Professor Llewellyn, this symposium brings together three distinguished members of different branches of the legal profession: a judge, a law teacher, and a practicing attorney.

Henry J. Friendly †

This is a heartening book for a recently appointed appellate judge—heartening, that is, after weathering the initial shock of being told that the bar is not merely "bothered about our appellate courts," but "is so much bothered about these courts that we face a crisis in confidence which packs danger." (p. 3). He wonders for a moment whether it was wise to abandon the safety and comfort of practice for a post so precarious. But for a moment only. Professor Llewellyn is happy about appellate courts as they are today. What makes him less happy than he would like is his belief that his happiness is not shared by others—especially by the lawyers who practice before appellate courts. The reason why the lawyers are not happy enough is that they do not read opinions enough, or well enough. The reason why the lawyers would be happier about appellate courts if they would read more opinions and read them better is that they would find the courts have returned to Reason—ley est resoun. ‡ Professor Llewellyn does not mean that the courts have returned to justice; he is too good a Holmesian to speak in that term, although he excuses the gallant gentleman's "I hate justice" as springing from and expressing "a normal appellate judge's revulsion at the too frequent ranting about justice which hopes to conceal either a weak case or a shoddy preparation." (p. 60). Instead, the "justice-duty" of appellate courts is expressed in a felt responsibility to do what is "'fair,' and 'right,' and, to mark the minimum, 'only decent.'" (p. 60). Or, to make matters entirely clear, "the main guide is felt sense and decency, the right result on the facts of case and situation (or, more


‡ Langbridge's Case, Y.B. 19 Edw. 3, 375 (1345) (Stonore, C.J.), cited at p. 52, n.46.
wisely, on the facts first of the situation-type and only then of the particular case) . . ." (p. 135).

The quality about our appellate courts which Professor Llewellyn prizes is their "reckonability." This is promoted by fourteen "factor-clusters," subsumed as "Major Steadying Factors in our Appellate Courts" (pp. 19-61), and no less than sixty-four methods of dealing with precedent, only two of which are condemned as "flatly illegitimate," with a third "dubiously legitimate," and a fourth "rarely, barely" so. (pp. 77-91, 133-35). It seems rather wonderful that appellate courts should have achieved reckonability with thirty-two different—but legitimate—methods of following precedent and twenty-eight of avoiding it, even when these are channeled by fourteen steadying factor-clusters. Professor Llewellyn explains this by distinguishing between cases governed by the Law of Compatibility, where "application of the seemingly apposite rule is compatible with sense," and the Law of Incompatibility, where it is not. (p. 180). The first group is not so large as the superficial thinker might think. Since "the form of words in which a rule is normally cast is very likely, thanks to the looseness of language, to be subject to a range of readings which not only rove in scope from the perverse literalistic all the way to the semfigurative, but also swing through various compass points according to diverse definitions or flavors of the constituent terms," it follows that "an additional requirement that the 'application' satisfy sense as well as the rule must materially, even hugely, cut down on both reach and region of the answers which are admissible." (p. 180). This is all very well, but, both in determining whether a case lies in the range of Compatibility where the Law of the Singing Reason is sweetly heard (p. 183), or in the disturbing world of Incompatibility, and in finding the right answer if it falls in the latter, the judge is thrown back on "sense" or "situation-sense." Here is where we get into trouble since what one judge regards as sense, another often considers nonsense, or, in Professor Llewellyn's language, non-sense.

The book divides the history of American appellate courts into three major periods. The first—and the best—is the period of the Grand Style, 1820-1860. The courts then subjected precedents to the three-fold test of "the reputation of the opinion-writing judge," of "principle"—meaning "a broad generalization which must yield patent sense," and of "'policy' in terms of prospective consequences of the rule under consideration." (p. 36). There seems to be much agreement that this was a successful way of handling precedents, although quaere whether part of the success did not lie in there being so few precedents to handle. Then came the period of the Formal Style, wherein "opinions run in deductive form with an air or expression of single-line inevitability." (p. 38). Baron Parke, if we may borrow him for this limited purpose with an assured right of return, and Mr. Justice Peckham, may serve as examples. This was a bad period for appellate courts although the bar perversely seemed to think them good, and, one is a bit shocked to learn, even Holmes "enjoyed the method, the clean
line, the finish of a Formal opinion.” (p. 187). Commencing around 1920 the courts have begun to return in the direction of the Grand Style. Professor Llewellyn hesitates to say that even the greatest have quite achieved this—“we shall use terms more aptly if we speak of today’s appellate judging as being again in the Style of Reason, reserving ‘Grand’ to designate a going unity of the craft work and its evidence” (p. 465)—but at least judges have again become mightily interested in decency, reason, and situation-sense. This happy development is impressively documented by a detailed examination of 304 pages of New York Court of Appeals opinions handed down July 11, 1939, of Pennsylvania cases of 1944, of Massachusetts decisions of 1940 and 1946, of Ohio opinions of 1953, and of twelve “current samplings” from state courts.

Enough must already have been said to convey something of the Toynbeean quality of this book. It has been thirty years in the making (p. 508), and reflects knowledge born of an amount of investigation and study—most of it in areas too much neglected in favor of the more glamorous but less typical world of Washington—never before accomplished and not likely to be repeated in our time. The book has Toynbee’s assured periodicity. Not only is there the division among the three major periods, but each court has its own time chart. “The procedure of Reason,” in full flow in New York in 1939 (p. 135-40), was only “vigorously at work” in Pennsylvania in 1944 (p. 147),2 whereas Ohio was still rather arid in 1953, although “the sense-search phase of the work of actual deciding had in the interim [since 1940] become less inhibited, freer in flow, more happily conscious.” (p. 149). More important, there is the process, suggestive of Toynbee, of taking a single and here not essentially novel line of thought—that courts today have a less wooden attitude toward precedent and a more receptive one toward statute than forty years ago—and making it “attractive and suggestive of broad prospects and profound meanings by the rich stylistic and erudite decoration,”3 with both the defects and the virtues that such a process implies.

Just as Toynbee’s is “a remarkable mind, unusual in our everyday world of historians,”4 so is Llewellyn’s in the world of lawyers, judges, and jurisprudents. As one plows through the work, the accumulation of brilliant insights and analyses overcomes whatever irritation the elaborateness of apparatus, the involution of style, and the occasional arrogance of judgment may have engendered. The book’s own characterization of the work of appellate courts is its own best description—“rich ore, if worked with care.” (p. 132).

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2 There is a further treatment at pp. 310-11 analyzing Slonaker v. P. G. Publishing Co., 338 Pa. 292, 13 A.2d 48 (1940), in which “Horace Stern—a craftsman of parts—had done as pretty and at the same time unassuming a job of classification as one will often find.” For further appreciations of Chief Justice Stern see pp. 344 and 358.

3 GYEL, DEBATES WITH HISTORIANS 170 (1958).

4 GYEL, OP. CIT. SUPRA, NOTE 3, AT 110.
Any picking of plums from this pudding must be preceded with the caveat that even an initial reading will reveal scores of others—that this is a book that will grow. Nowhere have so many wise things been said on a subject of such peculiar interest to an appellate judge—the opinion. On the negative side, the opinion is not at all to “report the process of deciding.” (p. 56). (One wonders how many judges ever seriously cherished this favorite whipping boy of the realists.) Affirmatively, in the course of showing that the opinion writer must often be an advocate with his brethren, Llewellyn provides a catalogue of the opinion’s true functions: “to do a right job as such,” “to let losing counsel see they have been fairly heard,” “to persuade the interested public that outcome, underpinning and workmanship are worthy,” and “to provide wise and cleanly guidance for the future.” (p. 132). Creativeness, in decision and in opinion-writing, is not “limited to the crucial case, the unusual case, the borderline case, the queer case, the tough and exhausting case, the case that calls for lasting conscious worry.” (p. 190). Thus “the beauty of Cardozo’s judging did not consist primarily in production of three dozen transcendent landmarks of MacPherson stature. . . . 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.” (pp. 279-98). The appellate judge must never fail “each time, to take at least one fresh look,” no matter how assured the result may seem. “In most instances the inquiry will draw a blank.” But “it will be a strange clutch of appeals which will not hatch out at least one cantankerous candidate for improvement of rule, or of measure, or of situation diagnosis, whether in substance or in formulation or both.” (pp. 293-94). Every judge knows these “little” cases, in which the lazy or incompetent can get by with nothing, but a Cardozo will make an enduring contribution to the law. Has there ever been so good a description or so exciting a challenge?

Let us turn to another of the countless lumps of ore with a rich metal content—the discussion of the problem that arises where decision “is placed in part on any basis which is dug up by the court itself, but which is therefofore new to the case.” Professor Llewellyn suggests “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.” (p. 325). Although my one experience at the bar with such a case ⁶ left me profoundly convinced that the rehearing was more formal than real, I should accept the suggestion in cases where decision takes a line wholly different from anything argued by counsel, with an exception for dismissals for lack of jurisdiction, a ground regularly overlooked by counsel, whether through ignorance or design, and on which subsequent enlightenment from them is unlikely. Perhaps in theory Llewellyn is right that this practice should also be

followed in the "in part" cases if the "part" be significant, which is surely what he means. The difficulty is that a good appellate court so often sees a plain answer to an appellant's argument which the appellee did not discern, or develops a thought, only dimly suggested by counsel, with research going so far beyond anything presented to it, that in practice an overwhelming number of rearguments, most of them fruitless, would be demanded. Professor Llewellyn suggests the reason for all this when he says that "every one of the many law professor friends who have mounted the bench tells me that the general run of briefs which has come before his court—with of course many gratifying exceptions—seems to him barely and scrapingly passable, or else inadequate or worse." (p. 30). Why this should be so—and I wholly go along with the Professor's professor friends as to the fact—is hard to understand, even if litigation no longer attracts the best men at the bar and economics sets a limit to the time that can be devoted to study and presentation. At times counsel seem to be playing a deliberate game to make it hard for the judge to find the portions of the record on which they rely; and the briefs that miss or neglect significant points of law are legion. The brief that truly dissects the evidence, analyzes the precise precedential value of cited decisions, or places the words of a contract or statute under a microscope, as the court will wish to do, is a rarissima avis—indeed so rare and altogether delightful that the judge must be on his guard not to be overpersuaded when it lights on his desk. Yet the court's duty is to decide each case on its merits, not to award the palm to the lawyer who has done the less ill. Perhaps Professor Llewellyn will some day make the type of analysis at which he is adept to determine the proportion of appellate decisions that are based "in part" on grounds not truly developed by counsel, and whether resoun was not better served thereby. If our court affords a true sample, I think even he would be startled at the number; I hope, and think, he would be gratified at the result.

Professor Llewellyn's study is primarily directed to the state supreme courts—fortunately so because a disproportionate amount of academic energy has been turned elsewhere since Professor Frankfurter's courses at Harvard developed the fascinations of federal law. The only general judgment delivered on the federal courts of appeals is that "with all our judges drawn from the same pools of law schools, lawyers and communities as the State judges," with the beneficent influence of Erie v. Tompkins keeping the Federal judges from falling too far behind the state judges whose decisions they must follow (Mr. Justice Story's wheel has truly come full turn), "with, finally, the Hands and Swan conspicuous for more than a generation as the country's most distinguished bench, it would be a devil's miracle if the work of the federal Circuit Courts of Appeals should have fallen out along significantly different lines." (p. 159). This is modified

6 See the Second Circuit's recent comments on failure to comply with its rule in respect to appendices. Carabellese v. Naviera Aznar, S.A., 285 F.2d 355, 361 (2d Cir. 1960); United States v. Lefkowitz, 284 F.2d 310, 316 (2d Cir. 1960); Ribiero v. United Fruit Co., 284 F.2d 317, 319 (2d Cir. 1960).
rapture, indeed—especially when we find Hough and Sanborn also chosen to rank among Llewellyn’s elect. Part of the explanation may be that the courts of appeals are less their own masters than are the highest courts of the states; Judge Frank has told us that toward the Supreme Court they are “merely a reflector, serving as a judicial moon.” If a case in the court of appeals is truly ruled by a decision of the Supreme Court, it boots not whether the judge regards this as “compatible with sense”; and even in the penumbra he will be properly mindful of the nine big brothers on the telescreen. Beyond this, the courts of appeals have a special problem, arising from the panel system, in handling their own precedents. This problem has recently been placed on top of the table by the statement of Judge Clark’s belief “that in a proper case a panel of this court may frankly state its disagreement with a decision of another panel and refuse to be bound thereby.” The difficulties raised by this are obvious; its merits, if applied with the restraint intended, are likely to be more evident to the initiate, even a recent one, than to the outside observer. This and related problems of the panel system in the federal courts of appeals have been with us for half a century, and now exist in every circuit save the fortunate First and Fourth. Professor Llewellyn hints at them (pp. 35, 225-26, 313-15) but does little more; we should all be the gainers if he would. But we must not be over greedy; in this book he has provided the appeal buff and the appeal decider with fare Rabelaisian in richness and gusto.

Beryl Harold Levy

As well try to catch Niagara in a thimble as review this book in a few thousand words. It is not only that the capacity is insufficient; you miss the whole roar and splash—and the rainbows in the spume. The reviewer has a duty to the reader, however, which requires the author to risk the

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7 Choate v. Commissioner, 129 F.2d 684, 686 (2d Cir. 1942).
9 But see Upton v. Commissioner, 283 F.2d 716, 723 (9th Cir. 1960): “this court could not, except in en banc proceedings, hold in favor of the Commissioner if in another case this court has reached a contrary result in deciding the same question.” Judge Clark’s view has also been criticized in 6 ROEHNER, FEDERAL TAXATION, No. 5, at 33-34, in part on the basis of remarks with respect to in banc procedures by Mr. Justice Frankfurter in Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 345 U.S. 247, 270-71 (1953), and by Mr. Justice Harlan in an address, Manning the Dikes, 13 RECORD OF N.Y.C.B.A. 541, 552 (1958). I doubt that either of these will carry the weight Mr. Roehner puts upon them; the undoubted possibility of overruling a precedent in banc, and the desirability of using that method in many instances, do not necessarily make that the only admissible procedure.

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hazards of a thimbled summary—no comfortable risk even when the re-
viewer is the grateful student of a great teacher here vividly recalled.
Distilled from all its luxuriance of presentation, Llewellyn's thesis might
be starkly stated thus:

The bar has lost confidence in the appellate courts and in its own
lawyering craftsmanship. The oldsters are still bewailing the loss of a
simplistic stare decisis which never really existed. The youngsters, with
youth's characteristic rebellion to extremes, say that if there is no binding
certainty in precedents then there can only be arbitrary waywardness. And
the rest of the bar is cynical about the whole business. The bar doesn't
know what the appellate courts are doing, and doesn't know how to
address them (or appraise them) effectively.

If indeed this crisis exists, Llewellyn holds that it is without real
justification. Arrayed in the unaccustomed robes of a restorer of morale,
our beloved shillelagh-wielding Llewellyn of yesterday here appears in the
role of upholder of the faith. The appellate courts have found their
apologist, champion, and defender. For our author assures us that if we
take the trouble to examine what our top state courts are actually doing
these days we shall be pleasantly surprised. We shall find that day after
day, in the run of the mill of the cases, they are actually operating in the
"Style of Reason." That is Llewellyn's name for a method of judging
which characterized our courts before the Civil War in what Pound called
our classic period. Llewellyn regards this Style as the appellate process at
its best; and he rejoices in its reappearance. The "Style of Reason" is a
method of judging, not necessarily a manner of writing opinions. It be-
comes what Llewellyn calls the "Grand Style" when—as with Cardozo—
the opinion corresponds in quality to the method of judging.

What is this exemplary going method? I take my courage in both
hands and describe it quite simply: lining up the lines of precedent with
good sense for the situation with sound guidance for the future. That is,
in sober fact, what our appellators are seen to be doing regularly nowadays,
if we take a hard look. Some, like Pennsylvania's Horace Stern, have done
it better than others; but it is not a workout only for geniuses; it is the
day-to-day manner of our contemporary courts, which are experiencing a
renascence of the ante-bellum Grand Style. This Style, so the thesis runs,
affords sufficient regularity—a reasonable regularity, not the chimerical
certainty which we never had—to give us a basis for enough "reckonability"
to enable us as lawyers to know what we are about, once the trial is ended,
as we ponder whether to appeal and how to do so most effectively.
Llewellyn has done the back-breaking job of digging up the evidence—may
God give him absolution for all his sins—and he gives us the results of his
mineshafts in detail to see for ourselves.

I would have thought from where I sit that the crisis in confidence is
neither as grave nor as acute as portrayed; that the reasons for such
disenchantment as does prevail do not stem chiefly from the indeterminacy
of appellate decisions; and that cognizance by lawyers of this high Style—if indeed it is as pervasive and delineable as suggested—may help some but will not help overmuch in improving their predictability batting average in forecasting appellate decisions. These doubts being what they may, I am sure of one thing: there never was such shrewd and ample exposition of what goes on in appellate judging and how it goes on. The appellate process—in all its myriad felicities, crochets, and expedients—is laid bare. There is a Croesus' wealth of golden insight for any lawyer, judge, or law teacher. For, after all, Llewellyn has spent the better part of his life teaching about appellate rules, reconstructing them, and trying to understand how they came to be as the product of a legal craft. It is the craft of judging which is here laid out and which the author is desperately concerned to teach. This book is probably the nearest thing we will ever have to a "handbook" for appellate judges—those harassed sons of the law who somehow clambered to the top, each by his own path, with varying accoutrements of talent and equipment, and then found they had to team up together to get this vital work done—no work more vital to the integrity of our society. Appellate judging is the only job of comparable importance for which our society provides no special training or apprenticeship. Surely it is not the woman preacher but the appellate judge who is most like a dancing dog: one is surprised, as Samuel Johnson said, not so much that he does it well as that he does it at all.

Anyone who supposes that I have now told you what is in this book is obviously a stranger to the prolific and ebullient outpourings of our Poet Dedicate. Anyone who supposes that I have read this book—or will ever read it—will be among those who think it is possible to hear everything to be heard in Parsifal or to see everything to be seen at Chartres. I shall leave each reader to his own delights, merely enumerating some of mine: the account of the achievements and the misrepresentations of Llewellyn's American Legal Realism (we are all Realists now, my friend Gellhorn insists, and if it is so, let us bow and bow low to our author); the indignant torment at the scandalous neglect, in our unintellectual times and unphilosophic profession, of air-conditioning minds like Walton Hamilton and Jerome Michael; the appreciation of Jerome Frank's clear-cut separation of the appellate process from trial processes, theretofore lumped together by Cardozo as "the judicial process" and by Pound as "justice according to law"; ¹ the exposure of the neutralizing thrusts and parries of the hopeless canons of statutory construction—a subject which, in my judgment, deserved to have far more attention in a book of this kind today. Each reader will locate his own favorite epigrams, turns of phrase, apercus, doubtless too, his own ambiguities and barbarisms. You read this book for its magnificent architectonic sweep; and you are welcome to your piddling warts.

¹ What gives me a bit of a start is the one sentence epitaph on Frank: "It was a troubled man almost great." (p. 220 n.214). I should rather have said: He was a great man—like the author—because he took our troubles upon him.
It would be a delinquent reviewer who could content himself with simple summary and due appreciation. It is only in the cross-fire of reviewer's and author's views that the reader can reap the reward of his attention. It is tempting, of course, to adopt the cliché of the overweening and announce humbly that even a midget can see further if he stands upon the shoulders of a giant (as to which Sigmund Freud once rejoined: suppose, however, it is a louse in the mane of a lion). I do not see jurisprudence in that metaphor, however, but rather as the play of lights from various corners of the circus tent. Nor have I ever been one to think it necessary to deflate a fellow contributor, even if he is one's teacher, in order to promote one's own views; and I venture to think that that kind of overrebellious reductiveness explains the testy resistance to much of earlier Realist writing—as well as the easy acceptance of much of Cardozo's gentle iconoclasm which lacked this sting. In this spirit I would seek the indulgence of some reorientations.

I would never mount the bed of nails, as Llewellyn does here, and talk about the appellate process in a way that half-kills me as I try to come to terms with Blackstonianism (there is an ulterior “law” and we are “finding” it). Llewellyn tells us that he finds at least a third of our state chief justices impenetrable on this score. I am afraid that for many painful years we shall have to continue to live with this facing-two-ways confusion. If Cardozo had followed Holmes more faithfully, instead of getting dazzled along the way and turning his head back and forth, he would have made things easier for Llewellyn, who is following in the tradition of Cardozo's pioneering exposés of the appellate process. Twenty-five years ago I tried to bring to a sharp head the pragmatism which Cardozo professed (and which he found to be at the center of the common law) by showing that a philosophy of experience ends up as a philosophy of art, because life is a series of reconstructions of problematic situations into more satisfying resolutions requiring the consciously shaping effort of human intelligence. But it was not possible in the severe survival preoccupations of our day to project the idea of the judge as artist, as a truly creative mind. We are having a hard enough time seeing him, in Llewellyn’s way, as the practitioner of a craft with elements half-mysterious, half-invocatory. But if we want to improve appellate methods—shall all things except appellate methods be subject to improvement?—we must not (or, at any rate, must not only) turn our heads back, like Lot’s wife, to a golden age of judging, resuscitated from a day when precedents had not spawned like the sands of the beach and become equally unencompassable. In twenty-five years, enough uniform state statutes, digests, Restatements, treatises, and practicing-law brochures have been produced to give us fair substitutes for much of the chaos of precedents. Today we are in a position to press forward with our Realist revisionism.

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3 Levy, Cardozo and The Frontiers of Legal Thinking 83-111 (1938).
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I have thought it important to stress the distinction between appellators as adjudicators and appellators as lawmakers, and the freedom of judges to make new law deliberately, because I am not at all worried about the degree of appellate indeterminacy—which explains the doubts I expressed at the start—and I have never met a practicing lawyer who allowed himself to be upset by it. I could cite both Lord Macmillan and Justice Cardozo for the proposition that we must recognize that a case could well have been decided either way. If that were not true it would never have reached the highest court. Why should we be surprised when we find an emancipated judicial mind like Thurman Arnold or Jerome Frank functioning in an official capacity with due respect for the momentums of the past and the conventional routines, as needed? The point is that such a mind is free to make the choice—as needed or as not needed. And it is this freedom we must everlastingly preach in a day which Llewellyn's great teacher, Max Weber, foresaw fifty years ago: a day when we are more and more being reduced and regimented and bureaucratized into corporational, union, or governmental cogs; when everything is run by a committee or a team; and when even lawyers have joined the assembly line in our corporation law factories. If we are not to be ground into faceless, other-directed ninnies, and lose the creative individual mentality which is our chief source of strength, we in the law need more, many more, Promethean figures like Llewellyn descending into our midst with blazing torches of light. And we must not let Llewellyn reserve such individuality for himself. We need to develop and encourage outstanding individual judges like, to pick two at random, Lord Mansfield and Justice Black—judges who are on the court team but not sunk into it, not sunk into what can easily become a least common denominator; judges who serve to leaven and lift the team because of the power, originality, boldness, independence, and contemporaneity of their minds. Judges like these are aware of all the factors which Llewellyn shows us play into appellate decisions. But they are far more capable of cutting loose, because they are far more conscious of freedom to do so, while giving to continuities the weight they deserve, but only in a noncompulsive, nonauthoritarian, nonpurblind way.

If the appellate judge, as I have elsewhere earlier suggested, is a three-way artist who remakes the law, constructs an opinion, and pro tanto reconstructs the contours of our society, we must help the judge to do that purposive job better by making the relevant materials more available to

4 "This is an old difference in judgement," Llewellyn writes me, "not only between us." "Your point about the enlarged range given by conscious technique is of course solid," he observes in the same letter.

5 I do not cite them because I feel that we are all still too authority-ridden and that the best service we can do, in a copycat society and a copycat profession which have almost begun to forget the possibility of such a thing, is by a kind of infectiousness to strengthen confidence in the responsibly autonomous mind.

6 LEVY, op. cit. supra note 3, at 83-111.
him, as the law ceases to be a closed system and as the "method of sociology" leads the judge more and more to whatever light is to be found in other social disciplines and in the value impacts of his own day. With such an approach, we would not see Holmes's dissenting opinion in *Vegelahn v. Guntner,* as Llewellyn seems to here, as only an instance of the outmoded Formal Style and a "conservative resistance to the expanding labor injunction" (p. 188), but rather as the beginning of a battle to win the court to the social-minded realism of the prima facie tort approach, which it finally adopted in essence. For with this felicitous approach, the court can squarely weigh the surface tort against its asserted justification and we have open and straightforward judging on the basis of an explicit evaluation of competing social interests struggling with each other in a changing society: what ends will "justify" the union in "damaging" the employer? Ours is the first generation in history, as Alfred North Whitehead in his long perspective has instructed us, which is not in a position to pass down a whole social complex to its children, but in which, within one lifetime, the social complex itself shifts and reshifts many times because of the rapidity of the changes to which we are exposed. That is why the courts must be partial legislators too; and that is why the prima facie tort doctrine is such a powerful and flexible instrument. In our newly-emerging, leisure-oriented, consumer-focused, recreation-pursuing, mass-media society, ushering in the new generation of easygoing Americans, who among us will bring the first case against his neighbor for interfering with his enjoyment of Channel 13 and find an alive court confront the issue squarely by expecting the defendant to spell out adequate justification under the prima facie tort theory?

I would also enter a plea for more attention to plain justice—not only the situation sense which is one of Llewellyn's important emphases and contributions—as an interplaying factor, more of the sentiment of deeply felt justice for the particular party, the suppliant at the bench, who doesn't care how much Holmes "hated" justice but raises his eyes in faith that if the court can possibly give him justice it will, because that is what the courts are there for. The Preamble to the Constitution speaks of estab-

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7 To this end I have proposed the establishment of a "Legal Commission on Social Data," analogous to Cardozo's proposal for a Law Revision Commission, as today's adjunct to his "ministry of justice." *Levy, Cardozo Twenty Years Later,* 13 RECORD OF N.Y.C.B.A. 461, 462-63 (1958).

8 Carrying this insistent Realism also to the aid of the advocate in "reckoning" on how a court will decide, and how it can be helped by him to decide "right," we would not only study all of each judge's opinions in the given field, as Llewellyn tells us Oliphant once did, following a counsel of perfection (p. 391), but also try to penetrate the judge's philosophy, as I pointed out, *Our Constitution: Tool or Testament* xiii-xviii (1941).

9 167 Mass. 92, 104, 44 N.E. 1077, 1079 (1896).

10 Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900). Holmes again dissented, but this time only on the application of the approach he had originally suggested and which the court had adopted. *Id.* at 504, 57 N.E. at 1015. Llewellyn notes as the item of expansion in Holmes's dissent in *Vegelahn v. Guntner,* supra note 9, that it "sought to let a labor union into the 'competition' protection already recognized for business." (p. 188).
lishing justice; there is not a word about making you and me the needless victims of what Llewellyn emphasizes is a case "law" system. I cannot, for example, slough off Judge Bartlett's point in his dissent in *MacPherson v. Buick Motor Co.*\(^\text{11}\) that Cardozo's Grand Style opinion was based too much on the "situation sense": the car was designed to go fifty miles an hour; in the facts of that case it was going only eight miles an hour; was the car a "thing of danger" at that speed? Only prospective overruling can rescue me from this dilemma.\(^\text{12}\)

If any of this seems a bit too streamlined and modernistic for either the author or the reader, I will plead guilty to a partiality for Mondrian and Braque in contrast to Llewellyn's avowed penchant for the Gothic, with all of its elaborate, aesthetically-intoxicating, intellect-seducing brocades. I indulged that preference long ago at about the same time Henry Adams convinced me that the Dynamo and not Mont St. Michel, for better or worse, is the symbol of our age.

But there are many Gothic structures worth half a trip around the world—and this book is one of them. It is our astringent Realist who here holds up to our professional conscience a reminder of the superlative ideal manifested in the way of work of our greatest judicial craftsmen. They exemplify in the "law" of the appellate courts what he exemplifies in the "law" of the inspired commentator—a standard of near perfection of its kind, in each case with the individual-soul stamp of a master spirit.

*Jerome J. Shestack* \(^\dagger\)

Appellate advocacy and counseling enter a new dimension of understanding with the publication of Professor Llewellyn's latest book.

Judge Friendly finds a "Toynbeeian quality" in the book; Mr. Levy sees in it "aesthetically-intoxicating, intellect-seducing" Gothic structure. From the vantage point of a practicing lawyer, what delights me is that at last someone has made clear and communicable the ways of work in appellate litigation. Even more, Professor Llewellyn has made a going *craft* out of appellate litigation. I mean by this that he has revealed a significant body of working know-how centered on the doing of a perceptibly better job in handling appeals. And he has transmitted it in the craft tradition—a tradition that is articulate, conscious, and sensitive and which elicits ideals, pride, and responsibility from the craftsman.

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\(^{11}\) 217 N.Y. 382, 395, 111 N.E. 1050, 1056 (1916).

\(^{12}\) That is not necessarily because Buick was relying on the old rule (although its insurance portfolio might have shown such reliance) but because this case pointed out the need for a change in such a *situation* without the facts justifying the change in *that* case.

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For the practicing lawyer, no matter at what level of appellate accomplishment, this book is sorely needed. The skilled advocate undoubtedly practices along the lines Llewellyn sets forth; and if the theory of his craft is articulate, he will find in Llewellyn confirmation, refinement, and fresh insight. The able lawyer who has not done much verbal accounting for his technique will find that he has not only been speaking prose but doing legal poetry. And the average, unskilled practitioner, who handles appellate litigation without art, craft, or insight, will make the exciting discovery that an effective craftsmanship does in fact exist for him to use in furthering his client's cause and justifying his being as a lawyer.

Beyond all this, the book is aesthetically satisfying. It is easy—and proper—to praise Professor Llewellyn's epigrams, turns of phrase, and bons mots. But they should not be viewed in removable singleness: Llewellyn's beauty lies not in bits but in wholes. His prose, even at the occasional sacrifice of "style," drives to a point, to an insight, to guidance for the craftsman. His mind and pen make vivid the whole vision. There is more in this vision than the graceful structure of know-how—more even than the functional cleanness of serving sense. What the book fulfills is the larger aesthetic need: values, rightness, strength, balance, precision. The entire creative effort is one which reveals beauty in things of law—and there has been so little of it revealed that any lawyer who loves the law must feel grateful to Llewellyn for this alone.

There are three major themes in Professor Llewellyn's book. The first is a demonstration that the widespread loss in confidence in our appellate courts is unjustified and that the work of the appellate courts is reckonable—at least to the extent that any lawyer can reasonably expect predictability from machinery devoted to settling disputes. Mr. Levy, in his review, expresses doubt as to whether a loss of confidence in the appellate courts really exists to the extent indicated by Llewellyn. I for one have no doubt of it. Talk to any group of lawyers about the appellate courts and you will hear the dirge of the wayward and willful decision. It is, therefore, a significant contribution to expose the dirge as a false folk song. In doing so, Llewellyn deals not with a few unusual cases, but digs convincing evidence from run of the mine cases which are the lawyer's daily job. At the minimum, Llewellyn succeeds in giving a horse-sense assurance that the machinery is such that some reckonability ought to flow from it; at best he rekindles faith that the craftsman can marshal and utilize the factors which will manage moderate reckonability.

While I accept fully Professor Llewellyn's thesis that practicing lawyers today have lost faith in the appellate courts, I am not sure that he has fully assigned the blame for the lack of confidence. He ascribes it to "the desultory character of each lawyer's attention to any but odd cases and sequences from his own supreme court which seems to . . . [be] the largest factor blinding . . . [practitioners] over the past thirty years and more . . . to the patent truths about that court's ways of going
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about deciding; to which one adds that there tends on this matter, within a State bar, to be rather little gathering and cross-stimulation of observations as between the captive slaves of the various specialties—except, of course, possibly, in terms of results; not of process.” (p. 141). While this is true as far as it goes, I think that to understand the man we must look at the child. I suspect that the genesis of much of the bar’s loss of confidence in the courts lies with the law schools. Anyone who went to law school during the last twenty years suffered substantial exposure to hunch theories of decision, to schools of thought that count the judge’s gastronomy as part of the judicial process, to the misinterpretation of Realist and sociological jurisprudence, and to the frequent penchant of the younger law professors to show what dolts judges are. All this has invariably had its corrosive effect. I recall Professor Llewellyn once telling his class in jurisprudence that it takes twenty years for a man to unlearn what he learned in law school.

A second theme is the demonstration of how the common-law tradition functions in our appellate courts and the lessons which that tradition has to offer. For some reason Llewellyn, in stating his own goals (pp. 1-7), seems to slight this theme. It may be that the first theme requires the harder sell, and that Llewellyn decided not to divide his readers’ attention in the initial statement of his case. That decision seems to have departed from the author’s own advice on the importance of having each case seen as a whole. (pp. 238, 245, 285-7). Be that as it may, if you center on the stuff of the book itself, the warp and woof of the common law tradition is there to see. In every page, Llewellyn leads the reader to see what is going on about him, to operate knowingly, and to appreciate the common law tradition in which the machinery of work is healthy, in which formalism does not hide reason, and in which directness, fluidity, vigor, and sense function together.

Llewellyn’s vision is that of a grand tradition at work. In a lovely passage he says (pp. 401-02):

What I see around me, at work, and what I take pride in, is a way of deciding in which the materials and structure of doctrine (case law and statute, each) contain, as part of themselves, along with words of command to courts, elements of reason and of purpose within the flexible leeways, not only to work toward wisdom with the materials, but again within flexible leeways, to reword the material themselves into wiser and better tools for tomorrow’s judging and better guides for tomorrow’s counselor and law-consumer. In the execution of this duty I have tried to make clear that three properly controlling factors tower each alone, and geometrically in their product,

1 In his title Llewellyn significantly makes “The Common Law Tradition” the lead, and “Deciding Appeals” merely a subtitle.

2 This is an obvious printer’s error in a book which otherwise seems to have been printed with commendable care. I might add that the book has an excellent index which permits easy tracing of subjects and concepts.
above the will or individual urges even of a Gibson or a Mansfield—than whom I know no more powerful or restive stallions of the law. Those three factors: (bridle, breaking to harness, and guiding hand on the reins)—are the doctrinal structure, the craftsmanship of the law and of the office, and the immanent rightnesses, largely to be felt and found, which are embodied in the significant type of situation up for judging. These three handle man and court; they set man and court free by turning them, in first instance, into officers and voices.

I know of no single passage anywhere which better voices the credo of the common law tradition.

The third major theme is the one I mentioned earlier as being of particular interest to the practicing lawyer: that craftsmanship is possible in appellate litigation. Here, the practitioner, even if unaroused by the other themes, will find much to satisfy him. Each chapter supplies material for usable and valuable judgments and for an effective and satisfying craftsmanship in handling appeals. For example, Llewellyn discusses the various factors which make for depersonalizing the appellate decision-making process. These include a frozen record, a known bench, law-conditioned judges, the period-style of the bench, group decision, and recognized techniques. (pp. 19-51). These factors are not new, but their effect is impressive when they are skillfully brought together. I would think that any lawyer would want to know and use them, one way or another, in handling an appeal.3

In another chapter called “The Leeways of Precedent,” Professor Llewellyn unfolds the wide range of techniques open to an appellate court even while it “stands” on past authority. Llewellyn uses the broad range of leeways available for handling precedent primarily as a springboard for demonstrating his thesis that the vital steadying element among branching doctrinal possibilities is recourse to the sense which ought to control in a given type-situation. But these usable leeways also serve another and more practical purpose; they suggest the range of effective craftsmanship that is available to the appellate lawyer. Here is a virtual workbench of technical tools which an advocate can utilize to shape decision. Some of the tools have been infrequently used; but all are available, and in the hands of the skilled craftsman they must be reckoned with.

A chapter on appellate argument is especially rewarding after the typical essays on the subject which abound in advice on decorum, humor, apparel, and other bromides obvious to the first year moot court litigant. Llewellyn leaves the banalties for others and handles the areas in which help is really needed. He advises advocates that it is not enough to have

3 Although Professor Llewellyn’s study is addressed primarily to the advocate there is obviously comfort to be derived by the counsellor from an accurate conception of the way in which appellate courts decide. The chapter (pp. 178-99) on the theory and function of rules of law should be particularly useful to the office lawyer.
a technically perfect case on the law: there is almost always a technically perfect case on the other side; hence, acceptance must turn on something beyond technical soundness. The central job of the advocate is to satisfy the court that sense, decency, and justice require the rule for which he contends in the type of situation presented and in the concrete dispute between these parties. Most of the chapter is devoted to how the appellate lawyer can best perform this delicate and difficult task. Llewellyn handles other tough ones too. What should be done, for example, when the established rule sings loud and clear against you? A number of illuminating ways for dealing with ingrained rules are given, and illustrated by concrete examples. (pp. 246-50).

I wish that Professor Llewellyn had devoted more than one chapter to oral argument, since obviously he has the resources for more. Indeed, except in this chapter, he rather underplays the advocate’s role in enabling courts to appreciate the sense of the situation to which courts will favorably respond. He correctly stresses that the situation and its sense of equity operate on a judge only so far as the judge understands it; but I would have welcomed a fuller discussion of the importance of advocacy in developing that understanding. Let us hope that these and other subjects for which Professor Llewellyn whets our appetite will be developed in books to come.

As Mr. Levy has observed, anyone who supposes that a review—or even three—can capture the range of this book is a stranger to Llewellyn. I have mentioned some major themes. There are many significant minor ones interweaving and adding harmony to the entire composition. Space demands an end to illustration, but I cannot refrain from mentioning Llewellyn’s clearing up the long-standing confusion about just what Realism was and is in the law. After the endless debates back and forth

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4 Judge Friendly, from his vantage point on the superb Second Circuit, indicates that his court more than occasionally decides cases, at least in part, on grounds not suggested or developed by counsel. But his court is hardly a true sample of the appellate bench. The Judge suggests that this question might some day be analyzed by Llewellyn. If that suggestion is followed, I hope he also will explore the extent to which appellate judges go off the track when they decide cases on grounds not developed by counsel. Knowing the facts not in the record often gives counsel a feel for what appropriately should not be argued or decided. My own experience with what judges do sua sponte has not been reassuring. At the very least, where a court finds a controlling ground which was not argued, I believe that the adversary system requires that an opportunity be afforded for written or oral argument addressed to that ground. Professor Llewellyn makes this suggestion which Judge Friendly accepts with a limitation in which I concur. Perhaps the problem of deciding on grounds that were not argued would be largely eliminated if appellate courts would do more preparation before argument. Decent advance study should, in most cases, uncover any pertinent grounds not suggested by counsel in their briefs; there would then be the opportunity for confrontation at oral argument, with additional briefs thereafter if required. Judge Friendly’s plaint at the slothful lawyer is matched by my puzzlement at appellate judges who come to oral argument with no more than a cursory glance at the briefs and none at the record.

5 At the minimum, this volume suggests two others: the common law tradition as it works in practical democratic government, and beauty in the institution of the law. In addition to the book’s hints on these subjects, Professor Llewellyn has already done the spadework in The American Common Law Tradition, and American Democracy, 1 J. Legal & Pol. Soc. 14 (1942) and in On The Good, The True, The Beautiful, In Law, 9 U. Chi. L. Rev. 224 (1942).
in countless law reviews, at last to find it explained simply in some four
pages (pp. 508-12), is refreshing and remarkable.

This book was not designed for casual reading. The perceptions are
often so novel that they are not absorbed in the first reading. After so
much famine in this area it is not easy to digest a feast. The book requires
attention, sustained attention. Is the effort worthwhile? Leave aside the
intellectual curiosity, the joy of understanding the institution in which we
labor, and the fun that comes when sudden cross-lighting reveals scenes
otherwise too familiar for notice. If you consider bald practicality alone,
here is a book that makes possible greater predictive power; here is learning
that leads to an increase in the craftsmanship of handling an appeal. For
the practicing lawyer, there can be no question but that this book offers a
rewarding and exciting experience.