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## The Common Law Tradition: Situation Sense, Subjectivism or "Just-Result" Jurisprudence?

### Cover Page Footnote

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# THE COMMON LAW TRADITION: SITUATION SENSE, SUBJECTIVISM OR "JUST-RESULT JURISPRUDENCE"?

PATRICK J. ROHAN\*

THE late Karl Llewellyn's crowning achievement, *The Common Law Tradition: Deciding Appeals*, received countless accolades on its initial appearance. Detachments of book reviewers, each staffed by a judicial officer, a law professor and a practicing attorney, were dispatched to reconnoiter the work.<sup>1</sup> All brought back parallel, highly favorable intelligence concerning what was found and what the reader might expect. Today there are signs that the probing reconnaissance phase has given way to the more critical and permanent occupational one; the full company of the legal profession has read the work and is setting about the task of determining what use can be made of it. Edmond Cahn has labelled the volume "the most emphatically *useful* work ever written on the subject of common law appeals."<sup>2</sup> In sharp contrast is the evaluation appearing in a recent article in the *Yale Law Journal*, wherein Judge Charles E. Clark and David Trubek espouse the view that a central concept, "situation sense"—a guide to deciding and predicting appeals—is not only unrealistic but dangerous as well.<sup>3</sup> Since *The Common Law Tradition* was intended to have extensive practical application, and has already come to be regarded as a classic treatment of the appellate process, a detailed analysis of Llewellyn's thought appears to be in order. The pages which follow are devoted to isolation and evaluation of his "situation sense" theory, in an effort to ascertain whether it is susceptible of day-to-day use in arguing and deciding appeals.

## I. THE TRADITION IN FOCUS

In order to place *The Common Law Tradition* in proper perspective, and to obviate some of the difficulties which might otherwise arise, some preliminary observations concerning its genesis and orientation should be noted. In his preface, Professor Llewellyn indicates that a "crisis in confidence" is besetting the Bar; a significant cross-section is possessed

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1. See, e.g., Breitel, Lasswell & Westwood, Book Review, 61 *Colum. L. Rev.* 931, 940, 948 (1961); Schaefer, McGowan & Kurland, Book Review, 28 *U. Chi. L. Rev.* 574, 576, 580 (1961); Friendly, Levy & Shestack, A Symposium, 109 *U. Pa. L. Rev.* 1040, 1045, 1051 (1961).

2. Jurisprudence, 1960 *Ann. Survey Am. L.* 587, 599 (1961).

3. Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *Yale L.J.* 255 (1961).

by the fear that the courts have all but abandoned stare decisis and predictability in favor of the more flexible *ad hoc* determination of appeals. *The Common Law Tradition* was written for the express purpose of allaying this fear. In Llewellyn's view, the faltering faith represents nothing more serious than a lack of awareness on the part of the profession that the courts are undergoing a transition from the "formal" to the "grand" style of decision-making and opinion-writing, from the mechanical application of precedents to a well rounded approach to the problems of life reflected in each appeal. Both predictability and certainty are restored and enhanced when a conscious awareness of the transition, with its implications for the advocate, is brought about.

In the main the work represents, not a wholly new Llewellyn contribution, but a compendium of his perennial ideas. Thus he may immediately be suspected of having conjured up a "crisis in confidence" as a springboard from which to launch a "Restatement of Llewellyn" or a "Llewellyn on Llewellyn." A plausible argument could be made on either side of the issue. American Legal Realism's heraldic period had long since drawn to a close and its position on the scale of acceptance stabilized. Similarly, despite intimations to the contrary appearing in recent articles,<sup>4</sup> Llewellyn's thesis remained relatively constant throughout his life.<sup>5</sup> Hence, the publication of a recapitulation of his views might have been received as old wine in a new bottle. Nevertheless, a felt need to systematize his ideas, and to bring them to bear on the problems of the day, no doubt existed. A certain amount of complacency, disarray and occasional outright disaffection had crept into the realist ranks and might have brought about a devaluation of Llewellyn's past contributions if left unchecked.<sup>6</sup> His jurisprudential writings, devoted largely to the decisional process and appellate advocacy, lay scattered throughout dozens of books and publications, both legal and nonlegal, foreign and domestic. Unlike his singular contribution to law study, *The Bramble Bush*, and the embodiment of the fruits of his substantive labors in the Uniform Commercial Code, his jurisprudential papers were decentralized and thus peculiarly vulnerable to obsolescence. To this may be added the

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4. See, e.g., Jones, Pelagius, 29 U. Chi. L. Rev. 619 (1962); Hart, Holmes' Positivism—An Addendum, 64 Harv. L. Rev. 929 (1951).

5. Llewellyn's final volume, *Jurisprudence*, a collection of his essays, contains remarkably few footnote annotations reflecting a change of views. Similarly, an outline of *The Common Law Tradition* may be gleaned from *The Bramble Bush* which he penned some thirty years before.

6. See Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1 (1960); Yntema, American Legal Realism in Retrospect, 14 Vand. L. Rev. 317 (1960); Rostow, American Legal Realism and the Sense of the Profession, 34 Rocky Mt. L. Rev. 123 (1962).

deep disappointment evidenced by Llewellyn over the fact that his early efforts had been branded positivistic by those who read his temporary separation of the "is" and "ought" as a permanent divorce. A somewhat secreted foreword in a second edition of *The Bramble Bush* contained a disavowal of the charge, but no demonstration of the role of "higher norms" in Llewellyn's jurisprudential scheme of things existed in print.

While it is likely that the foregoing considerations played a significant part in the genesis of the work, it is also probable that the *raison d'être* stated in the preface was in fact credited by Llewellyn, for he was not a man given to imagining things or to professing idle notions. Few observers would deny a growing awareness on the part of the profession that a change is taking place in the approach of many appellate courts. A shift from a routine of doctrinal reaffirmation to one of broadly based decisions is in evidence. In the daily solution of cases, old concepts are more readily overturned or revised, new principles and categories are freely minted, and judicial deference to the legislature, in the revamping of longstanding decisional law, is rapidly diminishing. "Result-oriented jurisprudence" is a phrase which passes current and is directly related to the foregoing phenomena. To some, the label connotes subjectivism pure and simple, with *stare decisis* and predictability sacrificed in a misguided effort to give effect to what the individual judge conceives to be the "justice" or "equities" of each and every appeal. To others, a "result-oriented" court signifies a welcome innovation, a belated recognition that neither tradition nor logic, alone or in combination, necessitates the abandonment of the realities of a problem in favor of what appears to be unyielding authority the other way. Still other shades of interpretation may exist between these polar positions. However, if, as Llewellyn suggests, the underlying developments are merely the labor pains accompanying a rebirth of the grand style, aggravated by the profession's lack of awareness of its renaissance, his past writings are not only germane but vital to an understanding of the times.

Judge Clark, as the reviewers before him, is visibly troubled by Llewellyn's assertion that a crisis in confidence exists. Still others have doubted whether a period may be classified under a rubric such as grand or formal style, when both decision-making and opinion-writing are so highly individualistic and personal in nature.<sup>7</sup> However, the

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7. See, e.g., Wetter, *The Styles of Appellate Judicial Opinions* (1960).

"With regard to so completely human and individual a process as deciding lawsuits and writing opinions, generalization and classification into historical periods, and into styles, Grand, or Formal, can be overdone. To the unenlightened it would seem that in every period of our history the judges would have been, by and large, honest men, conscious of their responsibility to the public, to the law as a social institution, and to the just decision

merits of *The Common Law Tradition*, and that of individual chapters and concepts, do not rest in any significant measure on the existence of, or belief in, a crisis or changing period style. Llewellyn's thought is eclectic; he also writes each chapter as if it were the only chapter, giving full sway to the ideas expressed in any given passage, to the neglect of chapter-to-chapter consistency and interrelationship. While some concepts are more central or pervasive than others, there is no unified whole.

## II. THE ANATOMY OF "SITUATION SENSE"

The key to an understanding of Llewellyn's thinking lies in his preoccupation with methodology and his conviction that appeals are but human problems, susceptible of rational statement, analysis and solution. Just as the professor grades examinations on approach (which in turn reflects the student's mode of operation in problem solving), Llewellyn scrutinizes reported judicial activity looking for the sound decision and well thought out, forward-looking opinion. Like the tutor, he believes that method and result are not coterminous, yet the method calls for a full examination of the realities of a situation, which in turn suggest the direction the solution should take. Finally, although method is more important than result, Llewellyn shares the pedagogue's view that a "correct," or at least preferable, answer exists for each question, in light of the full facts, the circumstances and the portent of competing solutions for similar cases as yet unborn. Once the evaluation has been completed, judicial craftsmanship and the tools of the judge combine to capture the essence in an opinion, which clarifies the issue for some time to come. Llewellyn describes the process in the following manner:

It is my position that in the Grand Style of Reason which dominated our appellate deciding a century back and which we have for twenty and more years been ever closer to recapturing, the juice lies first of all in the application of reason and sense to spotting the significant type-situation and diagnosing the sound and fair answer to the type-problem. This leads to *rules* of law, not to mere just or right *decisions*, much less to decisions merely according to any personal equities in individual cases. But it leads toward *good* rules of law and in the main toward flexible ones, so that most cases of a given type can come to be handled not only well but easily, and so that the odd case can normally come in also for a smidgeon of relief.<sup>8</sup>

A few features of this description stand out in bold relief. The object

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of the case in hand. They would have varied enormously in natural acumen, in learning in the rules and precedents, in their feeling for the problems of one or another social class, and in their articulateness in organizing and expressing their thoughts in writing. This condition of affairs always has existed and always will exist." Madden, Book Review, 10 Catholic U.L. Rev. 100, 101 (1961).

8. Llewellyn, *The Common Law Tradition: Deciding Appeals* 402 (1960) [hereinafter cited as Llewellyn].

of the judge's search is to spot the significant "type-situation" and not the "fireside equities"—the irrelevant pro-plaintiff or pro-defendant minutiae of the individual litigation. Thus, for example, the fact that the plaintiff is a widow and the defendant a railroad would be disregarded as having no bearing on the type situation under scrutiny. A certain Marxist economy is also suggested in the withering away of precedents as "situation sense" becomes embodied in an opinion which then solves future cases almost as a matter of course. The life span predicted for such opinions and the rules they house is curtailed, however, by the fact that they are ready to yield at any time, as part of the "ongoing and unceasing judicial review of prior judicial decision." In sum, Llewellyn's overriding concern is for a grasp of the actual problem raised by an appeal, with all its ramifications. The primacy of the factual is highlighted in his more explicit definition of "situation sense," a definition to which he refers periodically throughout the volume:

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.<sup>9</sup>

The thrust of this statement appears to be that the case or situation, if properly and broadly viewed, will yield the outline of its own solution, which in turn will give rise to a rule reflecting inherent sense. Although Llewellyn speaks of the immanent *law* of any given situation, he is concerned only with a grasp of the most meaningful view of the *factual pattern*. It is also clear that he is not endorsing the theory that judges merely discover the law. Nor is this a return to natural law thinking. Llewellyn, as if anticipating the comparison, explicitly states that his methodology is "quite independent . . . of any philosophy as to the proper sources of 'Right Reason' which may be held by any 'Natural Law' philosopher."<sup>10</sup>

### III. SOME PROBLEMS OF DEFINITION, ADVOCACY AND PRECEDENT

When one attempts to visualize situation-sense in practical operation, three principal obstacles to its effective employment loom large. The

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9. Llewellyn at 122.

10. *Id.* at 422. Language reflecting a quasi-natural law position is also found in Jones, Pelagius, 29 U. Chi. L. Rev. 619 (1962), an article recounting Professor Llewellyn's defense of his thesis in an informal discussion with a philosopher and two law professors. Even the term "Right Reason" is employed in the colloquy and in *The Common Law Tradition*.

first concerns the very nature of situation-sense itself, the second, the role of the advocate in obscuring situation sense, and the third, the manner in which precedent is reconciled with the ideal solution in cases where they diverge.

#### A. *The Characteristics of Situation Sense*

The fact that situation sense may be a Janus-faced concept appears as soon as the reader works through several of Llewellyn's illustrations. A degree of confusion immediately arises as one attempts to strip an appeal of its "fireside equities."<sup>11</sup> Although a datum such as widow versus railroad stands out as irrelevant, Llewellyn fails to demonstrate that the factual aspects of each case fall into two convenient categories, essentials and nonessentials. Thus, for example, in analyzing *McPherson v. Buick*,<sup>12</sup> he cites a passage from Judge Bartlett's opinion which considers the fact that the defendant had purchased eighty thousand wheels from the same manufacturer, none of which had been found to contain defective wood. He then comments: "If that [consideration] does not weight the fireside equities for the defendant, what can?"<sup>13</sup> Certainly evidence bearing on the volume and scope of Buick's enterprise, as well as its source of supply, quality control and safety record, while not necessarily exculpatory, cannot be labelled irrelevant or seductive minutiae. It may be nearer to the mark to theorize that the equities of any appeal are not divisible into two airtight categories, but that a whole range of equities exists, with those at one end obviously relevant and only those at the other end of the spectrum appearing as clearly of no possible bearing. A hint of such a reconciliation may be found in Llewellyn's observation that: "The [*McPherson v. Buick*] case further illustrates again how a solution for the situation-type can (four times out of five, it does) carry with it a satisfying solution on the immediate 'equities of the case'—partly because those equities themselves tend to line up more significantly and more incisively, when viewed against the larger situation."<sup>14</sup> The statement is confusing if it is interpreted as meaning that the accidental qualities of a case which tug at the emotions will coincide with situation sense, and the winning side, in four out of five instances. Thus, for example, the widow versus railroad datum can have no such statistical relation to sense or outcome. The statement does take on meaning, however, if it is intended to convey the notion that

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11. Llewellyn at 245, 267.

12. 217 N.Y. 382, 111 N.E. 1050 (1916).

13. Llewellyn at 433.

14. *Id.* at 430.



perception of the realities of a situation serves to align the conflicting equities on an ascending scale and to eliminate, or reduce in vigor, what initially appeared to be weighty considerations pointing to a standoff, if not dictating an opposite conclusion. However, such an ordering tool is not achieved until *after* situation sense has been crowned; no method is supplied to enable the judge to sift the strictly "fireside" aspects of a case from those which are relevant though not controlling, that is, from those things which can legitimately be considered for the losing side, and to separate both of these groupings from the cluster of equities which go to make up the sense of the situation.

When one turns from the problem of exclusion to that of inclusion, added difficulty ensues. Llewellyn's illustrations, with few exceptions, are drawn from the commercial law field. Although this may be defended on the ground that he could speak with added authority on the area of substantive law he knew best, it is also some indication that the true situation may only be grasped by the specialist or trained eye. Justification for this conclusion may be found in passages wherein Llewellyn ascribes the discovery, or furtherance, of situation sense to superior counsel, to knowledgeable amicus curiae, or to the one judge among the many on a particular court well versed in the field of endeavor or branch of law concerned<sup>15</sup> in the case under review.

A distinct, though related, phenomenon is found in the fact that in some portions of the volume, situation sense partakes of grasping how things are done in commercial practice, while in others broadly conceived legal goals, such as the advancement of freedom of contract or minimization of opportunity for fraud, appear to be of the essence. These varying examples of situation sense suggest at least two, and possibly more, problems for the judge seeking to make use of the concept. First, how is the judge to know when he has gone far enough in his quest for sense? The weighing of competing desiderata may appear to be all that is necessary to a sound solution, whereas a failure to uncover or appreciate the custom or practice in vogue may vitiate both the decision and the opinion. Secondly, in the case where the details of cur-

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15. Compare Llewellyn at 206-07, 232 (counsel); 323-32 (amicus curiae); 127, 235 (individual judges or the court as a whole). At page 334, Llewellyn all but concludes that a handful of giants of the stature of Cowen, Hand, Brandeis and Cardozo would really be necessary to blaze the path in any given era. "Indeed wherever an argument hinges on understanding of some type of situation which lies outside of such experience as, like driving a car or the party system or the Christmas season, comes to most Americans in the sheer process of survival to maturity, the advocate must be alert for the ear which can take the novel in with empathy and for the tongue which can make the fruits of empathy persuasive." *Id.* at 251.

rent practice are known to the court, or are pressed on appeal, no formula is supplied to assist in determining whether sense partakes of championing broad desiderata or in endorsing the countervailing, existing usage. A few of Llewellyn's illustrative decisions will serve to point up these difficulties. In his treatment of *Jenkins v. Moyse*,<sup>16</sup> situation sense is depicted as the realization that, in a poor money market, the marginal businessman needs a device (the corporation), with which to attract essential capital by offering to pay more than the six percent ceiling on interest. The correct solution was reached by the Court of Appeals where Judge Lehman, "who understood both real estate and business finance," wrote the opinion.<sup>17</sup> Similarly, in discussing *Whiting v. Hudson Trust Co.*<sup>18</sup> and *Legniti v. Mechanics & Metals Nat'l Bank*,<sup>19</sup> Llewellyn indicates that a grasp of the banking background is essential to a proper evaluation of these appeals. In the *Whiting* case, an individual acted as a trustee in two unrelated estates and misappropriated sizable amounts from both. When called upon to pay out funds from one estate, he found it necessary to dip into the other in order to meet the demand. The second estate sought to recover from the bank in which its account was located. The Court of Appeals, however, found for the defendant, reasoning that an account designated "executor" or "trustee" would have alerted the bank to be vigilant, but not one, as here, merely designated "special." In analyzing the result, Llewellyn observes:

I happen to be a banking lawyer, with some understanding of the needs and ways of "banking in a great commercial center"; therefore I know how much operating trouble the rule here laid down does save. But, if you will excuse me, I *am* a banking lawyer; and so I know also that an account once safely labeled "Eckerson, Special" drops almost by necessity out of further notice, unless attachment papers are served; or unless the bank (by accident) is making sure that payment made of a debt owing to itself is a payment which is safe to rely on. *Whereas an account initially and continuously labeled "Eckerson, Trustee" can hardly escape remaining an account for officers to watch.* Such watching is uncomfortable, but it does not clog the transactions of a great commercial center. What it does is to risk estranging an honest—and especially a dishonest—trustee who wishes his word to be the bank's bond.<sup>20</sup>

In *Legniti* the same court upheld an oral contract (to take up within four months a cable transfer for twenty thousand pounds sterling), despite well taken objections grounded on the Statute of Frauds. In voicing ap-

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16. 254 N.Y. 319, 172 N.E. 521 (1930).

17. Llewellyn at 228 n.225.

18. 234 N.Y. 394, 138 N.E. 33 (1923).

19. 230 N.Y. 415, 130 N.E. 597 (1921).

20. Llewellyn at 439.

proval of the outcome, in view of the manner in which foreign remittances are customarily arranged, Llewellyn remarks:

Surely the nub lies in the information from the briefs that word of mouth is the common method of closing such transactions and that an upset "will be productive of much inconvenience". . . . It is a good nub, and a wise decision; but there is nothing which suggests that the necessary understanding of situation and need was sitting, ready, on the bench; Cardozo's appreciation of banking, for instance, had no at-homeness at all in the hands-and-feet techniques of commercial bank operation. No, what we have is advocacy informing the court *at the appellate stage* about wise choice of concept and consequent rule, in view of the inherent needs of the type of situation; informing 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.<sup>21</sup>

Llewellyn's comments on the *Jenkins*, *Whiting* and *Legniti* cases convey the impression that the essence of situation sense is a grasp of financial and banking practices, but the treatment of cases such as *McPherson v. Buick* would lead to a different conclusion. There situation sense is said to lie in perceiving the importance of a remedy for the retail buyer who sustains injury via a defective, dangerous product of a national manufacturer. The result is only achieved by viewing this consideration as outweighing a literal reading of precedent and the factors which originally led to the privity requirement.<sup>22</sup> Similarly, in *Rozell v. Rozell*,<sup>23</sup> situation sense was arrived at by balancing intra-family harmony and fraud prevention against the need for protection from negligent harm at the hands of a member of one's family. The court correctly concluded that the latter should prevail.<sup>24</sup> In more recent times, Llewellyn finds the policy favoring wide latitude in exploratory bargaining and that of the Statute of Frauds militating against recognition of a cause of action in *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*<sup>25</sup> There preliminary, false assertions were made which led to a voidable oral contract. The Court of Appeals recognized a cause of action in fraud to be stated, finding the lack of an enforceable agreement to be irrelevant to the tort issue. Llewellyn, of course, asserts that the court erred.<sup>26</sup> His commentaries on decisions such as *Channel Master*, *McPherson* and *Rozell* indicate that situation sense often consists of the careful weighing of competing, broadly conceived desiderata, as opposed to accommodating law to practice. They also indicate that the two conceptions of situation sense may occasionally

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21. *Id.* at 212.

22. *Id.* at 430-37.

23. 281 N.Y. 106, 22 N.E.2d 254 (1939).

24. Llewellyn at 81 n.84, 136.

25. 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259 (1958).

26. Llewellyn at 473.

conflict. In *Legniti*, for example, the court correctly sanctioned current practice despite an obvious violation of the Statute of Frauds; in *Whiting* the court incorrectly sanctioned existing banking procedures (varying with the form of the account), and the free flow of monetary transactions, whereas, in Llewellyn's view, it should have championed the notion of the depositary's unique position to police accounts, as well as its ability to spread the risk over its entire operations and to insure against these losses.<sup>27</sup> No formula is supplied to indicate how Llewellyn himself, much less the judges, ascertained whether the merits of a practice outweighed sound legal goals in any of the cited cases. The same enigma appears in those illustrations wherein competing desiderata alone were involved. Thus, for example, in the *Channel Master* decision, it is impossible to determine how Llewellyn deciphered that the Statute of Frauds and freedom of exploratory bargaining negate recognition of a fraud cause of action otherwise made out. The answer may lie in the fact that Llewellyn was a commercial law man. Some indication of this may be found in his observation that commentators on the law of torts may have misled the court.<sup>28</sup>

### B. *The Role of the Advocate*

A second major source of difficulty in seeking to ascertain and apply situation sense lies in the role of the advocate in preparing and arguing appeals. Although under a duty not to intentionally mislead the court, the representatives of the respective parties are essentially participants in an adversary proceeding. As a consequence, each attorney seeks to persuade the appellate bench to rule in favor of his client, no matter where the sense of the situation lies and irrespective of how the attorney would rule were he a disinterested judge and not a biased advocate. Hence, in the typical appeal, one side will be endeavoring to counterfeit the "situation," the "sense" or both. Moreover, where one side has the inferior position and the other mishandles its case, or where neither party is deserving of the full relief requested, situation sense will be obscured by the briefs and oral arguments of all concerned. In any case, therefore, at least one advocate will be seeking to lead the court astray by asserting an "incorrect" view of the record, precedent, the ramifications of proffered solutions, or some combination of these factors.<sup>29</sup>

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27. *Id.* at 440.

28. See note 26 *supra*.

29. Another source of error lies in the failure of the record to speak clearly and forcefully of the true equities or values involved in the case. This point has been made repeatedly

The extent to which the court is dependent upon counsel for the parties, and hence must discern the optimum solution largely from their presentations, can be seen both from the press of time and the commonly accepted truism that the quality of a court's work merely reflects the calibre of the attorneys practicing before it. The judge's dilemma in having to rely on the attorneys is heightened by Llewellyn's masterful passages on appellate advocacy contained in *The Common Law Tradition*. A sizable portion of the volume is devoted to a "realistic" approach to advocacy. These materials are supplied to sharpen the advocate's ability to predict appeals and to enable him to carry a court that otherwise would not, and perhaps should not, rule in his favor. Thus, for example, Llewellyn asserts that knowledge of the state of the judge's digestion is important to the advocate; it only lacks utility because of the inaccessibility of such data.<sup>30</sup> His fourteen steadying factors also give clear indication of his belief that an advocate worthy of the name should never make a frontal assault on the court armed solely with the record and the "law"; instead, every weapon at his command, including psychology and subliminal perception, should be employed to seduce the mind of the judge.<sup>31</sup> The court must be brought to the subconscious reali-

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by Judge Frank. See Frank, Cardozo and the Upper-Court Myth, 13 *Law & Contemp. Prob.* 369, 381 (1948).

30. Llewellyn at 131. Consider the following passage: "The lowering of prediction-accuracy is obvious, to the degree that one cannot forecast the assignment and that the assigned judge (1) is assigned early—e.g., as a reporting judge, even before argument, (2) by practice does especially heavy advance preparation, or (3) is in any manner accorded by the course of operation or the habit of the court more weight than he would have, say, if he were assigned only after the hearing and the conference." *Id.* at 226.

Implicit in this observation is the realization that much depends on the impact of the case on the different judges sitting and the magnified impact of any one judge on his colleagues (who might otherwise have thought, voted and written differently). Llewellyn appears to overlook this omnipresent divergence of views among the judges elsewhere in his presentation.

31. "Of course the first thing that comes up is the issue and the first art is the framing of the issue so that if your framing is accepted the case comes out your way. Got that? Second, you have to capture the issue, because your opponent will be framing an issue very differently. You have got to so frame yours that it 'sells the Court,' to use the term of the marketplace, which I abhor—so that it 'captures the field,' is what I prefer, because I see this not as a matter of the marketplace but as a matter of war, once you're really into a case of appellate advocacy. And third, you have to build a technique of phrasing of your issue which not only will help you capture the Court but which will stick your capture into the Court's head so that it can't forget it." Llewellyn, *A Lecture On Appellate Advocacy*, 29 *U. Chi. L. Rev.* 627, 630 (1962).

Elsewhere Llewellyn observes: "If you are the appellee, a competently handled appeal confronts you . . . . The struggle will then be for acceptance by the tribunal of the one technically perfect view of the law as against the other. Acceptance will turn on something beyond 'legal correctness.' It ought to." Llewellyn at 237. (Emphasis omitted.)

zation that it could decide the case "correctly" only one way—in favor of the client of the attorney employing these tools. Llewellyn cautions the advocate to drive a vertical shaft into the court's past decisions on the question or topic at issue—the traditional approach to an appeal; he then admonishes that one should read the last two full volumes of the particular court's reports, in order to secure a knowledge of its thinking and that of individual judges.<sup>32</sup> In this manner the brief and oral argument may simultaneously avoid pitfalls while capitalizing on the majority's philosophy, predilections and idiosyncracies. The same thought recurs in the discussion of the "known bench,"<sup>33</sup> and in the treatment of the uncertainty inherent in the decisions of a court which sits in divisions or panels (where the brief and oral argument cannot be custom fitted to the judges sitting, since their identity cannot be ascertained in advance).<sup>34</sup> Similarly, Llewellyn invites the reader to build an "opinion kernel" into his brief, so that the judge charged with drafting the court's opinion will be drawn toward the advocate's position by the fact that the rationale to be employed in supporting it can be lifted out of the brief and inserted, perhaps verbatim, into a proposed opinion.<sup>35</sup>

Initially, one might query whether such an approach will disrupt the functioning of the adversary system or undermine its usefulness. The accepted theory appears to be that justice is achieved via advocates stating the strongest case that can be made for their respective clients. A disinterested observer arrives at a decision after weighing the points raised, giving due weight to the element of exaggeration and over-claim. The internal morality or mechanism of the device may be jeopardized to the extent that Llewellyn's approach to advocacy is adopted. Utilization of psychological and related factors which play upon the human frailties of the judge may partake of an effort to take undue advantage of the system rather than to make normal use of it. The likelihood of large scale disruption of the existing machinery is slight, however, in view of the fact that attorneys will endeavor to employ such devices as long as appeals are taken.

A more serious implication of Llewellyn's advocacy materials may

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32. "What is sure is that a record, rich and varied, lies open for study. It is here especially that the appellate lawyer may and must seek light on how far and wherein the bench in question, and its individual members, may differ from the lawyer's own notions about what is sense and reason . . ." Llewellyn at 224. See Llewellyn's carefully constructed hypothetical case, in which the judge's frailties and background are utilized. *Id.* at 253-55.

33. *Id.* at 34-35.

34. *Id.* at 250-52, 313.

35. *Id.* at 241-45.

be found in their ramifications on the function of the judge in deciding appeals. There is a strong possibility that these two mainstreams of thought in *The Common Law Tradition* are antithetical. Llewellyn's entire theory of a discernible "immanent law" is jeopardized by his own text on advocacy. In a passing reference, he notes that the attorney may occasionally counterfeit the sensible result,<sup>36</sup> he also touches upon the fact that individual litigants may win or lose a case solely on the abilities of their respective counsel.<sup>37</sup> However, the relative insignificance of these two passages indicates that he probably did not appreciate fully the fact that his advocacy chapters, if acted upon, would derail the jurist attempting to follow the dictates of his chapters devoted to situation sense. In particular cases, Llewellyn himself appears to have vacillated between the view that the sense of a given situation recommended itself to the court and the position that an adept advocate sold the bench a bill of goods. Thus, in commenting on *Jenkins v. Moyse*, at one point he attributes the satisfying result to Judge Lehman's capture of the inherent sense;<sup>38</sup> elsewhere he emphasizes that Proskauer was hired to take the final appeal, intimating that a less gifted counsel could not have brought the court to accept the lender's position.<sup>39</sup> A more recent example is Llewellyn's treatment of *Pennsylvania Coal Co. v. Mahon*,<sup>40</sup> a case wherein he concludes the Supreme Court was beguiled by the statement of the issue phrased by the Coal Company's counsel.<sup>41</sup>

A dichotomy also appears in his treatment of the vistas open to the advocate and those open to the court. Llewellyn exhorts the judiciary to embrace the "immanent" solution. When addressing himself to advocacy, he reminds the attorney that, in any case worth appealing, four or five solutions suggest themselves.<sup>42</sup> These possibilities run the gamut from

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36. *Id.* at 232, 440. This counterfeiting may take place not only on appeal but at the very trial stage itself, where the attorney formulates his pleadings, selection of evidence and witnesses to be offered according to the content of existing law in the area in question. An illustration of this may be found in cases dealing with mental competency of a testator.

37. Llewellyn at 24, 31 n.22.

38. See note 17, *supra*.

39. Llewellyn at 179 n.179, 228 n.225. See also Llewellyn, A Lecture On Appellate Advocacy, 29 U. Chi. L. Rev. 627, 634 (1962).

40. 260 U.S. 393 (1922), treated extensively in Llewellyn, A Lecture On Appellate Advocacy, 29 U. Chi. L. Rev. 627, 634-35 (1962).

41. "Now it is true that counsel's task in the run of cases is to win this case for his client, not to improve the law." Llewellyn at 244.

42. Llewellyn at 21. See also Llewellyn, A Lecture On Appellate Advocacy, 29 U. Chi. L. Rev. 627 (1962). "If the appeal has any reason to have been brought at all, or has any reason to be defended at all by the respondent, the authorities are available on each side in a letter perfect case in the hands of any really competent technician." *Id.* at 629.

complete affirmance on the one hand to outright reversal on the other, with each solution reasonably supportable by both precedent and logic. Llewellyn's judge apparently must train his eye to discern the singular solution among the many possible. As previously noted, he must accomplish this in the face of an issue so framed, and brief so constructed, by a Llewellyn-like advocate, as to render him all but powerless to refuse to acquiesce in the brief-writer's position, whatever that position happens to be. The ability of situation sense to shine through, nevertheless, is open to grave doubt.<sup>43</sup>

### C. *Precedent and Situation Sense*

As previously noted, Llewellyn often gives full sway to the concept he is treating at any given moment, with little thought to its relationship to matters contained in the preceding or following chapters. This is especially true of his treatment of precedent as it influences the result. The passages devoted to the topic of stare decisis exhibit an abiding respect for its virtues and the stability it engenders. Llewellyn stresses that all relevant decisions cited by counsel should be dealt with honestly and explicitly in the court's opinion; omission or slighting of cases in point, and distinctions lacking in substance, should be avoided. Where established case law stands in need of refurbishing, prospective overruling should be indulged in if at all possible. The judge must recognize and adhere to the "law of leeways," that is, stare decisis should be the normal pattern with substantial innovation being reserved for the modicum of cases which are ripe for and demand extensive departures from existing law. Despite the strong support of precedent contained in such precepts, the theme of *The Common Law Tradition* appears to be constant judicial creation, grounded in a grasp of the true nature of the problem presented by each appeal. The continuous review of existing law suggested, coupled with the primacy of situation sense,

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In a similar passage in *The Common Law Tradition*, Llewellyn states: "If sense looks in more than one direction, you have to capture the way in which the court will see and judge sense; and even then, if the choice before the court is a hard choice, it continues a chancy one." Llewellyn at 232.

43. "[T]here are the overskilled counsel who slant the needed knowledge; there are the underskilled counsel who know not even that background, situation, and immanent law have meanings; and, worse than either, there are the bison who smash up the china in half-suspicion that it might be important." Llewellyn at 309. However, throughout the volume, Llewellyn appears to overlook the fact that the judge is not usually free to conduct his own examination into the facts, the background involved, and countless other interesting and informative aspects of an appeal. He is confined to the narrow issue raised on appeal and to the previously established mode of ascertaining whether the party's contention is sound.



would indicate that precedent should yield when its dictates and the demands of situation sense are deadlocked. Although Llewellyn discusses the possibility of such an impasse, under the heading of "the law of incompatibility," he does so largely from the standpoint of reduced predictability of outcome, supplying little hint as to when, if ever, precedent should be preferred over situation sense.<sup>44</sup> However, his endorsement of prospective overruling would appear to contain an implicit recognition that at times the sound decision may consist of adherence to authority rather than to sense.<sup>45</sup> The same may be said of his exposition of the "law of leeways."

Another source of confusion in Llewellyn's treatment of precedent is that it fails to indicate whether existing law is a component of the factual problem (and hence an integral part of the situation), or whether situation sense is first arrived at in isolation, and then matched against existing rules of law to test their compatibility. The traditional view of *stare decisis* endorsed periodically throughout the volume would suggest that Llewellyn viewed existing law as a component of each situation. This would explain in some measure the absence of a chapter devoted to a reconciliation of these two factors. It would also square with his desire to sanction current practices wherever possible (as demonstrated by his concern for commercial customs and conduct undertaken in reliance on established law). However, his treatment of the situation sense concept appears to call for the conclusion that the ideal solution is to be arrived at independently of precedent. Thus, there is no mention of existing authority in his definition of situation sense.<sup>46</sup> Moreover, a principal theme of the entire work is the court's duty to initiate an investigation into the merits of each situation and to formulate, adopt or revise a rule to embody the sensible result thus ascertained.<sup>47</sup> Llewellyn's distinction between a situation sense result and a grand style opinion would also suggest that precedent does not enter into the

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44. Llewellyn at 180-81. This omission has lead Judge Friendly to comment: "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 . . . 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." Friendly, Book Review, 109 U. Pa. L. Rev. 1040, 1041 (1961).

45. A difficulty running throughout Llewellyn's work is that he does not indicate his own reservations and the extent to which he believes courts will adopt his views, or act in accordance with them, on a widespread and permanent basis.

46. Llewellyn at 122.

47. *Id.* at 139, 440.

formulation of the sensible solution but merely overrides it in instances where the "law of leeways" dictates that prior law should prevail.

#### IV. THE TRADITION IN RETROSPECT—A POSSIBLE RECONCILIATION

It is probable that many of the questions raised by the foregoing analysis would have been answered to everyone's satisfaction by Professor Llewellyn. His untimely death shortly after the publication of *The Common Law Tradition* relegates the profession to its own resources and to a reconstruction of what the author would have asserted in filling in the details of his thesis. The following points represent the writer's attempt to supply some of the missing elements.

##### A. *A Llewellyn-Cardozo Comparison*

By way of content and emphasis, Llewellyn no doubt pictured *The Common Law Tradition* as largely a gloss on the classics penned by Benjamin Cardozo. This is manifested not only by way of a singular, specific acknowledgment, but by constant citation to, and quotation from, Cardozo's opinions and extrajudicial writings. However, the differences between the viewpoints of the two men far outweigh the similarities; they also supply clues to an understanding of Llewellyn's thought. The origins of Cardozo's writings on the judicial process are directly traceable to the Storrs Lectures. Publishing his views only after initial misgivings were overcome, Cardozo did not regard the product of his pen as a set of working tools for fellow appellate judges. Llewellyn was drawing up just such a manual. Cardozo wrote in an era of judicial reticence; and even if he were writing today he could not, and would not, paint an exaggerated picture of judicial creativity, being a member of the judiciary himself. Although his candor was remarkable, and outstripped that of all other judges of his time, it was, nevertheless, a judicial candor which shunned statements that might be misconstrued by members of the bench, the legal profession or the public. Llewellyn labored under no such handicap. The freedom he enjoyed in describing the appellate process, as one not engaged in deciding, enabled him to make a singular contribution. In approaching his subject from the dual aspect of the advocate and the judge, he lays bare insights never quite definite enough to be put in print by a less gifted observer or writer. His "realistic" approach supplies subtleties and glimpses of the overall picture which Cardozo could not disclose were they his own. Ironically, the fact that Llewellyn was not a judge also detracts significantly from his work. The price paid for a free reign is a noticeable lack of perspective in some facets of his exposition, blind spots directly traceable to the fact that he never held judicial

office. Basing his observations primarily on reported opinions,<sup>48</sup> as well as empathy, Llewellyn fails to exhibit the soul searching quality invariably found in descriptions of the decisional process authored by members of the bench;<sup>49</sup> in a word, he is not troubled enough. Never having faced the dilemma of no correct answers, or no wrong answers, to an actual controversy, he writes as if there is an ascertainable, "correct" solution to all questions raised on appeal. It may well be that this same naivete underlies Llewellyn's entire endeavor to lay down precepts and examples to be followed by the attorney in presenting, and the judge in deciding, "tomorrow's appeal and next Thursday's."

The lifelike portrayal of advocacy only serves to emphasize the defects in his portrait of the judge. Thus, for example, no sympathy is expressed for appellate courts which daily decide causes by such margins as four-to-three and three-to-two votes. If situation sense were operable, would the percentage of agreement increase measurably? To pose the question is to answer it; few, if any, judges would venture an affirmative response.<sup>50</sup> Llewellyn appears to lose sight of the fact that the case which

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48. Much of the critical commentary contained in *The Common Law Tradition* is based on Llewellyn's reading of law reports and selected opinions. It is somewhat paradoxical that such an approach should be employed by one who has constantly reminded his audience that opinions reflect neither life nor the entire picture of the case before the court. See, e.g., Llewellyn at 359.

49. The troubled spirit, generated by lingering doubt and the necessity for compromise in deciding cases, is perhaps the most common note found in the extrajudicial writings of jurists. See the collection of such observations in Mendelson, *The Judge's Art*, 109 *U. Pa. L. Rev.* 524 (1961).

50. Most judges would probably accept the introspective observation of Judge Lehman: "There never can be a prediction of judicial action made with certainty. As long as I remain a judge I shall feel dismayed at times because I cannot decide the cases submitted to me with even a personal sense of certainty, and as long as you practice at the bar or study judicial decision you will feel dismayed at times because you will find that judicial decisions do not agree with your predictions or accord with your views of right or reason." Lehman, *The Influence of the Universities on Judicial Decision*, 10 *Cornell L.Q.* 1, 16 (1924). In a passage in the concluding chapters, Llewellyn himself acknowledges that "there is a line of guidance, but it speaks only to conscience plus judgment. That line is: 'the' problem-situation extends as far as you are perfectly clear, in your own mind, that you have grasped the picture fully and completely in life-essence and in its detailed variants, and therefore know it to present a significantly single whole, and one over which your knowledge and judgment have command." Llewellyn at 427. (Emphasis omitted.)

Llewellyn repeatedly asserts that his theories will not lead to certainty but to "reasonable regularity." However, this does not obviate the criticism of situation sense voiced in this paper. Llewellyn's reasonable regularity differs from certitude only to the extent that counsel or the judiciary misconceive the sense of any given situation. Stated somewhat differently, Llewellyn offers situation sense as a practical guide to deciding cases correctly; in pointing out the sense in certain precedents and lack of it in others, he conveys the distinct impression that one can know when he has grasped the sense of any given appeal.

a seasoned attorney deems "worth appealing" could be decided either way (or several ways), not only for or against the attorney's client, but in the judge's battle with himself to reach the optimum solution. Stated somewhat differently, it may be closer to the truth to generalize that, although in abstract reality a preferable solution may exist, it is probable that a case reaching the highest court of a state has so much to be said on each side as to cause all solutions to be unsatisfactory in some degree.<sup>51</sup> The inability of judges to concur on a singular answer is mirrored in the commentators. Llewellyn embraced the decision in *Wood v. Lucy, Lady Duff-Gordon*,<sup>52</sup> while others did not; he disapproved of *Chanel Master* while many authorities found the decision to be correct. The situation sense of *Jenkins v. Moyses* has apparently been rejected by the Legislature, which undertook to limit the holding by reinstating the law of usury (with respect to certain individuals who incorporate solely to secure loans otherwise unobtainable).<sup>53</sup> Even Cardozo saw much to be said for the defendant's case in *McPherson v. Buick*.<sup>54</sup>

### B. *The Scope of Situation Sense*

Llewellyn appears to be in general agreement with the observation of Cardozo that nine tenths of all appeals are predetermined, although he might set the percentage slightly lower.<sup>55</sup> Nevertheless, he never clearly indicates the cases in which situation sense serves a vital function. It is probable that he viewed it as a helpful guide to resolution of the small fraction of difficult cases which come before the courts; it would serve little purpose if intended solely as a guide to disposal of the "footless" appeal. However, it is precisely in the area of the difficult case that the

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51. Mr. Justice Frankfurter captured the thought when he noted that: "When, in any field of human observation, two truths appear in conflict it is wiser to assume that neither is exclusive, and that their contradiction, though it may be hard to bear, is part of the mystery of things." Frankfurter, *Some Observations on the Nature of the Judicial Process of Supreme Court Litigation*, 98 Proc. Am. Phil. Soc. 233, 239 (1954).

52. 222 N.Y. 88, 118 N.E. 214 (1917).

53. N.Y. Gen. Bus. Law § 374(2). In fairness to Llewellyn it should be stated that he invariably speaks of the "authorities" pointing in seven directions, or of the capable attorney being able to muster precedent on either side of an appeal, and not of seven rather evenly balanced solutions. However, lurking beneath the surface of these observations is the fact that traditional and appealing lines of reasoning may be found to justify any number of varying solutions. The precedents will not appear as isolated cases of citations, but as seven different ways of looking at the conflict. Again, the advocate championing a cause will not state that principle X is correct and the principles Y and Z ill conceived or outmoded. Typically he will state that Y and Z are fine standards but that his case in the instant appeal properly belongs under principle X.

54. See Cardozo, *The Growth of the Law* 41 (1924).

55. Llewellyn at 25, 45.

concept will supply no panacea. The most that can be said for it is that it may broaden the horizons of some judges and make explicit the approach already employed by the majority. The suggestion that a preferable solution is possible, if one could only ascertain the full facts and circumstances of a situation, is not likely to draw dissent. The problem is, however, that the judiciary must operate within the confines of the present appellate machinery; no new source materials are offered by Llewellyn. The competing considerations or values in each case are usually discerned via examination of the briefs and attendance at oral argument; the balancing of such factors, even under Llewellyn's theory, will always call for a policy determination to be reached by the individual judge. If the guide lies largely in the judge's approach and in a grasp of the true problem, the fact remains that the end product can never be established scientifically as the "sense" of a particular appeal.

At times Llewellyn calls for constant judicial creation, even in the footless appeal area, while in other places he minimizes such creativity by stressing that the "immanent law" of the case will suggest itself to a competent judge. This unorthodox bifurcation has led Judge Clark to conclude that "situation sense" cannot aid, but may well hamper, the judge in his attempt to steer a path between the Scylla of logical form and the Charybdis of subjectivism, by clouding the judge's sense of personal responsibility for the course eventually decided upon. He asserts that:

Llewellyn has led us astray. The judge is independent, and must exercise his independence. It is difficult to formulate principles to guide this judicial freedom or to provide simple maps through the maze of value-choices presented by any significant case. But it will not do to deny that the freedom exists or that the choices must be made. There are no immanent laws, easily grasped; no precise rules.<sup>56</sup>

In the writer's view, the conclusion of Judge Clark is probably correct, yet it is also overstated.<sup>57</sup> Llewellyn sought to equip the advocate with the sophistication of a law clerk recently retired from the service of the court in which an appeal is about to be taken. This task is brilliantly accomplished. He also sought to assist the bench in converting from the

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56. Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *Yale L.J.* 255, 275 (1961). Judge Desmond appears to be in agreement: "Precedent and principle, rationality and dignity, justice and common sense all have their places in the perfect opinion. But 'common sense' and 'justice' may be mere disguises for unrelieved subjectivism unless there are permanent norms available." Desmond, *Book Review*, 36 *N.Y.U.L. Rev.* 529, 530 (1961).

57. The members of the bench who undertook to review *The Common Law Tradition* were not misled by the situation sense concept. It is also probable that the average judge will not be swayed by any single text or commentary on the appellate process, especially in view of the abundance of material available on the subject.

formal to the grand style, largely through enlightened reason in the form of situation sense. In this endeavor, he submits a telling brief on behalf of constant judicial creation, both in statutory matters and in disputes governed by case law. Difficulties are generated, however, by his failure to clarify the method whereby cases are singled out for such treatment as opposed to summary disposition. A related shortcoming lies in a failure to differentiate between various types of issues raised on appeal. Thus, for example, appeals which merely contest the finding of fact of an administrative agency or jury, or which seek to bring the facts under an inapplicable principle stand little chance of success. The number of such appeals is quite large in proportion to those which present fertile questions of law for study.<sup>58</sup> Moreover, the inundation of appellate tribunals in recent decades indicates that henceforth a greater percentage of appeals will have to be scanned merely to insure that the litigants received their day in court, with a correspondingly smaller share receiving extensive treatment in a formal opinion. As a consequence, judicial creation in most cases, as envisioned by Llewellyn, appears to be unrealistic.

The portions of *The Common Law Tradition* which indicate that a court can manipulate precedent, or mold it to almost any end, also represent an oversimplification. It may be well to discuss this failing in conjunction with a projected attorney's outlook on situation sense. Under Llewellyn's theory, reasonable regularity based on the likelihood of a sensible result would take the place of the present appearance of certainty grounded in the fiction of rigid adherence to precedent. The continuous revamping and discarding of prior law would prove workable, as long as attorneys made situation sense their primary guide. However, this progression falls short of meeting the advocate's needs. Llewellyn's conception of the appellate process is not as yet the controlling one and may never be. Moreover, his view that precedents will not outlive their usefulness appears to be an ideal difficult of attainment. As matters currently stand, precedents sometimes span the centuries and continue to exhibit vitality, and even controlling influence, merely as precedents, with no claim to utility or service. Similarly, the precedent which dictates an unjust or unsatisfactory result remains to be reckoned with; it is not universally overcome by the tools supplied by Llewellyn to enable the judge to mold prior law to the sense of the immediate situation.<sup>59</sup> A

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58. Appeals founded on mere dissatisfaction with the outcome at the trial level, questions of sufficiency of evidence, routine objections and repetitious legal questions (such as whether a memorandum satisfies the Statute of Frauds), make up the bulk of an appellate court's docket and require little thought or exposition for adequate treatment.

59. Even the attorney may be caught off balance if concentrating on situation sense,

survey of the writings of our ablest judges, even those possessing the literary qualities and Solomon-like attributes of a Learned Hand, will indicate that resourcefulness and craftsmanship will not solve all the problems posed for the judge by prior decisions.<sup>60</sup> Accordingly, the attorney would be hard pressed to make a choice, if informed that on his next appeal his client's cause would be fortified by either precedent or situation sense, at his option. If the choice proved an easy one, the decision would probably be that of embracing established law and forsaking situation sense.<sup>61</sup>

## V. CONCLUSION

The difficulties surrounding situation sense indicate that it will not prove a touchstone for deciding all troublesome appeals. Grasp of the concept itself is made difficult by the fact that it bears no marked resemblance to any previously offered guide, with the possible exception of Gény's work.<sup>62</sup> It claims precision or certitude where natural law norms would not; it leaves little or no room for the doubts which trouble the ablest of judges and which give a semblance of reality to Judge Hutcheson's "hunch" theory.<sup>63</sup> It should be noted, however, that no text or

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as, for example, in a case where the court feels the pull of precedent to be so great as to require acquiescence, or at least prospective overruling.

60. Llewellyn gives recognition to this in stating: "Seldom indeed does it not pay to at least one adversary to marshal and deploy 'established law.'" Llewellyn at 30.

61. It may be that Llewellyn's "crisis in confidence" was misconceived. He may have concluded that attorneys are taking foolhardy appeals only to be rebuffed. However, attorneys can gauge fairly well whether to take an appeal or not. Discontent, if any exists, may be due to the somewhat different cause of having a court pull the rug out from under the advocate by achieving a sound or fair result unexpectedly, that is, by judicial creativity in the face of precedent pointing the other way. An attorney evaluating a case comes to two conclusions, one as to the strength of his hand on the law, the other as to who should win based on sense, justice or a combination of both these factors. It is probable that in all but the really unconscionable situation, he would prefer to have the better side law-wise, despite the possibility that justice or sense may produce an upset on any given occasion.

62. See Gény, *Judicial Freedom of Decision: Its Necessity and Method*, in *Science of Legal Method*, Select Essays 17 (Bruncken & Register transl. 1921) (an extract from Gény's *Méthode*).

63. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *Cornell L.Q.* 274 (1929). Llewellyn discusses the fiction of "One Single Right Answer" and makes it one of his fourteen steadying factors. Although he would no doubt protest, it may legitimately be questioned whether his situation sense concept is not the second cousin of the one right answer illusion.

It is interesting to note that at one point Llewellyn explicitly states that situation sense is not a "hunch" or "gut-reaction"; if that is all the judge possesses, he must continue his search. Llewellyn at 447. In addressing himself to the "ordinary lawyer," however, he

formula has ever greatly simplified the task of the appellate judge; if *The Common Law Tradition* does not do so, comfort may be found in the realization that neither did the writings of Cardozo. In the last analysis, the only flaw in Llewellyn's presentation may be that, in his treatment of situation sense, he forsook realism for idealism. This criticism is overshadowed, however, by the volume's principal merit, the author's demonstration that the true office of the judge lies midway between the traditional conception of it and subjective, result-oriented jurisprudence.<sup>64</sup>

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indicates that all the latter can hope to do is to predict the outcome of an appeal and not its rationale. *Id.* at 340-41. This would appear to be some type of "hunch" or "feel" approach. It also casts some doubt on the efficacy of situation sense, wherein perception of the real factual problem produces the rationale and the result. If the reasoning or path to be adopted is unclear to the attorney of average ability, will judges uniformly fare better?

64. For illustration of this balanced approach to justice and precedent, see the illuminating discussion of recent New York Court of Appeals decisions, in Cuomo, *Appellate Advocacy: Some Observations and Suggestions*, N.Y.L.J., Oct. 3, 1963, p. 4, cols. 1-5, Oct. 4, 1963, p. 4, cols. 1-5.