

do justice in a particular case and to make good by our individual research his shortcomings, we are not only called upon to do work that is not properly ours but we are deprived of the benefit of the argument of opposing counsel as to such new matter.⁷

Surely lawyers would be surprised at the amount of independent research, beyond authorities set out in briefs, that judges must do in almost every case. It would certainly be helpful for lawyers to read and follow the advice set out in the chapter on argument, pages 236-55 of this book; and it would also be most helpful to the courts for some of these suggestions to be followed. An appellate judge has great satisfaction in finding a case well briefed by both sides.

Professor Llewellyn's main theme is that in deciding cases appellate judges are getting away from the formal style of 1860-1920 (opinions which "run in deductive form with an air or expression of single-line inevitability")⁸ and are returning to what he calls the Grand Style of the Common Law, the style of reason, which he says prevailed prior to 1860. In explanation of this style, he says:

[T]hree properly controlling factors tower each alone, and geometrically in their product, above the will or individual urges . . . [of judges]. Those three factors: (bride, 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 rightness, largely to be felt and found, which are embodied in the significant type of situation up for judging.⁹

Undoubtedly most judges seek to reach results which conform both to legal rules and to reason; results they feel are both good law and good sense. To do so they must consider precedent with good sense for the situation involved and with a view to sound guidance for the future. This is the essence of the Grand Style explained by Professor Llewellyn and the theme of his book is that the tendency of our appellate courts now is in this direction.

The Pursuit of Reckonability—Horace S. Haseltine*

The practicing lawyer is vitally interested in anything which will enable him to predict to a particular client what precise rule of law will be applied in that client's specific case. In his sometimes precarious business of trying thus to divine the future, the lawyer often longs for a workable set of crystal balls, tea leaves, or other exotic

7. Vanderbilt, *The Record of the New Jersey Courts in the Fourth Year under the New Constitution*, 7 RUTGERS L. REV. 317, 318 (1953).

8. P. 38.

9. P. 402.

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forecasting devices. Karl N. Llewellyn does not claim to have discovered¹ such a handy-dandy divining device, but in one remarkable book, *The Common Law Tradition*,² he assembles a host of techniques which, if carefully studied and regularly practiced by bench and bar, would, in this lawyer's opinion, serve as a satisfactory substitute.

Llewellyn urges upon the appellate judge a conscious and continuous rededication to specific goals.³ He pleads for a return to the *overt* use of a number of decision producing techniques, which characterized the Grand Style of Judgeship.⁴ A soul searching process of judgment analysis *before* an opinion is published is enjoined upon the author of each opinion. Llewellyn also suggests to the appellate lawyer a host of case-trying persuaders designed to help the appellate court reach justice in his favor.⁵ If the appellate courts were to standardize Llewellyn's step-by-step appeal deciding procedure, the lawyer, who must travel the same route and reach the same result *in advance* of the appellate court, would have a check list of questions readily available.

1. Indeed, he insists he has not "discovered" at all, but preaches "the neglected beauty of the obvious." LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 339 (1960) [hereinafter cited only by reference to page].

2. *Ibid.*

3. Llewellyn has not written a condemnation—quite the contrary—he recognizes the great problems faced by the courts. P. 293. He states that no "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." P. 199. (Author's emphasis.)

4. P. 5.

5. Pp. 237-55. Llewellyn lists a number of rules designed to make "prophecy come true." He insists: (1) a technically perfect case alone is insufficient, especially where the (2) facts do not fit clearly into the rule; and (3) where the "technically perfect" case on the law is at odds with sense and reason, the case is in jeopardy, but (4) where the "technically perfect" case makes obvious sense, the appellate lawyer is likely to succeed on appeal. In any event, (5) the lawyer should carefully "frame the legal issues" in the statement of facts, and (6) a "simple pattern" should be sought on the facts and on the law (two or three points are sufficient). Moreover, (7) the fire should be "concentrated"—all points should be integrated by subpoints into a *single* line of attack. He recognizes the (8) obligation and opportunity of oral argument. He recommends the drafting of (9) the carefully phrased "opinion-kernel" which can be used by the court. He repeats that (10) the strength of the appeal is in the presentation of the situation-sense behind the rule, and (11) if there is a rule supported by reason *against* the appeal, then the only hope is confession and avoidance by shifting the background or by a side-step. He emphasizes that (12) the court, which will decide, must be carefully studied. Finally, (13) an exhaustive and astounding chart of thrust, parry and counter-thrust canons of statutory construction is presented at 521. For a detailed discussion of the appellate brief tailored for Missouri practice, see the excellent article by A. P. Stone, Jr., then presiding Judge, Springfield Court of Appeals, *Effective Appellate Briefs*, 15 J. Mo. B. 80 (1959).

Here we come to the tool which fairly leaps from his pages—*questions!* A deluge of questions! Questions for the bench and questions for the bar. Questions which probe and search out the blind spots. Questions which lead and guide. Questions which warn of dangers. Questions which set the mind at rest. This practicing lawyer sees in this book a catechization of the appellate process—and the first question is—

WHY DO APPELLATE COURTS EXIST?

Why *do* appellate courts exist? They exist because there is *doubt*. Double doubt! There is doubt as to the proper decision on the facts of the particular case. This flags a larger doubt in the law itself in the area from which this case emerged. As his major premise, Llewellyn asserts that appellate courts exist:

- (1) To decide particular cases;
- (2) To render decisions in harmony with good sense and justice;
- (3) To render decisions moderately in accord with the doctrine of the past;
- (4) To express the decisions in clear, frank, forthright opinions which will (a) deal fully and fairly with the authorities of the past and (b) overtly treat the situation-sense and justice factors compelling the result;
- (5) To take a fresh-new look at each rule enunciated;
- (6) To produce clean guidance for the future.

The author demonstrates his thesis by samples from the work of an illustrious company of great judges of the past who accepted these goals and mastered the judicial techniques out of which the immanent law has emerged. He does not expect all judges to match the work of the immortals; but does urge that these great judges used *learnable* techniques in their judging and in articulating those judgments.

In this regard it is well to remember, lest we become overcritical, that the appellate court is always at the frontier of the law. As on any frontier, we can expect there will be discord; the most we can hope for is a gradual approach to order and reason in any given legal area. It would be absurdity to expect a whole framework of legal principle to burst full-blown out of the first attempt at judicial expression.⁶ On the other hand, the appellate judge holds such awe-

6. Llewellyn suggests a two-stage attack upon difficult problems, wherein the problem is signaled in the first opinion. P. 305.

some power⁷ and is answerable to no one in this world except for most flagrant abuse. Shouldn't each decision and opinion be tested against the goals of good judgeship before it is released? Even before the judge decides and writes, shouldn't he set the tone for his judging by a sort of personal judicial *voir dire*?⁸

ALWAYS A FRESH NEW LOOK

Does the judge have preconceived ideas as to the law of this case? The absence or presence of preconceived ideas in the mind of the judge is neither condemned nor favored. If such exist they should be recognized. More than this, there should always be a willingness to take the fresh, new look at the situation. The best rule is not always readily apparent. Like the goodness described by Lao-tzu, the best rule is often like water, choosing the lowest places, hidden; and you know it is there only by the greenness upon the bank.

MARSHALLING THE RAW MATERIALS

The elements from which decisions are fashioned are: (1) the facts of the case; (2) the authorities of the past; and (3) the background situation out of which the case arose. Have all essential facts in the record of this case been assembled? Have those facts been fully and fairly considered?⁹ Have the applicable authorities of the past been collected?¹⁰ Does the judge possess background knowledge and experience in the area of life from which the case arose?¹¹ If the judge can answer "Yes" to all of these questions, he is ready to decide.

7. "[I]f the appellate courts should ever take to doing daily what they have absolute and unchallenged power to do sometimes, we should have to get rid of the guilty judges; we might in the process and for a while get rid even of the courts." Pp. 219-20.

8. Llewellyn's suggested judicial slogan of the fresh new look is reminiscent of Jonathan Edwards: "Resolved . . . that I will be impartial to hear the reasons of all pretended discoveries, and receive them, if rational, how long so ever I have been used to another way of thinking." HAWKSLEY, MEMOIRS OF THE REV. JONATHAN EDWARDS 36 (1915).

9. Llewellyn emphatically condemns the admittedly disappearing illegitimate technique of twisting or ignoring vital facts whether in the record of the case or in a prior authority. P. 27, n.18.

10. This contemplates more than decisions from a particular jurisdiction; good sense and reason transcend state lines even though law does not.

11. If the judge does not possess this background "situation-sense," should he consider broadening that base of knowledge? We are here considering the background knowledge of the facts of life in that area from which the law emanates. This knowledge is to be distinguished from the frozen facts of the case record. The latter are the facts which fit the case to the law which emanates from the background life situation. Where may the judge properly go for this background knowledge? It is always proper to apply common sense and the

DECIDING THE NOVEL CASE

Does this case appear to be governed by precedent, or does it appear to be unique? If it is, indeed, a case of first impression, is this not always a fact which should be frankly and clearly stated? The court, faced with this problem has no choice but to probe deeply into the background facts and attempt to uncover and implement the immanent law.¹²

Only as a judge or court knows the facts of life, only as they truly understand those facts of life, only as they have it in them to rightly evaluate those facts and to fashion rightly a sound rule and an apt remedy, can they lift the burden Goldschmidt lays upon them: *to uncover and to implement the immanent law.*¹³

Thus, the question—out of the background situation-sense—what appears to be the appropriate rule of law to be applied in this situation? This may be stated in the form of another question—in which direction does good sense direct? Does the sense of the situation look in more than one direction?¹⁴ Is there some significant classification of the facts which will resolve the apparent conflict?

If no apparent answer readily appears to the court, Llewellyn suggests the court push the problem aside for a while to simmer. Here, certainly, is the time to look to other jurisdictions, and it is well to question whether there is recent, respectable authority from other jurisdictions resting solidly on situation-sense. Finally, after

background knowledge gained by prior experience and training. It is proper to give way to a fellow judge on the court who has that experience. The law library material is available.

But is this all? What of the general library and treatises in the field? It would be a strange doctrine, indeed, to permit a judge to use knowledge gained in an undergraduate textbook twenty years before—but forbid him the use of the latest, most modern work in the area: Should the judge not welcome every shred of background knowledge which will shed light upon the overall background factual situation?

12. Llewellyn quotes Levin Goldschmidt's Preface to *KRITIK DES ENTWURFS EINES HANDELSGESETZBUCHS*, *Krit. Zeitschr. f.d. ges. Rechtswissenschaft*, Vol. 4, No. 4:

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." P. 122.

13. P. 127. (Emphasis added.)

14. For a situation in which there were two readily available situation types, see *Sleeth v. Sampson*, 237 N.Y. 69, 142 N.E. 355 (1923), discussed by Llewellyn at 269.

the matter has simmered, after other jurisdictions' solutions have been sought, if the problem still appears to be baffling,¹⁵ the court can only decide each case according to the best light it has, and then attempt to wrestle with whatever authorities there are.¹⁶ Llewellyn strongly suggests the court, in this case, has a special duty to be frank about its difficulty. Where the rules of law do not appear to be clear, then the court should simply list the "factors to be considered, in reaching the decision."¹⁷ If the court is in trouble, is it not better to frankly admit the problem and hope that in time, other appellate lawyers and legal scholars will have an opportunity to focus on the problem?¹⁸ This is the sort of challenge which will raise the scholars every time! If the court is in doubt, making this clear to the bench and bar is the most direct method of obtaining the best available help.

Does the case appear to be governed, by authority and precedent of the past? If so, has the court backed off, read broadly and taken a fresh, new look at the fact situation?¹⁹ Is there some other concept or principle of law which might be applicable? Are there any recent cases in this or other jurisdictions which have decided this point and have overtly considered the applicable situation-sense?

"Does the rationale satisfy? What, if one stops to ponder, does it mean, that rationale? Do the facts of the cases which have been cited, or located by the court itself, suggest anything about whether the type of problem-situation involved may need redefinition?"²⁰

Are the available authorities from the particular jurisdiction consistent with each other? If not, the court has a rule-tidying job.²¹ Here again, frank recognition of the conflict at the very outset is indicated.²² Nothing causes more outrage than ignoring authority or the unwillingness to face up to an apparent problem.²³

15. P. 453.

16. Of course, this means *all* the applicable authorities.

17. P. 344.

18. This is one of the advantages of the two-stage approach. P. 219.

19. As in the case of first impression, Llewellyn insists that good judgeship requires a fresh new look regardless of authority.

20. P. 294.

21. Llewellyn insists the whole court should have a persistent, organized, planned system of rule-tidying. Pp. 294-98.

22. Llewellyn suggests this approach:

We have cases which seem to look two ways on this matter. In *Carle*, we held . . . and yet we later announced that this rule should be confined within narrow limits, being adopted only where it is shown that otherwise there would be material injustice. On the other hand, there are cases in which we have extended the rule so as to allow It is not as yet clear to us what the exact line of discrimination is, but there is no doubt as to which side of the line to place the present case. P. 460.

23. Llewellyn speaks sharply about the "*judicial sin*" of permitting "*divergent*

SEARCH FOR THE PATTERN

If the authorities are consistent with each other, does a thoroughly established rule appear to be applicable?²⁴ If so, does this rule make sense in light of modern day conditions? That is to say, in view of the situation-sense now existing, does the rule make for a sensible and just result? Moreover, does this rule make sense as applied to the facts in the case at bar? Does the indicated rule offer a "decent answer"²⁵ to the problem to be decided? If the indicated result tends to produce shock or overt or covert rebellion, then it is obvious that a reshaping of the principles is in order. Certainly the court must be able to feel without reservation that the result is "moderately satisfactory."

THE RED FLAG

Does there appear to be some tension between the precedent indicated and the sense of the situation? In short, is the court torn between its felt sense of duty to justice and a felt sense of duty to pre-existing authority? Are law and situation-sense at odds? Do all the relevant facts support the indicated judgment? Are there any uncomfortable facts which have been minimized or ignored? Mr. Justice Whittaker underscores this point as he mentions the tendency of some courts to liberally construe facts under the guise of a liberal construction of the law.²⁶ Even though the trial court ignored those facts, does this justify the appellate court in also ignoring those facts?²⁷ These questions signal that the case or the indicated rule is in trouble.

If there does appear to be a thoroughly established precedent, and if the foregoing questions raise tension or problems, it would appear that one of the many precedent-handling techniques discussed by Llewellyn are in order. It is, indeed, questionable whether there should ever be a "blunt, unreasoned application"²⁸ of so-called controlling concept. And surely if the result shocks, some entirely different concept might be and probably is more applicable.²⁹ We are

lines of deciding which deliberately ignore each other," to exist. Pp. 459-60. (Author's emphasis.)

24. In fitting and shaping a formula or principle, often difficulty is had in the applicability of that formula. Llewellyn asserts that "*a formula which does not guide its own application is not as yet a rule of law at all—*" P. 344. (Author's emphasis.)

25. P. 227.

26. Whittaker, *Some Reminiscences*, 47 A.B.A.J. 1090 (1961).

27. Mr. Justice Whittaker states, "The effort, it seems obvious, should be to . . . [answer] the legal question, not whether the trial judge is innocent . . ." *Id.* at 1090.

28. P. 106.

29. P. 107.

here at the crossroads, where the court is tempted, in a well-intended, right-decided case, to fall back on one of what Llewellyn calls "illegitimate precedent techniques."³⁰ When this temptation arises, it is a signal that the work of the past is no longer adequate, and the court faces the problem and opportunity of creation.³¹

STANDING ON THE PAST

Even though the court is standing "on the things decided," this mere following of precedent involves a constant current of creation.³² Mr. Justice Cardozo gave apt expression to this wide choice open to the court: "Every lawyer knows that a prior case may, at the will of the court, 'stand' either for the narrowest point to which its holding may be reduced, or for the widest formulation that its *ratio decidendi* will allow."³³ The author breathes life into the statement and spells out sixty-four different methods of handling the past which have been indulged in by the courts.³⁴ The court may pull a prior rule from a case where that rule was not specifically spelled out. The court may follow the reasoning of a prior case. The court may follow an exception to a prior rule. The court may follow a concept-label of a prior case, or the court may follow a "hole in the authorities."³⁵

*Does the problem call for a form of simple creation while following and standing on the prior authority?*³⁶ Where the reason for the rule applies the court may follow that rule, even though the prior case might have been distinguishable. The rule may be extended to a new situation. The rule may not be applied because the reason does not fit. The court may follow the negative implication of a prior rule, or a prior reserved point might be ruled applicable.

*Does the situation sense call for the "expansive or redirected use of the precedent-material"?*³⁷ The court may take an unnecessarily broad basis for the decision, often leading into a bold new area. A

30. P. 133. Illegitimate precedent techniques are (1) disregard of a case in point without mentioning it; (2) manhandling the facts of a pending case; (3) manhandling the facts of a precedent; (4) the distortion of a case in point; (5) the unvarnished citation of authorities which have nothing to do with the proposition. The use of any of these techniques inflicts upon the bench and bar "unresolvable uncertainty."

31. The great importance of the day-to-day creation by the courts is hammered home by the author. P. 109.

32. P. 108.

33. P. 117.

34. Pp. 77-91.

35. P. 80. (Author's emphasis.)

36. P. 80.

37. P. 82. (Author's emphasis.)

hitherto unphrased principle may be extracted from a prior decision. The court may follow dictum or an unnecessary ruling. The court may follow the "tendency of the decisions."³⁸

ESCAPE FROM THE PAST

Is it possible to avoid the prior decision without accepting responsibility for the future?³⁹ Each case may be dealt with on its own facts. The court may distinguish the precedent situation from the prior case.⁴⁰

*Is it possible to limit or narrow the application of the precedent?*⁴¹ The court may kill off a *dictum*, distinguish on the facts, or undercut and distinguish based upon the authorities used in the prior case. The court may expressly limit the rule.

FRANK CREATION

If the foregoing methods of handling the precedent are not available, perhaps the precedent itself must be killed, and this may be done in a range of methods from "confined to its exact facts" to "is (explicitly) overruled."⁴² Even though not actually overruling prior precedent, and though not actually following, *is there some method of taking a fresh start from old material?*⁴³ The court may capitalize on a mere squint at the rule in a prior decision, or the court may redirect a rule or rely on the spirit of a prior rule. The court may use some new method of construing the facts or introduce some new concept, or enlarge or subdivide a concept. In any event, the most signal result is the unchaining of a new principle to substitute order for prior conflict or confusion.

*Is it possible to enlarge the sources or techniques in order to arrive at properly applicable principles?*⁴⁴ The court may resort to the briefs or the court's unpublished notes in the prior case. The court may sometimes base the opinion and decision on common knowledge and sense, or may on that basis announce some new principle. The court may make a deliberate forward-prophecy or make a deliberate hedge by an alternative ruling and thus render the main ruling dictum.

38. P. 83.

39. P. 84.

40. A distinction requires a *significant* difference.

41. P. 86.

42. P. 87.

43. P. 88.

44. P. 90.

THE OPINION

Thus far, we have been concerned with the process of deciding appeals. This, of course, has involved the first three of the goals previously mentioned: (1) to decide cases; (2) in a manner reasonably harmonious with good sense and justice; and (3) moderately in accord with the doctrine of the past. The decision could be made in a few blunt words, but it is in the opinion that the court bridges the gap between the appellate tribunal and the lower bench and bar. The opinion, as distinguished from the decision is concerned with the last three of the appellate goals: (4) to express the decision in clear, frank, forthright opinions which deal fully and fairly with the authorities of the past, and *overtly* treat the situation-sense and justice factors compelling the result; which (5) take a fresh new look at each rule enunciated; and which (6) produce clean, clear guidance for the future. The opinion is the court's main line of communication, and its only device for re-education of the bar.⁴⁵

CLEAR, FRANK, FORTHRIGHT OPINION

Does the opinion *overtly* show why the court reached the decision? Does the opinion clearly indicate why the winner won and the loser lost? Does the opinion present a clear statement of the facts and law? Has the opinion evaded or dodged any facts or issues which were troublesome? Will the opinion inflict upon the bar unresolvable uncertainty?

BLUR

If after all the effort, the facts and the law still fail to shape up with clarity, then we have what Llewellyn calls a problem of "focus" of direction and scope.⁴⁶ This is a sort of "blur." He suggests "blur" can be reduced, even though perhaps not completely eliminated by: (1) frankly stating the significant problem involved; (2) marking out the life-situation which gave rise to the problem; (3) determining the most appropriate line of solution or treatment; and (4) applying the specific prescription to the case.⁴⁷ A deliberate quest for clarity at each stage in handling the problem incites others to face the problem squarely. If this court does not spell out the rules the next court is, at least, apprised of the factors which caused the trouble.

45. P. 288.

46. P. 449.

47. P. 450.

FAIR USE OF AUTHORITY

Does the opinion represent a fair use of authority? If in deciding the court used one or more of the precedent techniques, has this been spelled out in the opinion? Are there two or more distinct opposing lines of authority in the same jurisdiction on the same question? Surely candor requires that the situation be aired. Llewellyn points out that any opinion which suppresses mention of pertinent authority which has been pointedly called to its attention, strikes at the court's reputation for fairness. The losing lawyer "bays the moon, for months."⁴⁸ It is noted that this judicial sin is extremely rare today.

GUIDANCE

Will the opinion actually guide for the future? Does the rule appear to "absorb the next few cases"?⁴⁹ Does the opinion build for the future? One remarkable demonstration of an opinion deliberately building for the future is found in *Harke v. Haase*,⁵⁰ a decision by the supreme court of Missouri. Numerous reversals in Missouri are caused by errors in jury instructions. In *Harke*, Judge Laurence M. Hyde drafted what the court considered to be a proper set of instructions in a *res ipsa loquitur* situation. Since that decision, those instructions have stood without a reversal. This is, indeed, guidance for the future! Lawyers can move in this area with confidence; the court's work load has been reduced. The judicial neck is out, but isn't the judicial neck out in any event? The court must in the long run shoulder responsibility for the development of the law. How refreshing the opinion which seizes the opportunity to guide in the first instance!

A FINAL QUESTION

Is it enough that the enunciated rule should guide? Shouldn't each rule be carefully tailored to guide in the direction of the pattern and flavor of the law? Shouldn't each opinion be tested by the question—*will this opinion tend to increase or decrease litigation?* That is to say, will this opinion aid in reckonability? Will this opinion help resolve the doubts? The opinion does not operate in a vacuum; it is the immediate decision for the case at bar; it is the basis for countless decisions by the lawyer and the courts below. If the opinion does not guide or, at least, state the unresolved problem, has it not failed its central function in the common law tradition?

48. P. 258.

49. P. 216.

50. 335 Mo. 1104, 75 S.W. 2d 1001 (1934).