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Charles D. Breitel - Judging in the Grand Style

Cover Page Footnote

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CHARLES D. BREITEL—JUDGING IN THE GRAND STYLE

THOMAS W. MAYO*

When Chief Judge Charles D. Breitel retires from the New York Court of Appeals in December 1978, he will leave a legacy of judicial work that spans two and one-half decades, the last eleven years of which will have been a product of his years on New York's highest court. The process of sifting through not only the Chief Judge's many opinions but also his extrajudicial comments has no doubt begun in earnest in a number of quarters. This Article represents an initial attempt to evaluate Chief Judge Breitel's craftsmanship as an appellate decisionmaker.

INTRODUCTION

HOW does one judge the performance of a judge . . . ?¹ Whether or not it is explicitly acknowledged, this is the first and in some ways the most formidable problem that a would-be critic faces in assessing the performance of a judge. Some writers modestly posit certain minimum standards that are more or less universally acknowledged as such,² and others set more demanding standards.³ Chief Judge Charles D. Breitel has made the problem of judging his performance easier than it would otherwise be by indicating the standard against which he would have his work judged and, as one might expect, he has set a high standard for himself.

Largely through his extrajudicial writings, Chief Judge Breitel has endorsed the standards and techniques of the late Karl Llewellyn's "Grand Style"⁴ of deciding appeals and has embraced this style as his own.⁵ In the Cardozo Lecture at the Columbia University School of Law, Chief Judge Breitel, then a justice in the Appellate Division of the New York Supreme Court, vividly summarized Llewellyn's central thesis and, in the process, provided a standard against which his own decisions may be measured:

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1. V. Countryman, *The Judicial Record of Justice William O. Douglas* 379 (1974).
2. *E.g.*, *id.* at 380-81; Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 *Harv. L. Rev.* 293, 328 (1976).
3. *E.g.*, A. Bickel, *The Supreme Court and the Idea of Progress* 45-100 (1970).
4. Llewellyn coined the term "Grand Style." K. Llewellyn, *The Common Law Tradition* 5 (1960) [hereinafter cited as *The Common Law Tradition*].
5. In a book review of Llewellyn's *The Common Law Tradition*, then-Justice Breitel of the Appellate Division of the New York Supreme Court wrote: "[O]ne may question the demonstration and still accept a priori the thesis of *The Common Law Tradition*. (I would personally do both.)" Breitel, *Book Review*, 61 *Colum. L. Rev.* 931, 939 (1961).

Breitell is steadfast in his praise of Llewellyn's analysis of the legal opinion in the common-law process and the appellate judicial process. *E.g.*, C. Breitel, *The Lawmakers* 44 (1965) ("The finest analysis of the legal opinion in the common law process has been done . . . in . . . *The Common Law Tradition* I would say [Llewellyn's] contribution to the understanding of the appellate judicial process ranks with the contributions of Holmes and Cardozo.")

What Llewellyn taught us is that in any reasoned elaborated opinion worth its "salt," the rational derivation of rules from other rules, whether statutory or decisional in origin, is not only made explicit, but the ground for the derivation in the situation as it exists as a socio-economic fact is also made explicit. To accomplish this the judge must have a situation-sense. From what he knows of the facts, the case facts and the milieu in which they have occurred, with a broad sociological view, he relates the rules to the case.⁶

This Article will sample Chief Judge Breitel's criminal law opinions and, adopting the methodology pioneered by Llewellyn in *The Common Law Tradition*, show that his opinions have exemplified the Grand Style of appellate decisionmaking. Part I will summarize briefly Llewellyn's writings on the Grand Style, and Part II will analyze Chief Judge Breitel's precedent-handling technique in forty of his criminal law opinions.

I. THE GRAND STYLE

Although Karl Llewellyn broke new ground with his writings between 1925 and 1960,⁷ most of what he wrote in those years about the Grand Style and the Formal Style⁸ has since become conventional wisdom in law schools and in practice. The distinctions between what he referred to as the Formal Style and the Grand Style "have grown familiar to the point of caricature,"⁹ so that the Grand Style now

6. C. Breitel, *supra* note 5, at 45. Breitel went on to say: "A simple deductive process from black letter decisional rules or statutory language can lead only to the mechanical jurisprudence so abhorred by Pound, so loved by those who read with their lips. A process undisciplined by relation to the rules in precedent or statute, on the other hand, leads to unpredictability, vitiating a cardinal purpose in the law if future conduct is to be influenced by law. Worse, it leads to subjectivism or idiosyncrasy at the hands of the men in the long robes." *Id.* See also Breitel, *Chief Judge Stanley H. Fuld*, 25 Syracuse L. Rev. 1, 3-4 (1974). In the Cardozo Lecture, Justice Breitel offered a definition of law that appears to be based loosely upon an analytical definition of positive law, but that goes beyond the concept of merely official sanctions: "Law also includes those exercises of power which may not presently have available the form of a legal coercive sanction, but which it is recognized would be forthcoming without much question, in short order. The exercise may emanate from the chief executive, a judge, or a policeman." C. Breitel, *supra* note 5, at 17. This is the logical result of a decisionmaking process that focuses upon "socio-economic fact," "situation-sense," "the milieu in which [the case facts] have occurred," and the "broad sociological view." C. Breitel, *supra* note 5, at 45.

7. A caveat may be in order. The Common Law Tradition represents a large part of a lifetime of considerable work. In another book, Llewellyn estimates that the number of cases considered in *The Common Law Tradition* is somewhere between 350 and 400. K. Llewellyn, *Jurisprudence: Realism in Theory and Practice* 222 (1962) [hereinafter cited as *Jurisprudence*]. The table of cases in *The Common Law Tradition* lists over 650 cases. The complexity of the book prompted Professor Twining to preface his treatment of *The Common Law Tradition* by stating: "[It] could easily be the subject of a book-length study." W. Twining, *Karl Llewellyn and the Realist Movement* 203-04 (1973).

8. *The Common Law Tradition*, *supra* note 4, at 5-6.

9. Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1313 (1976). Although excellent examples of both the Grand Style and the Formal Style exist in the official reporters, a fascinating series of fictional opinions in Professor Lon Fuller's *The Case of the Speluncean Explorers* illustrates the two styles at work on the same legal problem. Fuller, *The*

influences even the extrajudicial writings of Supreme Court Justices.¹⁰ At the risk, therefore, of propounding the obvious, this Section will summarize briefly the foundations and principles of the Grand Style of deciding appeals.

A. *The Grand Style and the Formal Style: A Comparison*

Karl Llewellyn and the legal realists, taking their cue from a famous passage by Holmes,¹¹ made predictability a key concept of the law.¹² Just as Holmes' attention shifted in *The Path of the Law* from the predictability of judicial results to the method and style of judicial decisionmaking,¹³ so, too, did Llewellyn eventually direct his efforts toward developing a judicial style that would increase the "reckonability"¹⁴ and right result of the law.¹⁵

For Llewellyn, judges could achieve reckonability of result through the use of fourteen "steadying factors,"¹⁶ and the explication of these factors¹⁷ provided the context for his extended discussion of the most subtle and complex of these factors—the notion of a "general period-

Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949). See especially the Formal Style opinions of Justice Keen, *id.* at 631-37, and Chief Justice Truepenny, *id.* at 616-19, and the Grand Style opinion of Justice Foster, *id.* at 620-26.

10. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977).

11. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897).

12. Jerome Frank summarized this concern succinctly: "The first sub-group [of legal realists], of whom Karl Llewellyn of Columbia is perhaps the outstanding representative, I would call 'rule-skeptics.' . . . As these rule skeptics see it, the trouble is that the formal legal rules enunciated in courts' opinions—sometimes called 'paper rules'—too often prove unreliable as guides in the prediction of decisions. The rule skeptics believe that they can discover, behind the 'paper rules,' some 'real rules' descriptive of uniformities or regularities in actual judicial behavior, and that these 'real rules' will serve as more reliable prediction-instruments . . ." J. Frank, *Courts on Trial* 73 (1949) (footnote omitted). See also Donnelly, Book Review, 3 Hofstra L. Rev. 899, 900-01 (1975).

13. Holmes, *supra* note 11, at 467 ("I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.").

14. For a sampling of Llewellyn's usage of the term "reckonability", and of the shades of meaning with which he infused it, see *The Common Law Tradition*, *supra* note 4, at 17-18, 37-38, 181-82, 185-86 (" 'certainty' of outcome [or decision]"), 200, 216, 336-38 ("reasonable regularity").

15. See Donnelly, *supra* note 12, at 901. This shift has been skillfully described in Comment, *The Dual Problems of Legal Justification: A Key to the Unity of Karl Llewellyn's Jurisprudence*, 45 U. Chi. L. Rev. 654 (1978). For a casual but useful discussion of Karl Llewellyn and the legal realist movement, see G. Gilmore, *The Ages of American Law* 77-79, 81-91 (1977).

16. The 14 steadying factors in American appellate courts are: "(1) Law-conditioned Officials; (2) Legal Doctrine; (3) Known Doctrinal Techniques; (4) Responsibility for Justice; (5) The Tradition of One Single Right Answer; (6) An Opinion of the Court; (7) A Frozen Record from Below; (8) Issues Limited, Sharpened, Phrased; (9) Adversary Argument by Counsel; (10) Group Decision; (11) Judicial Security and Honesty; (12) A Known Bench; (13) The General Period-Style and Its Promise; (14) Professional Judicial Office." *The Common Law Tradition*, *supra* note 4, at 19.

17. *Id.* at 19-61.

style."¹⁸ Llewellyn identified two competing period styles, the Formal Style of which he disapproved,¹⁹ and the Grand Style of which he approved.²⁰ Professor Twining has presented these two styles in point-counterpoint fashion,²¹ and has reduced their elements to a brief synopsis that provides a framework for a consideration of Llewellyn's own theory.²²

First, a Formal Style judge tends to emphasize bare legal precepts and blackletter law; a Grand Style judge looks to the principle or reason behind the rule.²³ Llewellyn opposed the use of illegitimate precedent-handling techniques, which he described as "[d]eliberately [turning] the back upon pertinent but uncomfortable authority, leaving it unmentioned and therefore leaving the question open as to how the matter now really stands."²⁴ He frowned upon distinctions of precedent "without explicit reason addressed to the wisdom of distinguishing."²⁵ Llewellyn urged courts to gather the relevant precedents "at home," and to look to outside authorities for good reason and for policies.²⁶ Llewellyn also endorsed the "ongoing correction and recorection"²⁷ of rules of law, and favored "rule-tidying."²⁸

Second, a Formal Style judge shuns resort to considerations of social fact; a Grand Style judge deliberates using "situation-sense."²⁹ Llewellyn implored judges first to make "[c]onstant [o]vert [u]se of [s]ituation-[s]ense" and to resort to the equities of the case only against the framework provided by the use of situation-sense.³⁰

Third, the Formal Style judge does not consider guidance to the practicing bar and to society to be a major factor in his opinions; the Grand Style judge fashions rules and decisions that provide "guidance for the future"³¹ and that, as a result, improve the reckonability of the law. Llewellyn urged courts to give advance notice of important changes in doctrine,³² by intimating what the courts might do on a

18. *Id.* at 35-45.

19. *Id.* at 38.

20. *Id.* at 36.

21. See W. Twining, *supra* note 7, at 210-11, 213.

22. *Id.* at 210-11.

23. *Id.*

24. The Common Law Tradition, *supra* note 4, at 256 (emphasis omitted).

25. *Id.* at 287.

26. *Id.* at 295-96.

27. *Id.* at 291.

28. *Id.* at 298 ("to make each little opinion, in its own little way, a *clean* fresh start").

29. W. Twining, *supra* note 7, at 211. The term "situation-sense" was coined by Llewellyn and discussed at length in The Common Law Tradition, *supra* note 4, at 121-57. Situation-sense is discussed in pt. I(B) *infra*.

30. The Common Law Tradition, *supra* note 4, at 260, 268.

31. W. Twining, *supra* note 7, at 211.

32. The Common Law Tradition, *supra* note 4, at 299-305.

different set of facts,³³ or by prophesying an impending overruling as soon as the opportunity arose.³⁴

Before dealing with the opinions of Chief Judge Breitel, Llewellyn's concepts of situation-sense and precedent-handling techniques deserve further consideration.

B. *Situation-Sense*

One way to understand the role of situation-sense in the decision-making process is to focus first on Llewellyn's dictum to judges to consider the principle or reason behind the legal rule under consideration. The corresponding inquiry in any given case is to ask what is the "type of life-situation"³⁵ out of which the present case has arisen, for only then can the applicability of the principle or reason embodied in the legal rule even roughly be determined. The problem has been called one of "horizons,"³⁶ and Llewellyn's situation-sense was intended to help equalize the disparity in personal horizons that exists among judges. This necessary step requires the judge to acquire a sense of the general type-situation out of which the specific controversy has arisen, and it should help prevent his consideration of the case in a vacuum or in a singular framework, totally but unconsciously limited by the judge's own horizons. The process, wrote Llewellyn, is an

open, reasoned, extension, restriction or reshaping of the relevant rules, done in terms not of the equities or sense of the particular case or of the particular parties, but instead (illuminated indeed by those earthy particulars) done in terms of the sense and reason of some significantly seen *type of life-situation*.³⁷

Professor Twining claims that Llewellyn always used the term "situation-sense" in relation to a principle or policy.³⁸ Professor Don-

33. *Id.*, *supra* note 4, at 299-300.

34. *Id.* at 303-06. Again, reckonability is the goal: "Warning is a tremendous value to a counselling lawyer." Jurisprudence, *supra* note 7, at 225. Llewellyn's own step-by-step summary of the Grand Style reduced the process of appellate decisionmaking to four steps: (1) "diagnose the significant problem involved"; (2) "mark out the life-situation that gives rise to the problem"; (3) "determine an, or the most, appropriate *line* of solution or treatment"; (4) "[determine] the specific prescription which may be called for." The Common Law Tradition, *supra* note 4, at 450.

35. Jurisprudence, *supra* note 7, at 219-20.

36. Donnelly, *supra* note 12, at 911.

37. Jurisprudence, *supra* note 7, at 219-20. In another passage, Llewellyn described the relationship between the judge's acquired sense of the situation and the applicability of a particular legal rule: "As you size up the facts, try to look first for a significant life-problem-situation into which they comfortably fit, and only then let the particular equities begin to register; so that when the particular equities do begin to bite, their bite is already tempered by the quest for and feel for an appropriate rule that flows from and fits into the significant situation-type." *Id.* at 222. Llewellyn was most critical of courts' opinions where "above all, . . . [no] *practice* . . . even budded of trying to grasp and solve *first* the type of problem-situation, coming only then to grips with the specific case." The Common Law Tradition, *supra* note 4, at 147-48.

38. W. Twining, *supra* note 7, at 222, noted in Donnelly, *supra* note 12, at 907.

nely has defined the term in relation to the judge's perspective, however it was acquired—by life experience within a group or on the basis of briefs and oral argument.³⁹ It would seem that both uses are critical to any understanding of the utility of the concept to Llewellyn's and Breitel's Grand Style.

C. *Precedent and Precedent-Handling Techniques*

Llewellyn stated his theory of stare decisis in a nutshell: "Rules guide, although they do not control, decision."⁴⁰ Having so written, however, Llewellyn went on to prove that the concept of precedent, like the Rule Against Perpetuities, may be easier to put in a nutshell than to keep there.

Llewellyn's own words best describe his concept of precedent:

[A]s overt marks of the Grand Style: "precedent" is carefully regarded, but if it does not make sense it is ordinarily re-explored; "policy" is explicitly inquired into; alleged "principle" must make for wisdom as well as for order if it is to qualify as such, but when so qualified it acquires peculiar status. On the side both of case-law and of statutes, where the reason stops there stops the rule⁴¹

Precedent-handling techniques play an important role in Llewellyn's analysis of the Grand Style, and are inseparable from a consideration of precedent and stare decisis generally. Recalling that reckonability of result is the desired product of the Grand Style, one quickly sees the need to match the malleability of legal precedent with an openness about what is being done to the precedent and the reasons why. The "[c]onstant [o]vert [u]se of [s]ituation-[s]ense"⁴² and the "overt resort to

39. Donnelly, *supra* note 12, at 910.

40. Jurisprudence, *supra* note 7, at 110; see The Common Law Tradition, *supra* note 4, at 189.

41. Jurisprudence, *supra* note 7, at 217. On the subject of stare decisis Llewellyn wrote: "[T]he vicious illusion is still powerful and pervasive that legal doctrine is rigid (at least in the normal case), that 'following' consists in standing, and that 'standing' (at least in the normal case) involves no choice, no action, no independent responsibility. This—even in the normal case—is an illusion, a mirage; 'repose is not the destiny of man,' as man, much less that of *homo juridicus*. Yet *stare decisis* does still mean, to most, passivity, so that it is not true *stare decisis*, not responsible standing by and work [*sic*] with the authorities; it is instead some lotus-eating inertness or push-button operation which floats before law's yearners as their dream-ideal." The Common Law Tradition, *supra* note 4, at 341-42.

Jerome Frank, for one, thought Llewellyn's discussions of precedent and stare decisis presented "an overdrawn picture of the vagueness caused by the *ratio decidendi* device." J. Frank, *supra* note 12, at 280. "Llewellyn and others suggest that the value of the precedent system lies in this very pliancy of the precedents But the precedent system so considered—as a sort of accordian—comes far from supplying legal uniformity and certainty." *Id.* at 284. Llewellyn responded by taking Frank to task for denying that precedents are authoritative. Precedents may be "studiously ambiguous," wrote Llewellyn, but "within margins." Jurisprudence, *supra* note 7, at 110. The debate over precedent rages on, but—as this exchange indicates—the issue is often a question of degree.

42. The Common Law Tradition, *supra* note 4, at 260 (emphasis added).

and discussion of sense⁴³ are recurrent themes in Llewellyn's exposition of legitimate precedent-handling techniques.⁴⁴ In *The Common Law Tradition*, Llewellyn describes and illustrates sixty-four precedent-handling techniques,⁴⁵ sufficient in number to give a judge the tools necessary to modify, distinguish, or overrule adverse precedent while being completely honest about what he is doing.

Llewellyn's dictum that rules guide decisions but do not control

43. Jurisprudence, *supra* note 7, at 219 (emphasis added).

44. Thus, upon reading a Pennsylvania case, Llewellyn wrote admiringly that "reason, regret, authority, and the reason for abiding by the authority, [were] *all at work in sunlight*." *The Common Law Tradition*, *supra* note 4, at 146 (emphasis added).

45. *Id.* at 77-91. Four techniques are denominated "illegitimate." They all entail the "Avoidance [of Adverse Precedent] Without Acceptance of Responsibility," *id.* at 85, and include: (1) ignoring a controlling case that is on point; (2) falsely presenting the holding or facts of the prior case; (3) making a distinction without a difference; and (4) distinguishing the prior case on its facts while using a different system of classification or level of generality in treating the facts of the instant case. *Id.* at 27 n.18, 85-86. The result of using these techniques is to cloud the true rule of law being applied and to leave the law in an uncertain state—in a word, unreckonable. *See id.* at 256. Even a baffled court faced with a difficult case is warned to "decide each case according to the best light it has . . . [W]restle with the authorities . . . [B]e frank about the difficulty." *Id.* at 453-54. These concepts of craft are intertwined with a controversial rule-skepticism, which Llewellyn evidences by listing pairs of "mutually contradictory and alternative techniques" of construction and interpretation. Jurisprudence, *supra* note 7, at 338-39 (cases); *The Common Law Tradition*, *supra* note 4, at 531-35 (statutes).

These concepts of craft, however, have nonetheless become basic to our understanding of judicial craftsmanship. Thus, Professor Shapiro's discussion of the judicial craftsmanship displayed by the opinions of Mr. Justice Rehnquist, with appropriate changes of names and dates, could pass for a case critique from *The Common Law Tradition*: "Determining the proper role of precedent is one of the hardest tasks facing an appellate judge, especially a Justice of the Supreme Court . . . Given that [Justice Rehnquist] . . . is intent upon implementing [his] ideology whenever an opportunity presents itself, one would expect that Justice Rehnquist would frequently advocate rejection of the holdings or rationales of prior decisions. What is called for in this process, I believe, is complete candor. If a decision is to be overruled, or its rationale rejected, it should be done with the fullest possible explanation of the reasons for doing so. At the same time, a decision should not be distinguished if the result and rationale cannot honestly be reconciled with the result reached in the case at hand. Such actions lead only to cynicism about the nature of the judicial process and disrespect for the judiciary itself. Further, they may lead to confusion and conflict among lower courts, and needless uncertainty as to the state of the law." Shapiro, *supra* note 2, at 349-50 (footnote omitted). Professor Shapiro continues: "If that philosophy is to be watered down or rejected—as it evidently is—it should be done openly and with respect for precedent, not by sleight of hand." *Id.* at 354-55 (footnote omitted).

In light of Professor Shapiro's comments, it is interesting to note that in *United States v. Scott*, 98 S.Ct. 2187 (1978), Mr. Justice Rehnquist, writing for the Court, candidly admitted that another decision which he wrote, *United States v. Jenkins*, 420 U.S. 358 (1975), was wrongly decided; he then proceeded to overrule *Jenkins* and to explain the reasons for so doing. Mr. Justice Rehnquist wrote: "Yet, though our assessment of the history and meaning of the Double Jeopardy Clause in . . . *Jenkins* . . . occurred only three Terms ago, our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that *Jenkins* was wrongly decided. It placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empaneled to try him so as to include those cases where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence. We have therefore decided to overrule *Jenkins* . . ." 98 S.Ct. at 2191.

them⁴⁶ is applicable to statutory as well as case law precedent. Professor Twining points out that the major difference between statutory rules and case law rules is that "[the former] are expressed in fixed verbal form Typically, [the latter] are not expressed in fixed verbal form" ⁴⁷ Notwithstanding this difference, Llewellyn insisted that "the range of techniques correctly available in dealing with statutes is roughly equivalent to the range correctly available in dealing with case law materials."⁴⁸ Thus, as with case law rules, the court must seek the meaning of a statutory rule by examining its reason and purpose—a statute without reason and purpose is meaningless⁴⁹ and nonsensical.⁵⁰ The problem posed by a statutory rule is much like that presented by a case law rule: whether the reason or policy embodied in the statute may properly be applied to the type-situation presented by the case and to this case in particular. It is important to continue to apply to the statute "some one of the technical devices which will serve the purposes of [its] sense,"⁵¹ and to avoid reliance on the talismanic recitals of "legislative intent"⁵² and the superior power of the legislature.⁵³ The process of statutory interpretation in the Grand Style has been succinctly described by Soia Mentschikoff;⁵⁴ it suffices for present purposes to note that for Llewellyn the techniques of handling statutory precedent roughly parallel those for handling case law precedent.⁵⁵

46. The pertinent language is quoted in the text accompanying note 40 *supra*.

47. W. Twining, *supra* note 7, at 491.

48. The Common Law Tradition, *supra* note 4, at 371 (emphasis omitted). "The demarcation between 'statutory interpretation' or 'constitutional interpretation', on the one hand, and judge-made law on the other, is not a sharp line. Statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advertence to the issue at hand attenuates." Monaghan, *The Supreme Court, 1974 Term—Foreword: "Constitutional Common Law,"* 89 Harv. L. Rev. 1, 33 (1975) (quoting P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's *The Federal Courts and the Federal System* 770 (2d ed. 1973)).

49. Jurisprudence, *supra* note 7, at 228.

50. The Common Law Tradition, *supra* note 4, at 374.

51. *Id.* at 377-78.

52. *Id.* at 382.

53. Jurisprudence, *supra* note 7, at 228 ("Even when legislators do have demonstrable intentions . . . there can be times when a court has a duty of restrictive construction."). The canons of construction do not help the Grand Style judge choose between alternative constructions because he knows they exist in opposite pairs—"the construction contended for must be sold, essentially, by means [of] . . . [t]he good sense of the situation and a simple construction of the available language to achieve that sense, by tenable means, out of the statutory language." The Common Law Tradition, *supra* note 4, at 375 (emphasis omitted).

54. "If it is correct that the grand style of appellate judging involves looking at the situation before the court in terms of its type situation and arriving at a conclusion as to what is the best policy, then if you look at the precise language of the statute and at the situation before you and the reason for the language seems to be present in the situation, you can expand by analogy or, if the reason is absent, limit the statutory language." S. Mentschikoff, *Commercial Transactions* 11 (1970).

55. The Common Law Tradition, *supra* note 4, at 373. Llewellyn's techniques were inspired in part by Breitel's writing on the subject of statutory construction. *See id.* at 372.

II. BREITEL AS A REALIST

In this Part, forty of Chief Judge Breitel's criminal law opinions are analyzed in the same statistical and textual manner that Karl Llewellyn employed.⁵⁶ No effort has been made to preselect or sift through the opinions for the best or the worst. Beginning with volume 19 of *New York Reports Second Series*, the first reporter to contain the court of appeals opinions of then-Judge Breitel, every criminal law opinion was read through volume 21, yielding a sample of twenty-one of his early opinions, written over one and one-half years (1967-1968). For comparison, nineteen of Chief Judge Breitel's more recent opinions were read, starting with volume 36 of *New York Reports Second Series* and ending with volume 40.

The decision to analyze only criminal law opinions was not entirely an arbitrary one. First, an area that is largely controlled by statute was selected in order to see whether Chief Judge Breitel adhered to Llewellyn's theory of Grand Style statutory interpretation. Second, certain areas of the law have historically proved to be fertile soil for legal growth in the Grand Style. Choice of law, commercial law, and the law of torts, for instance, were the fields in which some of America's pioneering legal realists toiled. Llewellyn himself limited his analysis throughout most of *The Common Law Tradition* to commercial law opinions of the courts whose opinions he studied. But little has been written about legal realism, the Grand Style, and criminal law. Certainly the field can only be understood in its factual and socio-economic setting, and no sensitive opinion can be persuasive or command adherence if it ignores these factors. Thus, the time is ripe for a modest beginning in this direction. As this Part will show, no more worthy subject could have been chosen for such a beginning than Chief Judge Breitel.

A. Quantifying the Unquantifiable

In his statistical analysis of opinions, Llewellyn focused upon two aspects of the use of simple citations. First, he examined the ratio of *cf.*'s, *see*'s, and other qualifying introductory signals to simple citations. Because the "undiscriminating simple cite" is the "easy citation," "if the work of the court is coarse either in doctrinal perception or in the sorting of authority, one ought to expect straight simple cites and little else."⁵⁷ A ratio of 2½:1 demonstrates "a careful interest in and reliance on the precedents,"⁵⁸ and a ratio of 3:1 is also acceptable.⁵⁹ Second, Llewellyn required that, if simple citations were sparingly

56. See Appendix *infra* for a table of the forty criminal law opinions in the sample.

57. *The Common Law Tradition*, *supra* note 4, at 101.

58. *Id.* at 258.

59. *Id.* at 101.

used, they should be accurately used as well: the point cited should be accurately stated and should be the holding in the cited case, not dictum.⁶⁰ Llewellyn's method in *The Common Law Tradition* was to check every fifth simple citation until 100 were collected. In the smaller sample used in this Article every simple citation was checked.

1. Ratio

The ratio of simple citations to qualified citations changed rather severely from 1967 to the present. In the earlier years, twenty-one cases yield a ratio of 89 qualified citations to 40 simple citations, or about 2¼:1—not far from the 2½:1 that Llewellyn found acceptable.⁶¹ Breitel's later opinions evidence even greater selectivity and discrimination: nineteen cases produce 192 qualified citations to 36 simple citations, a ratio of about 5:1. The latter ratio compares favorably with the "discrimination factor" of any court reported in *The Common Law Tradition*.

2. Accuracy

As the table below shows, only one simple citation was inaccurate. In *People v. Winfrey*,⁶² Judge Breitel stated that sections 667 and 668 of the Code of Criminal Procedure⁶³ were mutually exclusive and that no section 667 motion may be entertained after an indictment has been returned; he then cited a case in which those questions were not even decided.⁶⁴ But in every other citation, only the weight of the authority cited and the appropriateness of the unqualified cite could be questioned.

ACCURACY OF BREITEL'S SIMPLE CITATIONS

		Accurate	Recited Prior Holding	Dictum	Error	Total
Early cases	Number	27	8	4	1	40
	% of Total	67.5	20	10	2.5	100
Later cases	Number	22	9	5	0	36
	% of Total	61	25	14	0	100
All cases	Number	49	17	9	1	76
	% of Total	65	22	12	1	100

The accuracy of Chief Judge Breitel's simple citations is admirably high, but marred somewhat by his tendency to indulge in a percentage-

60. *Id.* at 101, 258.

61. *Id.* at 258.

62. 20 N.Y.2d 138, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967).

63. Law of June 1, 1881, ch. 442, §§ 667, 668, 1881 N.Y. Laws 175 (current version at N.Y. Crim. Proc. Law §§ 190.80, 30.20 (McKinney 1971 & Supp. 1976-1977)).

64. 20 N.Y.2d at 140-41, 228 N.E.2d at 810, 281 N.Y.S.2d at 825-26 (citing *People v. Saccenti*, 14 N.Y.2d 1, 196 N.E.2d 885, 247 N.Y.S.2d 79, *cert. denied*, 379 U.S. 854 (1964)).

lowering practice that is endorsed by Llewellyn. Twenty-two percent of Breitel's simple citations were not to holdings but were to cases in which the cited rule was simply restated along with a further citation to the case that first established the proposition being supported. Llewellyn encouraged "rule-tidying," a practice that includes the restatement of prior lines of cases into a series of convenient summaries of established law for easy reference in future cases.⁶⁵ The judge who, like Breitel, is conscientious about such chores, is confronted with a choice: Does he cite the recent case with a simple citation to indicate the proper strength of the cited proposition, notwithstanding that the case cited technically does not so hold? Or does he qualify the citation to indicate that the cited case merely repeats the proposition and does not establish it, and thereby run the risk of misleading a reader by indicating that the proposition is not as well-established as it is? The answer may be to ignore the "problem" altogether. Properly used, the simple citation will mislead no one since it still will be reserved only for propositions that enjoy the status of holdings. Properly and respectfully used, such a use of the simple citation does not imply coarse analysis or an attempt to obscure the true reasons for decision. So viewed, Breitel's accuracy rate jumps to eighty-seven percent, which compares favorably with the "scores" of some of Llewellyn's favorite Grand Style courts.⁶⁶

B. *The Cases Speak*

For this section, each of the forty cases examined in Part II(A) was read for its Grand Style attributes. Some of the cases involved routine questions and, therefore, Chief Judge Breitel had no opportunity to employ Grand Style techniques.⁶⁷ Such cases will be passed over in this discussion. Even among this limited selection of cases, however, there are some Grand Style masterpieces. These cases will be explored a bit further.

Two points should be made before proceeding. First, the author

65. See notes 27-28 *supra* and accompanying text.

66. See *The Common Law Tradition*, *supra* note 4, at 101-03.

67. *E.g.*, *People v. Wright*, 37 N.Y.2d 88, 332 N.E.2d 331, 371 N.Y.S.2d 460 (1975); *People v. Freeland*, 36 N.Y.2d 518, 330 N.E.2d 611, 369 N.Y.S.2d 649 (1975); *People v. Gleeson*, 36 N.Y.2d 462, 330 N.E.2d 72, 369 N.Y.S.2d 113 (1975); *Nigrone v. Murtagh*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975); *People v. Carbonaro*, 21 N.Y.2d 271, 234 N.E.2d 433, 287 N.Y.S.2d 385 (1967), *modified mem.*, 21 N.Y.2d 971, 237 N.E.2d 360, 290 N.Y.S.2d 199 (1968); *People v. Cefaro*, 21 N.Y.2d 252, 234 N.E.2d 423, 287 N.Y.S.2d 371 (1967) (Breitel, J., dissenting), *rev'd in part on rehearing*, 23 N.Y.2d 283, 244 N.E.2d 42, 296 N.Y.S.2d 345 (1968); *People v. Goldman*, 21 N.Y.2d 152, 234 N.E.2d 194, 287 N.Y.S.2d 7 (1967), *appeal dismissed per curiam*, 392 U.S. 643 (1968); *People v. Torres*, 21 N.Y.2d 49, 233 N.E.2d 282, 286 N.Y.S.2d 264 (1967); *People v. Liller*, 20 N.Y.2d 727, 229 N.E.2d 617, 283 N.Y.S.2d 51 (1967) (mem.); *People v. Grossman*, 20 N.Y.2d 346, 229 N.E.2d 589, 283 N.Y.S.2d 12 (1967); *People v. Gallon*, 19 N.Y.2d 389, 227 N.E.2d 284, 280 N.Y.S.2d 356 (1967), *cert. denied*, 390 U.S. 911 (1968).

recognizes the difficulty of the task of analyzing opinions in this manner. It is humbling indeed to read Llewellyn's own confession: "[A]fter a decade and a half of labor in the general area, my manuscript of 1941 on the cases in 281 N.Y. still came nowhere near to bringing out either the pervasiveness or the intensity of the return to the Manner of Reason there displayed."⁶⁸ If nothing else, this study has taught the author the complexity and subtlety of Llewellyn's undertaking in *The Common Law Tradition*.

Second, no effort has been made in this Section to identify substantively good or bad opinions. The results reached in the cases might be right or wrong and they might be results that any panel of experts could agree with or not. The Grand Style is not concerned with opinions that are "right" so much as it is with opinions that are supported by "the best reason the particular court can manage at the particular time for the particular question."⁶⁹

*People v. Henderson*⁷⁰ is an ideal starting point because it presents a familiar situation during Judge Breitel's early years on the high court: Breitel dissenting in a Grand Style tour de force from a formalistic majority opinion. In *Henderson*, the defendant was incarcerated at the time of his indictment on felony charges. A felony information was filed with a police justice court, which then caused the arrest warrants to be served upon the defendant. The police justice court lacked subject matter jurisdiction over the felony information. Pursuant to statute, the defendant requested disposition of the indictment and information within 180 days. When the court failed to dispose of the indictment and information, defendant moved to dismiss all charges.

The majority's response in *Henderson*⁷¹ was formalistic—a mechanical syllogism devoid of all policy considerations and, in its artificiality, useless as a guidepost for further decisions by lower courts. The syllogism was as follows: (1) by statute, all *untried* informations must be disposed of within 180 days; (2) the police justice court lacked subject matter jurisdiction over the information filed with it; (3) the information, then, was not a triable information; (4) the information, if not *triable*, could not be an *untried* information; (5) therefore, the information filed with the police justice court did not have to be disposed of within the statutory period.⁷²

In dissent, Judge Breitel focused on the type-situation to which the statute applied and found that the policy embodied in that statute was equally applicable to the instant situation.⁷³ Once a warrant issues, he

68. *The Common Law Tradition*, *supra* note 4, at 142.

69. *Id.* at 139.

70. 20 N.Y.2d 303, 229 N.E.2d 422, 282 N.Y.S.2d 734 (1967).

71. Judge Scileppi wrote the majority opinion in which Judges Fuld, Van Voorhis, Vergan, and Keating concurred.

72. 20 N.Y.2d at 305-06, 229 N.E.2d at 424, 282 N.Y.S.2d at 736.

73. *Id.* at 307-08, 229 N.E.2d at 425-26, 282 N.Y.S.2d at 738-39 (Breitel, J., dissenting).

reasoned, and is received by the penal authorities, certain consequences follow: the prisoner's rehabilitation program may be interrupted, his parole status affected, or even his day-to-day prison life disrupted.⁷⁴ It was to minimize such interruptions that the legislature enacted the 180-day rule.⁷⁵ Since these consequences would follow the receipt of any warrant, whether or not the issuing court has subject matter jurisdiction of the underlying offense, Judge Breitel saw the two type-situations as essentially identical (for purposes of the statute) and dismissed as irrelevant the majority's distinguishing factor of subject matter jurisdiction.⁷⁶ Considerations of policy and a feel for the factual context of the operation of the statutory rule combined in Breitel's dissent to produce the more persuasive and satisfactory opinion.⁷⁷

While *Henderson* demonstrates Judge Breitel's Grand Style treatment of statutory precedent, *In re Barash*⁷⁸ shows a Grand Style judge handling adverse case law precedent in a straightforward manner. In *Barash*, the court confronted the issue of whether a lawyer who has been disbarred as the result of a felony conviction must, upon reversal of the conviction, show convincing proof of his innocence when petitioning the appellate division for re-admission.⁷⁹ In *In re*

74. *Id.* at 308, 229 N.E.2d at 425, 282 N.Y.S.2d at 738 (Breitel, J., dissenting).

75. *Id.*

76. *Id.* at 308, 229 N.E.2d at 425-26, 282 N.Y.S.2d at 738-39 (Breitel, J., dissenting).

77. For a similar treatment, see *People ex rel. Williams v. La Vallee*, 19 N.Y.2d 238, 225 N.E.2d 735, 279 N.Y.S.2d 1 (1967). Here an indigent relator in a habeas corpus proceeding requested counsel on the ground that he was indigent and incapable of retaining counsel of his own selection. The hearing court denied the relator's request because the nature of the proceeding was civil rather than criminal. Writing for the majority, Judge Breitel rejected the hearing court's rationale as formalistic. Indeed, the hearing court's rationale exemplified the Formal Style's literalism and strict, deductive reasoning. Instead, Breitel chose to broaden the rule allowing assigned counsel for indigents in coram nobis proceedings. Under this rule, when postconviction relief was sought to correct an alleged error or defect in a criminal proceeding, indigent defendants were entitled to representation. The relator in a habeas corpus proceeding is in precisely this situation. Thus, Breitel stated that the rule followed in coram nobis proceedings should apply in this type-situation (a habeas corpus proceeding) in which the indigent defendant raised an issue arising in or out of a criminal proceeding. *Id.* at 240-41, 225 N.E.2d at 736-37, 279 N.Y.S.2d at 3-4 (Breitel, J., dissenting). This is a relatively simple case illustrating the Grand Style at work on a small problem where a sense of the situation is not hard to perceive.

Similarly, in *People v. Ross*, 21 N.Y.2d 258, 234 N.E.2d 427, 287 N.Y.S.2d 376 (1967), Judge Breitel, in dissent, urged a broad application of a rule after looking at the type-situation behind the rule. In *Ross*, the defendant had made certain damaging pretrial statements, intending them to be exculpatory. At trial, the prosecution offered these statements without first giving the defendant prior notice, as required by statute. Breitel's view that the statute sought to give all defendants an opportunity for planning an investigation prior to the introduction of a pretrial statement led to his conclusion that the defendant's exculpatory intention at the time he made the statement and his subsequent failure to object on the grounds of voluntariness were both irrelevant to the decision. *Id.* at 264-65, 234 N.E.2d at 430, 287 N.Y.S.2d at 381-82 (Breitel, J., dissenting).

78. 20 N.Y.2d 154, 228 N.E.2d 896, 281 N.Y.S.2d 997 (1967).

79. *Id.* at 156, 228 N.E.2d at 897, 281 N.Y.S.2d at 999.

Ginsberg,⁸⁰ the court had earlier held that when an attorney's conviction is reversed and the attorney asks for reinstatement, the appellate division may consider all the facts and circumstances to see if there is "convincing proof of innocence."⁸¹ In overruling *Ginsberg*, Breitel began by stating that the *Ginsberg* rule was too harsh and, therefore, unjust.⁸² Breitel noted that although *Ginsberg* was a reversal case, it relied upon *In re Kaufmann*,⁸³ which was a pardon case.⁸⁴ Obviously, the policies regarding reinstatement are far different in the two types of cases. Breitel's implication is that the rule relied upon in *Ginsberg* was not the appropriate rule. Also, in *Ginsberg* the conviction had been reversed as a matter of law after affirmance of the findings of fact, unlike the situation in *Barash* where the conviction had been reversed because of trial error and without affirmance of the findings of fact.⁸⁵ Having avoided the adverse precedent on policy and technical grounds, Breitel then fashioned a new rule for applications for re-admission, complete with instructions to the appellate division that defined the amount of discretion at their disposal.⁸⁶ Although *Barash* was a brief opinion, Breitel still managed to employ five different precedent-handling techniques⁸⁷ and, by openly basing his result on considerations of fair play and justice,⁸⁸ provided the lower courts with a workable rule replete with instructions on its proper use.

Careful attention to "the situation as it exists as a socio-economic fact . . . and the milieu in which [the facts] have occurred, with a broad sociological view"⁸⁹ marked two landmark Breitel opinions. In *People v. Nixon*,⁹⁰ the court resolved the issue of whether a trial court confronted with a defendant who is pleading guilty to a lesser crime than the one charged in the indictment has an obligation in every case to inquire of the defendant concerning his guilt and the propriety of his plea.⁹¹ It was a case of first impression in the state, and Judge Breitel

80. 1 N.Y.2d 144, 134 N.E.2d 193, 151 N.Y.S.2d 361 (1956).

81. *Id.* at 147, 134 N.E.2d at 194, 151 N.Y.S.2d at 363 (quoting *In re Kaufmann*, 245 N.Y. 423, 157 N.E. 730 (1927)).

82. 20 N.Y.2d at 158-59, 228 N.E.2d at 898-99, 281 N.Y.S.2d at 1001.

83. 245 N.Y. 423, 157 N.E. 730 (1927).

84. 20 N.Y.2d at 158, 228 N.E.2d at 898, 281 N.Y.S.2d at 1001.

85. *Id.* at 156, 158, 228 N.E.2d at 897-98, 281 N.Y.S.2d at 999, 1001.

86. *Id.* at 158-59, 228 N.E.2d at 898-99, 281 N.Y.S.2d at 1001-02.

87. The precedent-handling techniques were: No. 42 ("Distinguish on the facts; especially if the reason is discussed."); No. 43 ("Undercut and distinguish or disregard via the authorities used in the older case."); No. 45 ("Must be confined to its exact facts."); No. 47 ("Involves a misrepresentation of the true principle (or rule)."); No. 61 ("Announcing new principle ex cathedra."). The Common Law Tradition, *supra* note 4, at 86-87, 90.

88. See 20 N.Y.2d at 159, 228 N.E.2d at 899, 281 N.Y.S.2d at 1002.

89. C. Breitel, *supra* note 5, at 45, quoted at text accompanying note 6 *supra*.

90. 21 N.Y.2d 338, 234 N.E.2d 687, 287 N.Y.S.2d 659 (1967), *cert. denied*, 393 U.S. 1067 (1968).

91. *Id.* at 344, 234 N.E.2d at 690, 287 N.Y.S.2d at 663.

gave free rein to considerations of policy in light of his understanding of the underlying type-situations that may give rise to a bargained plea. After considering both federal law and the recommendations of the American Bar Association,⁹² he indicated that no uniform rule or standard ("a uniform mandatory catechism of pleading") should be required.⁹³ He also enumerated a series of factors that a judge should consider in deciding whether to accept a bargained plea.⁹⁴ Throughout, Judge Breitel demonstrated familiarity with the milieu surrounding the institution of plea bargaining and an accurate eye for areas that lend themselves to abuse or other denials of justice.

Overt considerations of sociological fact and social policy also marked *People v. Broadie*,⁹⁵ which confronted a major constitutional attack upon the so-called "drug" laws that mandated life imprisonment.⁹⁶ Chief Judge Breitel, speaking for the court, rejected defendants' claim that the severe sentences mandated by the statutes constituted cruel and unusual punishment.⁹⁷ His opinion is a massive document that examined exhaustively the nature of the problem of drug abuse and trafficking upon society, the penological purposes served by severe, nondiscretionary sentences, and the necessary considerations that a court must make in weighing a claim of cruel and unusual punishment. Most of the opinion developed the factual background of the drug abuse problem both in the United States and in the state of New York.⁹⁸ Particularly noteworthy is Breitel's twelve-page appendix,⁹⁹ which traced the history of the concept of cruel and unusual punishment from pre-colonial times to the present. The appendix is as much prospective as it is historical, since one of its primary achievements is to place New York with states that have adopted the disproportionality test.¹⁰⁰ The opinion is striking in its avoidance of talismanic recitations and pat solutions. The Chief Judge made no attempt to disguise the process by which he arrived at his conclusions or to hide from view the analysis of policy considerations and facts that inevitably colors, and often determines, the outcome of any appeal.

It is perhaps fitting to end this line of decisions with a case in which Chief Judge Breitel made his most explicit judicial statement of his

92. *Id.* at 345, 234 N.E.2d at 690-91, 287 N.Y.S.2d at 663-64 (discussing Fed. R. Crim. P. 11 (amended 1975) and ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty 7-8 (Tent. Draft 1967)).

93. *Id.* at 353, 234 N.E.2d at 695, 287 N.Y.S.2d at 670.

94. *Id.* at 353, 234 N.E.2d at 695-96, 287 N.Y.S.2d at 670-71.

95. 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471, *cert. denied*, 423 U.S. 950 (1975).

96. N.Y. Penal Law §§ 220.18, .39 (McKinney 1967 & Supp. 1977-1978); N.Y. Penal Law § 220.40 (McKinney 1967) (repealed 1973).

97. 37 N.Y.2d at 110, 332 N.E.2d at 341, 371 N.Y.S.2d at 474.

98. *See* 37 N.Y.2d at 112-19, 332 N.E.2d at 342-47, 371 N.Y.S.2d at 476-83.

99. *Id.* at 119-30, 332 N.E.2d at 347-54, 371 N.Y.S.2d at 483-92.

100. *Id.* at 130, 332 N.E.2d at 354, 371 N.Y.S.2d at 492.

theory of *stare decisis*. In *People v. Hobson*,¹⁰¹ the court decided whether a defendant who is in custody and represented by an attorney in connection with charges currently being investigated, may validly waive his right to counsel in his attorney's absence. The clear rule in New York until 1970 was that such a waiver was not valid.¹⁰² Between 1970 and 1972, however, the court of appeals decided three cases that departed from this rule.¹⁰³ The reason for the departure was not made clear, if the departure was noted at all.¹⁰⁴ Thus, the cases left Chief Judge Breitel asking: "What is required of a stable court in applying the eminently desirable and essential doctrine of *stare decisis*. Which is the *stare decisis*: The odd cases or the line of development never fully criticized or rejected?"¹⁰⁵

As might be expected, the Chief Judge adopted an enlightened view of precedent and the doctrine of *stare decisis*; the latter is "a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable."¹⁰⁶ In a nutshell, "*stare decisis* does not spring full-grown from a 'precedent' but from precedents which reflect principle and doctrine rationally evolved."¹⁰⁷ Hard cases are unavoidable, and difficult and troublesome precedent is not to be dismissed lightly. Thus, "[t]he closeness of a vote in a precedential case is hardly determinative,"¹⁰⁸ and "the accident of a change of personalities in the Judges of a court is a shallow basis for jurisprudential evolution."¹⁰⁹ Chief Judge Breitel then stated:

Throughout, however, a precedent is less binding if it is little more than an *ipse dixit*, a conclusory assertion of result, perhaps supported by no more than generalized platitudes. On the contrary, a precedent is entitled to initial respect, however wrong it may seem to the present viewer, if it is the result of a reasoned and painstaking analysis.¹¹⁰

In the end, the three recent departures were "overruled in principle."¹¹¹ The opinion is a fascinating one, and well worth reading by anyone who wishes to learn more about the Chief Judge's sophisticated brand of Grand Style decisionmaking and *stare decisis*.

101. 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

102. See *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968); *People v. DiBiasi*, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).

103. See *People v. Wooden*, 31 N.Y.2d 753, 290 N.E.2d 436, 338 N.Y.S.2d 434 (1972), *cert. denied*, 410 U.S. 987 (1973); *People v. Lopez*, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied*, 404 U.S. 840 (1971); *People v. Robles*, 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970), *cert. denied*, 401 U.S. 945 (1971).

104. 39 N.Y.2d at 485, 348 N.E.2d at 899, 384 N.Y.S.2d at 423.

105. *Id.* at 487, 348 N.E.2d at 900, 384 N.Y.S.2d at 424.

106. *Id.*

107. *Id.* at 488, 348 N.E.2d at 901, 384 N.Y.S.2d at 425.

108. *Id.* at 490, 348 N.E.2d at 902, 384 N.Y.S.2d at 426.

109. *Id.* at 491, 348 N.E.2d at 903, 384 N.Y.S.2d at 427.

110. *Id.* at 490, 348 N.E.2d at 902, 384 N.Y.S.2d at 426.

111. *Id.*

CONCLUSION

Of the forty opinions in this sample, those criminal law opinions that best exemplify the Grand Style of appellate decisionmaking have been focused upon at the expense of other opinions of perhaps greater substantive moment but of less illustrative value.¹¹² As Karl Llewellyn

112. Six additional cases also show Chief Judge Breitel's sense of craftsmanship and style at work. The issue presented in *People v. Ianniello*, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462, *cert. denied*, 393 U.S. 827 (1968), was whether the target of a grand jury investigation is immune from prosecution for criminal contempt for evasive testimony before the grand jury. Judge Breitel considered the type-situation through a laborious examination of the facts of the case making it possible for the reader to see the interplay of the various precedents and policies. The policy-in-need-of-a-rule that was suggested by the type-situation in this case was the promotion of truthful testimony before the grand jury and the exclusion of such testimony from prosecutions for previously committed crimes. These policies have been achieved through an exclusionary rule and, according to Judge Breitel, they would be furthered by a rule that would punish the targets of an investigation who are perjurers. Breitel also rejected the defendant's argument that he was denied the right to counsel. Before doing so, however, Breitel engaged in rule-tidying by listing the situations in which a witness is entitled to advice of counsel.

In *People v. Radunovic*, 21 N.Y.2d 186, 234 N.E.2d 212, 287 N.Y.S.2d 33 (1967), the issue was whether a rape victim's testimony as to the completed act of rape must be corroborated in a related prosecution for assault. The majority decided the case on the basis of a rather sterile examination of the law of evidence. In concurrence, Judge Breitel agreed that corroboration is necessary, but criticized the "immature jurisprudence" that requires technical corroboration, no matter how unreliable, and that rejects overwhelming reliable proof when corroboration is lacking. *Id.* at 190-91, 234 N.E.2d at 214-15, 287 N.Y.S.2d at 36-37 (Breitel, J., concurring). His comments resemble the deliberate foreshadowing of a change in the law that was favored by Llewellyn.

Bland v. Supreme Court, 20 N.Y.2d 552, 232 N.E.2d 633, 285 N.Y.S.2d 597 (1967), raised the issue whether, for double jeopardy purposes, jeopardy attaches in a jury trial after the jury has been sworn but before any evidence is given. The majority pointed to the "time-honored" New York rule that requires the introduction of some evidence, and dismissed a contrary Supreme Court case, *Downum v. United States*, 372 U.S. 734 (1963), on the ground that the Supreme Court did not intend a uniform rule for the states. Judge Breitel marshalled impressive support for his dissenting position that the New York rule should be changed. Pointing to the rule in other states that jeopardy attaches when the jury is sworn, he cast doubt on the wisdom of New York's ancient rule. He noted that the Supreme Court's opinion embodied a principle that should be applied in New York cases, and he opened the door for that application by observing that, generally, the New York rule largely had been applied only in nonjury cases. Using a variety of precedent-handling techniques, Breitel then proceeded to attack the cases that established the "time-honored" rule. The two most recent cases in that line did not, on their face, involve the attachment of jeopardy; thus their statement of the rule must be viewed as dictum. *Cf.* The Common Law Tradition, *supra* note 4, at 86 (Precedent-handling techniques: No. 41 ("Kill off a dictum, as such and without more."); No. 43 ("Undercut and distinguish or disregard via the authorities used in the older case.")). In the oldest of the three cases, evidence had been introduced, but the court nonetheless accepted defendant's argument that jeopardy had attached when the jury was sworn. By quoting dictum from this old case which described the sense of the situation, Breitel elevated the dictum to the level of a principle. *Cf. id.* at 84 (Precedent-handling technique: No. 32 ("A dictum about the reason of a situation is quoted, elevated into the foundation of a principle, and applied.")). Finally, Breitel pointed to the confusion among more recent opinions trying to apply the "time-honored" rule and argued that the time was right for a fresh start. *Cf. id.* at 89 (Precedent-handling technique: No. 55 ("Unchaining a new principle to substitute order for conflict or confusion.")). His opinion shows a careful consideration of

taught and Chief Judge Breitel has shown, the Grand Style judge's task is a daily burden, in things both large and small, to strike the right balance between social policy, legal theory and practice, and social and political fact. No judge can daily make the mental and psychological exertion that is required to make the Grand Style of deciding appeals achieve its goal of increasing the reckonability of the law.¹¹³ But the mark of a Grand Style judge is the frequency with

precedent, open considerations of policy, a wide range of precedent-handling techniques, and a willingness to make a fresh start—a Grand Style tour de force. See 20 N.Y.2d at 556-60, 232 N.E.2d at 635-38, 285 N.Y.S.2d at 600-04 (Breitel, J., dissenting).

People v. Moseley, 20 N.Y.2d 64, 228 N.E.2d 765, 281 N.Y.S.2d 762 (1967), presented a question of first impression in New York: whether a psychiatrist's testimony should be admissible at a sentencing hearing on the issue of defendant's mental condition when the defendant had been determined legally sane to stand trial. Judge Breitel distinguished the situation presented by the sentencing hearing—where mitigating circumstances are relevant—from the situation at trial, where the issue is sanity and criminal responsibility. Thus, he fashioned a rule that would allow psychiatric testimony at a sentencing hearing, and pointed to the law of California as an example of that policy in action.

In *People v. Jeffries*, 19 N.Y.2d 564, 227 N.E.2d 870, 281 N.Y.S.2d 67 (1967), the defendant challenged the sufficiency of the information that was issued upon a police officer's information and belief and contained no first-hand allegations. The majority reversed the conviction after a mechanical consideration of the problem. Judge Breitel's dissent is far more persuasive and convincing. Breitel identified two types of informations. The first is used as the arresting instrument and is the basis of the accused's appearance in court. This type of information must be sufficiently complete in order to prevent baseless prosecutions. The second type of information, which was present in this case, is used as a pleading instrument. It is filed after arrest or when the defendant has been brought into court on the basis of a summons in lieu of arrest. Breitel concluded that because there is no danger of baseless prosecutions, fewer procedural safeguards are necessary in the case of a pleading information. *Id.* at 568-73, 227 N.E.2d at 873-76, 281 N.Y.S.2d at 71-75 (Breitel, J., dissenting).

In *People v. Schompert*, 19 N.Y.2d 300, 226 N.E.2d 305, 279 N.Y.S.2d 515, *cert. denied*, 389 U.S. 874 (1967), Judge Breitel once again extracted the principle behind a rule of law and determined that the principle did not apply to the type-situation presented in the case. The defendant claimed a confession that he had made while voluntarily intoxicated should have been excluded from evidence despite the fact that the confession was reliable. Judge Breitel phrased the issue as whether alcoholic intoxication, voluntarily induced without any suggestion of persuasion by others, should, as a matter of policy, preclude a confession. Breitel rejected the defendant's claim after pointing out that the exclusionary rule was designed to prevent abuses of power by public officials and not to protect wrongdoers from punishment. Breitel found support for his decision in a series of intoxication cases but he frankly admitted that these cases failed to distinguish self-induced intoxication from police-induced intoxication. Using Llewellyn's precedent-handling technique No. 28 ("A principle theretofore unphrased is extracted from the decisions and applied." *The Common Law Tradition*, *supra* note 4, at 83.), Breitel pointed out that the facts of these cases highlight the distinction between self-induced and police-induced drunkenness.

113. As one might reasonably expect, not all of Chief Judge Breitel's opinions are thoroughly satisfying. Llewellyn suggested that the reasons for such lapses might include personal pressures, the restraining influence of brethren whose concurrence is sought, and the felt need for a sound rule for the future. See *Jurisprudence*, *supra* note 7, at 282-83.

For instance, in *People v. Crimmins*, 38 N.Y.2d 407, 343 N.E.2d 719, 381 N.Y.S.2d 1 (1975), the court held that the trial court's denial of a motion for a new trial on the basis of newly discovered evidence cannot be reviewed on appeal. Chief Judge Breitel, writing for the majority, was not responsive to the arguments raised in Judge Fuchsberg's lengthy and impassioned

which he can succeed at such a task, and on this basis Chief Judge Breitel scores high marks: he has been consistently frank, open, and skillful in dealing with competing policies and precedents.

Long after his retirement this year, Chief Judge Breitel's high level of craftsmanship and principled attention to precedent will have set a worthy goal toward which his honorable successors should strive.

dissenting opinion. Breitel's recitation of the New York rules of review is devoid of policy considerations. Moreover, Breitel's long discussion of why he would uphold the trial court's ruling even if the denial of a motion for a new trial were capable of review suggests that the Chief Judge was not entirely satisfied with his own opinion.

In *People v. Ianniello*, 36 N.Y.2d 137, 325 N.E.2d 146, 365 N.Y.S.2d 821, *cert. denied*, 423 U.S. 831 (1975), the defendant was convicted of criminal contempt for evasive testimony before a grand jury. The issue was whether the propriety of the questions asked the defendant was a question of fact for the jury. A prior perjury case had held that if a question was material it was proper, and that materiality was a question of fact to be decided by the jury. *People v. Clemente*, 285 A.D. 258, 136 N.Y.S.2d 202 (1954), *aff'd mem.*, 309 N.Y. 890, 131 N.E.2d 294 (1955). Relying on the *Clemente* reasoning, prior criminal contempt cases had held that the propriety of a question was an issue of fact for the jury. See *People v. McAdoo*, 45 Misc. 2d 664, 257 N.Y.S.2d 763 (Crim. Ct. 1965), *aff'd*, 51 Misc. 2d 263, 272 N.Y.S.2d 412 (Sup. Ct. 1966), *cert. denied*, 386 U.S. 1031 (1967); *People v. Amarante*, 100 N.Y.S.2d 677 (Sup. Ct. 1950), *aff'd*, 278 A.D. 827, 104 N.Y.S.2d 807 (1951). Although Chief Judge Breitel acknowledged the close analogy between the materiality element of perjury and the propriety element of criminal contempt, he nonetheless concluded, without further explanation, that the criminal contempt cases applying the perjury rationale were not persuasive, and, therefore, should not be followed. 36 N.Y.2d at 143-44, 325 N.E.2d at 149, 365 N.Y.S.2d at 825-26. The Chief Judge's rejection of the analogy without explanation is disappointingly uninformative. Although the result in this case may be correct, the reasoning behind it is unclear.

Finally, in *People v. Taggart*, 20 N.Y.2d 335, 229 N.E.2d 581, 283 N.Y.S.2d 1 (1967), *appeal dismissed*, 392 U.S. 667 (1968), Judge Breitel delivered the majority opinion upholding the seizure of a pistol under exigent circumstances that suggested a threat to life, limb, or property, but that were not sufficient to establish probable cause for an arrest and incidental search. Prior cases had upheld an initial "frisk" of the suspect on the grounds that this relatively slight invasion of privacy "may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search." *Id.* at 342, 229 N.E.2d at 586, 283 N.Y.S.2d at 8 (quoting *People v. Rivera*, 14 N.Y.2d 441, 447, 201 N.E.2d 32, 35, 252 N.Y.S.2d 458, 463 (1964), *cert. denied*, 379 U.S. 978 (1965)). The instant seizure "probably exceeded the limitations of [the two prior] opinions," but was proper under these "additional circumstances." *Id.* at 342-43, 229 N.E.2d at 586, 283 N.Y.S.2d at 8. In such a difficult and highly charged area of the law, one would expect greater certainty in Judge Breitel's handling of both the prior cases and the elusive additional circumstances in the instant case that justified the search and seizure.

APPENDIX

Table of Cases

1. *People v. Brown*, 40 N.Y.2d 381, 353 N.E.2d 811, 386 N.Y.S.2d 848 (1976) (Breitel, C.J., dissenting), *cert. denied*, 433 U.S. 913 (1977).
2. *People v. Baker*, 39 N.Y.2d 923, 352 N.E.2d 879, 386 N.Y.S.2d 575 (mem.) (Breitel, C.J., concurring in part), *cert. denied*, 429 U.S. 868 (1976).
3. *People v. Mackell*, 40 N.Y.2d 59, 351 N.E.2d 684, 386 N.Y.S.2d 37 (1976) (Breitel, C.J., concurring in a separate opinion).
4. *People v. Jones*, 39 N.Y.2d 694, 350 N.E.2d 913, 385 N.Y.S.2d 525 (1976) (Breitel, C.J., dissenting).
5. *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976) (Breitel, C.J., majority opinion).
6. *People v. Patterson*, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976) (Breitel, C.J., concurring in a separate opinion), *aff'd*, 432 U.S. 197 (1977).
7. *People v. Gonzalez*, 39 N.Y.2d 122, 347 N.E.2d 575, 383 N.Y.S.2d 215 (1976) (Breitel, C.J., majority opinion).
8. *People v. Kelly*, 38 N.Y.2d 633, 345 N.E.2d 544, 382 N.Y.S.2d 1 (1976) (Breitel, C.J., majority opinion).
9. *People v. Crimmins*, 38 N.Y.2d 407, 343 N.E.2d 719, 381 N.Y.S.2d 1 (1975) (Breitel, C.J., majority opinion).
10. *People v. Briggs*, 38 N.Y.2d 319, 342 N.E.2d 557, 379 N.Y.S.2d 779 (1975) (Breitel, C.J., majority opinion).
11. *People v. Kreichman*, 37 N.Y.2d 693, 339 N.E.2d 182, 376 N.Y.S.2d 497 (1975) (Breitel, C.J., majority opinion).
12. *People v. Broadie*, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (Breitel, C.J., majority opinion), *cert. denied*, 423 U.S. 950 (1975).
13. *People v. Wright*, 37 N.Y.2d 88, 332 N.E.2d 331, 371 N.Y.S.2d 460 (1975) (Breitel, C.J., majority opinion).
14. *People v. Freeland*, 36 N.Y.2d 518, 330 N.E.2d 611, 369 N.Y.S.2d 649 (1975) (Breitel, C.J., majority opinion).
15. *People v. Gleeson*, 36 N.Y.2d 462, 330 N.E.2d 72, 369 N.Y.S.2d 113 (1975) (Breitel, C.J., majority opinion).
16. *Nigrone v. Murtagh*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975) (Breitel, C.J., majority opinion).

17. *People v. Ingle*, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975) (Breitel, C.J., majority opinion).
18. *People v. Schneider*, 36 N.Y.2d 708, 325 N.E.2d 877, 366 N.Y.S.2d 419 (1975) (mem.) (Breitel, C.J., dissenting).
19. *People v. Ianniello*, 36 N.Y.2d 137, 325 N.E.2d 146, 365 N.Y.S.2d 821 (Breitel, C.J., majority opinion), *cert. denied*, 423 U.S. 831 (1975).
20. *People v. Ianniello*, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462 (Breitel, J., majority opinion), *cert. denied*, 393 U.S. 827 (1968).
21. *People v. Nixon*, 21 N.Y.2d 338, 234 N.E.2d 687, 287 N.Y.S.2d 659 (1967) (Breitel, J., majority opinion), *cert. denied*, 393 U.S. 1067 (1969).
22. *People v. Carbonaro*, 21 N.Y.2d 271, 234 N.E.2d 433, 287 N.Y.S.2d 385 (1967) (Breitel, J., majority opinion), *modified mem.*, 21 N.Y.2d 971, 237 N.E.2d 360, 290 N.Y.S.2d 199 (1968).
23. *People v. Ross*, 21 N.Y.2d 258, 234 N.E.2d 427, 287 N.Y.S.2d 376 (1967) (Breitel, J., dissenting).
24. *People v. Cefaro*, 21 N.Y.2d 252, 234 N.E.2d 423, 287 N.Y.S.2d 371 (1967) (Breitel, J., dissenting), *rev'd in part on rehearing*, 23 N.Y.2d 283, 244 N.E.2d 42, 296 N.Y.S.2d 345 (1968).
25. *People v. Radunovic*, 21 N.Y.2d 186, 234 N.E.2d 212, 287 N.Y.S.2d 33 (1967) (Breitel, J., concurring in a separate opinion).
26. *People v. Goldman*, 21 N.Y.2d 152, 234 N.E.2d 194, 287 N.Y.S.2d 7 (1967) (Breitel, J., majority opinion), *appeal dismissed per curiam*, 392 U.S. 643 (1968).
27. *People v. Torres*, 21 N.Y.2d 49, 233 N.E.2d 282, 286 N.Y.S.2d 264 (1967) (Breitel, J., majority opinion).
28. *Bland v. Supreme Court*, 20 N.Y.2d 552, 232 N.E.2d 633, 285 N.Y.S.2d 597 (1967) (Breitel, J., dissenting).
29. *People v. Liller*, 20 N.Y.2d 727, 229 N.E.2d 617, 283 N.Y.S.2d 51 (1967) (mem.) (Breitel, J., dissenting).
30. *People v. Grossman*, 20 N.Y.2d 346, 229 N.E.2d 589, 283 N.Y.S.2d 12 (1967) (Breitel, J., majority opinion).
31. *People v. Taggart*, 20 N.Y.2d 335, 229 N.E.2d 581, 283 N.Y.S.2d 1 (1967) (Breitel, J., majority opinion), *appeal dismissed*, 392 U.S. 667 (1968).
32. *People v. Henderson*, 20 N.Y.2d 303, 229 N.E.2d 422, 282 N.Y.S.2d 734 (1967) (Breitel, J., dissenting).
33. *In re Barash*, 20 N.Y.2d 154, 228 N.E.2d 896, 281 N.Y.S.2d 997 (1967) (Breitel, J., majority opinion).

34. *People v. Winfrey*, 20 N.Y.2d 138, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967) (Breitel, J., majority opinion).
35. *People v. G.I. Distribs. Inc.*, 20 N.Y.2d 104, 228 N.E.2d 787, 281 N.Y.S.2d 795 (Breitel, J., majority opinion), *cert. denied*, 389 U.S. 905 (1967).
36. *People v. Moseley*, 20 N.Y.2d 64, 228 N.E.2d 765, 281 N.Y.S.2d 762 (1967) (Breitel, J., majority opinion).
37. *People v. Jeffries*, 19 N.Y.2d 564, 227 N.E.2d 870, 281 N.Y.S.2d 67 (1967) (Breitel, J., dissenting).
38. *People v. Gallmon*, 19 N.Y.2d 389, 227 N.E.2d 284, 280 N.Y.S.2d 356 (1967) (Breitel, J., majority opinion), *cert. denied*, 390 U.S. 911 (1968).
39. *People v. Schompert*, 19 N.Y.2d 300, 226 N.E.2d 305, 279 N.Y.S.2d 515 (Breitel, J., majority opinion), *cert. denied*, 389 U.S. 874 (1967).
40. *People ex rel. Williams v. La Vallee*, 19 N.Y.2d 238, 225 N.E.2d 735, 279 N.Y.S.2d 1 (1967) (Breitel, J., majority opinion).