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The Common Law Tradition: Deciding Appeals, by Karl N. Llewellyn

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BOOK REVIEWS

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

Rabelais, in his sixteenth century satire on the Renaissance, portrays how "Judge Bridlegoose" decided law cases by "the chance and fortune of the dice."¹ Although Rabelais's satire has been called "incisive but essentially good-natured,"² the taunt now directed at the Bar and Bench that law cases currently are decided by the chance of how judges happen to wish to decide, is too serious for jest. Yet, when we come to defend against the taunt of chance decisions, what shall we deny and what shall we assert is in fact the case? If elements of chance in the making of decisions are admitted, what kinds of remedies should be proposed?

These questions become important in considering Professor Karl N. Llewellyn's recently published "The Common Law Tradition," a book bearing the sub-title "Deciding Appeals." In it we find a vigorous attack made in homespun language frequently teeming with excitement, upon what we are told is the worry of the Bar as to whether there is any "reckonability" in the work of our appellate courts, whether there is any real stability of footing for the lawyer in appellate litigation or in counseling, and whether there is any effective craftsmanship for the lawyer to bring to bear to serve his client and to justify his being. The Bar's ill founded worry of the lack of "reckonability," Llewellyn contends, brings us face to face with a crisis in confidence. He tells us that the work of our appellate courts all over the country not only is reckonable, but is so on a relative scale, far beyond what any sane man has any business expecting from a machinery devoted to settling difficult disputes.³

Llewellyn states that today's typical appellate judge is interested, first of all, in getting the case decided *right* within the authorities, and that it is this goal which gives the main drive and direction to his labors. Illustrations are given of the judges' concern for "Sense," "Wisdom" and "Justice," for a standard of wisdom, rather than a personal standard, and for the employment of what Llewellyn calls "horse sense." The

1. Rabelais, Gargantua, Book III, Ch. X (1550), reprinted in COHEN & COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 440 (1951).

2. COHEN & COHEN, *supra* note 1 at 440.

3. Pp. 3-4.

latter is "that extraordinary and uncommon kind of experience, sense, and intuition which was characteristic of an old-fashioned skilled horse trader in his dealings either with horses or with other horse traders." Llewellyn is aware of possible and actual miscarriages of justice. In criticizing an important case, he does not hesitate to describe the result as "another instance in which shrewd appellate advocacy has sold a pup to one of the best of our judges."⁴

Llewellyn attacks what he calls a baleful line of reading, thinking and teaching, leading to the false conclusion that courts can and do decide any way they want to and then write opinions to suit. He seeks an answer to the lawyer's question as to how an appellate tribunal arrives at the particular and concrete answer in a particular and concrete case. He lists and discusses fourteen of what he calls major steady-ing factors in our appellate courts, namely: "law-conditioned officials," "legal doctrine," "known doctrinal techniques," "responsibility for justice," "the tradition of one single right answer," "an opinion of the court," "a frozen record from below," "issues limited, sharpened and phrased in advance," "adversary argument by counsel," "group decision," "judicial security and honesty," "a known bench," "the general period-style and its promise," and lastly "professional judicial office."⁵

In a discussion of "The Leeways of Precedent," he argues against what he calls a basic false conception that precedents will in fact and ought simply to dictate the decision in the current case. He observes that this false conception of precedents casts our style of legal argument in its mold, and that this "misimage seduces counsel into judgment and behavior based on the crazy premise that if you have a good case on available doctrine you *therefore* have a winning case. . . ."⁶ We are shown that the "Grand Style" recognized that "The reason and spirit of cases make law, not the letter of particular precedents," and that our precedent-system still is what it has so long been: a system of guidance and suggestion and pressure, and only on occasion a system of dictation-control. Some sixty-four categories are listed by which courts use precedent techniques. Most of the techniques are used legitimately but some of them are used illegitimately.⁷

In considering "Situation-sense and Reason," Llewellyn stresses what he calls the differential impact of the facts of the individual case as compared with the facts of the situation taken as a type. He quotes

4. Pp. 41, 59, 201, 440.

5. Pp. 13, 19 ff.

6. P. 62.

7. Pp. 63, 75, 77 ff.

with approval "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 within itself its appropriate, natural rules, its right law. . . . The highest task of law-giving consists in uncovering and implementing this imminent law.'" Illustrations are given from the decided cases to show what is called the unceasing thrust of the situation-facts toward a fair solution and toward application, development or readaptation of doctrine to decent ends.⁸

Noting that the function of the opinion is not to report how the decision was arrived at, he concludes that many opinions are written to convince other judges on the same bench of the soundness of the opinions, ("to pick up votes, or to hold votes"), and that the opinion is intended to do a right job as such, to let losing counsel see they have been fairly heard, to persuade the interested public, and to provide wise guidance for the future. Cases from various states are praised in terms of the situation-sense and reason which the courts applied. The reader is expected for the most part to find the meaning of these terms if he finds himself in agreement with the cases.⁹

In a chapter on the "Reckonability of Results: Theory of Rules," the author formulates what he calls laws of "Compatibility" and "Incompatibility," and of the "Singing Reason." He contends that unremitting labor by courts in the "Grand Style" means a cumulative output of rules ever sharper in form, ever sounder in substance. Yet he suggests that measured against the large inept or obsolescent stockpile of existing rules, the task is still one for generations. What we need, he says, is ". . . that certainty *after the event* which makes ordinary men and lawyers *recognize as soon as they see the result*, that . . . it is the right result." He considers that advocacy informs the court at the appellate stage about wise choice of concepts and about the consequent rule. At times the advocacy is done so persuasively that "the court turns its back on the plain text of a statute to strong-arm an exception which the legislature has lacked the knowledge and prudence to provide."¹⁰

In a chapter entitled "Appellate Judging as a Craft of Law" he attacks various misconceptions about the appellate judging process and suggests some explanation for them. The misconceptions include the notion that deciding, even in the tough case, can be essentially an intellectual or intellectualizable process. He urges that appellate judging

8. Pp. 121-122, 125.

9. Pp. 132 ff.

10. Pp. 178 ff, 183-185, 212.

is a central craft of the institution of Law-Government and that a healthy craft elicits ideals, pride and responsibility in its craftsmen. The task of the lawyer contemplating an appeal is described as the exploration and comparison in his imagination of the various lines of attack open to him after he has found the sense phase of his cause not to be an insurmountable barrier. He urges that it is the counsel's business to get into the pleadings and the proofs material which makes the situation come alive to the court, explain itself and educate the court into such sympathetic appreciation of the situation that the court will be able to discover or at least to recognize its "imminent law."¹¹

In his chapter on "Argument," he contends that the cases showing how the appellate courts do their work can instruct the lawyer not only on how to help them do it, but on how to help them do it in his favor. He gives what he calls "Seven ABC's of Appellate Argument," and observes that there frequently is an equally perfect technical case to be made on each side. Since the struggle then will be for court acceptance of the one technically perfect view of the law as against the other, he says that acceptance will and ought to turn on something beyond "legal correctness." He ends his seven "ABC's" with the "Principle of Concentration of Fire," pointing out that even two or three points can prove troublesome as dividers of the court's attention unless a way can be found to make them sub-points of a single simple line of attack. He cautions against dealing simply with the appellant's points as the appellant made them, urges oral argument and the use of a brief proffering the court an "opinion-kernel" so put as to demand "to be lifted into the opinion." He concedes to the advocate that his task in the run of cases is to win the case for his client, not to improve the law; and that a truly right rule for the future is neither to be demanded nor expected if the client's case might be disserved thereby.¹²

A chapter is provided on "Conclusions For Courts." They are cautioned against deliberately turning their backs upon pertinent but uncomfortable authorities, as a "sin against the nature of our case law." The author inquires whether articulate rules for the work of the appellate courts would handicap or further their job. In this connection he mentions the old tale of the centipede who, on pondering how he managed the coordination of his legs, discovered in panic that he no longer could. He does not fear that articulate principles of appellate judging would impair judges' work and concludes that there is a need for a conscious

11. Pp. 213-219, 227, 232.

12. Pp. 236 ff, 244.

working philosophy of the craft of appellate judges.¹³

In an Appendix the author summarizes and defends what he has written and has tried to do. He states that he puts the book forward "as a solid and unmistakable product and embodiment of American Legal Realism." He contends that "Realism" never was a philosophy but rather was and is only a method. He notes requirements of the method such as—"See it fresh"; "See it as it works." From such requirements, one goes on, he says, to the inquiry about "What it is for (function or goal). . . ." ¹⁴ The "reckonability" claimed for the appellate process needs to be judged from these points of view.

Yet it should be noted that for Llewellyn the existing body of legal doctrine includes not merely the very elaborate body of rules of law in statutes and in judicial opinions, but also the accepted lines of organizing and seeing these materials; concepts, "fields" of law, pervading principles, living ideals, tendencies, constellations, tone.¹⁵ With so much included in the notion of legal doctrine, the material available to appellate courts to enable them to determine what they ought to do in deciding appeals and available to counsel in order to reckon what the courts will do, has few limitations. The difficulties of the courts as instruments in a system of government are compounded, since as Llewellyn recognizes, the system serves issues to them "only a tiny slice at a time, and leaves the choice of the particular tiny slice to happenstance, to such accidents as which kind of a dispute happens to break out first, with also at least one party on one side who is obnoxious or a lion or insolvent or else in the hands of a lawyer either signally inept or preternaturally able."¹⁶ Under these circumstances, the meaning of "reckonability" as applied to the appellate process is highly complex.

"Reckonability" on other than a very rough and ready basis would seem weak unless it contemplated the prediction of both the outcome of an appeal and the achievement of the rightness, the wisdom and the sense for which the courts strive. Unless such dual "reckonability" is possible, the denial of chance decisions has little significance. An assertion that the appellate process generally results in chance decisions presents a claim that there is no or insufficient connection between the appellate method and the assumed ideals. Such an assertion, Llewellyn of course, would deny. On the other hand, an assertion of "reckonability" should urge a connection between the employment of the method

13. Pp. 256 ff, 264, 267.

14. Pp. 508-520.

15. P. 20.

16. P. 263.

and the achievement of the recognized ideals and should imply an ability on the part of lawyers to "predict" that courts will decide as they ought to decide. Assuming that the book makes such an assertion, it may be observed that there is a clear distinction between a prediction of the outcome of litigation and a determination by the judge of what the outcome ought rationally to be.¹⁷ Since a chapter in the "Common Law Tradition" is devoted to "Argument: The Art of Making Prophecy Come True," we may ask what happens if the lawyers on both sides of the same appeal read the book and especially study this chapter. Since ancient times, the techniques of rhetoric and eristic have been fairly well defined. We know that men consciously can engage in plausible reasoning or reason from false premises to achieve victories. All would agree that the appellate process contemplates the detection of such techniques and the avoidance of the victories such techniques seek to obtain. Neither Llewellyn's insistence that Realism is a method, and not a philosophy, nor his description of its approach offers sufficient help to meet the demands of the appellate process.

In the light of such problems it seems to this reviewer that a larger framework and more unifying concepts than we have been given are needed for an appellate method even tentatively adequate for the accepted goals of wisdom, justice, sense and the reduction of miscarriages. In the formulation of a method of deciding appeals, greater note can be taken of prior studies to present the larger structure and the concepts within which human reason and human language must operate. Assistance seems possible by invoking analogies between problems in making ethical and moral decisions, and legal decisions. For example, the question whether these are "emotive" or "cognitive" needs to be faced. While the tenor, if not the language of Llewellyn's discussions seems to deny mere emotive significance for judicial decisions, at times Llewellyn seems to be assuming some non-empirical sources of knowledge, some mystical ability, if not to know what justice is, then at least to know what is unjust. With proper allowances for Llewellyn's position that he is dealing with "ABC's and is trying to keep his key terms fittingly blunt and simple," judicial method requires a better theoretical structure than indicated by the explanations that "our appellate courts *are* interested in and *do* feel a *duty* to the production of a result which satisfies, placed upon a ground which also satisfies," and that "One can indicate this crudely as the presence of a felt duty to Justice, a felt duty to The Law

17. See Hampshire & Hart, *Decision, Intention and Certainty*, MIND, Jan. 1958, p. 1.

and a third felt duty to satisfy both of the first two at once, if that be possible."¹⁸

The author believes that the general idea of "Justice" has little direct effect in the daily operations of the courts. He prefers to view the judges' task in terms of avoiding unfair or unjust results, and suggests that words such as "fair" and "right" "come close to the flavor of the justice-duty as it cooks and works in the men."¹⁹ Llewellyn makes clear that he is engaged at this point, not in analysis but in the description of processes as they work. Yet one may question whether the terms and distinctions which he prefers, make any substantial contribution to the description of the processes. However great the desire to keep key terms blunt and simple, the need persists to apply more philosophical thinking and the teachings of Jurisprudence which Llewellyn knows so well, to the problems with which he deals.

Accepting his statement about his work—"A job is the job it is, and it is not any other,"²⁰ we may ask how his many helpful and stimulating generalizations and insights perhaps may be seen in a different perspective and with a different emphasis. His insistence on the recognition of the case resources available to the judge and advocate, the skills which are possible of attainment by them if they focus attention on the cases and the problems and permit these to filter through their own psyches, his rejection of the fear that conscious self-critique by judges and lawyers will cripple or kill the better doing of their jobs,—all these and more—are highly valuable. Yet his devotion to such terms as "craft" and "craftsmanship," "horse sense," "situation-sense," "singing reason," "opinion-kernel" and others, often suggests an inadequate acceptance of the intellectual process. There seems to be a glorification of a human ability, unaided by other than craft techniques, to intuitively recognize right and wrong judicial decisions. Intellectual and intellectualizable processes include far more than logical deduction. Their role in the law can be great even if, as Llewellyn contends, there could be two right answers to a case, or even when selection of the answer depends on the circumstances.²¹

A recent analysis of moral judgments stated:

The age of innocence is over; Descartes' Discourse on Method imposes epistemological sophistication on us; we are no longer

18. P. 59.

19. P. 60.

20. P. 516.

21. P. 213, n. 206.

free to assume naïvely that we have knowledge without the epistemological enquiry into its sources and tests.²²

Of course, Llewellyn was not required to adopt such an approach. What he has written so earnestly and emphatically deserves careful reading and re-reading by both the Bench and the Bar. Yet we may recognize that the appellate process is increasingly facing methodological problems of tremendous scope and importance. For example, there is the problem of the relevancy to a decision of competing knowledge claims, as illustrated by the question as to why the pain to negro children from school segregation is constitutionally decisive, while the threat of social disorder from school integration, even if true, is properly rejected. Developing a logical structure to exhibit the relationships between such competing claims may provide further progress in the "reckonability" with which Llewellyn deals. To achieve such progress, better tools are needed.

A number of recent analyses have application to the task Llewellyn is pursuing. For example, Hall has referred to Austin's quarrel with the intuitional school which asserted that man has an instinct or sense of justice which instantaneously recognizes and approves the good and disapproves the bad. Hall points out that Austin insisted that a theory of morality was fallacious which could give no reasons for such approbation and disapprobation, other than ascribing them to an innate instinct. Hall concluded that it makes little difference where one's thinking begins; that what is important is where and how it ends, and even more, that inquiry proceed without inhibition as to its scope or character and without deliberate intention to support a particular school of thought; and that unfortunately, however sincere the endeavor, equal sensitivity to reason and reality remains largely an ideal.²³

Northrop's conclusion in his recent analysis of "The Complexity of Legal and Ethical Experience," that one's philosophical theory of the ultimate nature of reality, and of man as a factor in reality, defines his values,²⁴ also would seem to be relevant to problems in deciding appeals. If this is the case, responsible reckonability would be enhanced by making explicit the philosophical theory a method assumes. The importance of such explicitness is emphasized if appellate method is considered from the points of view expounded by Hampshire, in his

22. Schuster, *Peter Glassen on the Cognitivity of Moral Judgments*, MIND, Jan. 1961, p. 97.

23. Jerome Hall, *Reason and Reality in Jurisprudence*, 7 BUFFALO L. REV. 361, 403 (1958).

24. NORTHROP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE, 233 (1959).

"Thought and Action." We are reminded that one may picture to himself various courses of action, but that he cannot, without some aid from conceptual thinking, deliberate upon alternatives—he only can rehearse them.²⁵ Judicial reflection, like other instances of reflection may explore alternatives better if it is aware of the classification it has accepted in making the exploration. Hart's classification of human actions with which law deals, in terms of description and in terms of ascription of responsibility for actions, also would seem a vital one in considering the appellate process.²⁶ Indeed the entire field of Jurisprudence and the philosophy of science may offer helpful and needed analogies for the judicial appellate process.

Conceding to the author that—"A job is the job it is, and it is not any other," the problem remains as to how the decision of appeals can avail itself of knowledge from all disciplines which can contribute to law. The ancient Greeks, Hampshire tells us in another context, "were fascinated by the intelligence manifested in a craft, which they saw to be so different from the articulate and verbal intelligence of the law court and the assembly, or from the exactly communicable calculations of doctors and mathematicians."²⁷ Whether or not the Greeks were correct in seeing the intelligence of the law court, of the assembly and of doctors, as different from that manifested in a craft, the needs of today demand more than what ordinarily are called "craft-skills," in the presentation and decision of appeals. Yet it matters little what terms are used to emphasize the skills required for the appellate method which Llewellyn seeks to formulate. The development and clarification of a philosophy of appellate method must be a continuing challenge if the long range results of the method are to withstand critical reflection.

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25. HAMPSHIRE, *THOUGHT AND ACTION* 220, 214 (1959).

26. Hart, *The Ascription of Responsibility and Rights* in *LOGIC AND LANGUAGE* 145 (Flew ed. 1952).

27. HAMPSHIRE, *supra* note 25 at 193.

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