Vanderbilt Law Review

Volume 15
Issue 1 *Issue 1 - December 1961*

Article 14

12-1961

Book Reviews

Donald P. Kommers

I. C. Rand

BOOK REVIEWS

LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY. By James Willard Hurst.[1] Ann Arbor: The University of Michigan Law School, 1960. Pp. xvii, 361. $5.00.

The excellence of *Law and Social Process in United States History* in every respect matches the high honor accorded Professor Hurst when invited to deliver the ninth series of the Thomas M. Cooley Lectures under the sponsorship of the University of Michigan Law School. This volume, following upon the heels of his *Growth of American Law*[2] and *Law and the Conditions of Freedom*,[3] the latter having won the James Barr Ames prize granted quadrennially by the Harvard Law School, merely affirms his stature as an eminent legal historian. Like the earlier volumes this work is as captivating in insightful analysis as it is compelling in stylistic quality. It discloses a mind disciplined by exacting research and informed by intensive study in the related disciplines of economics, political science, philosophy, and socio-intellectual history.

Professor Hurst writes in a grand style. He views law, not as a static, but as a dynamic substance continually interacting with social forces outside itself, influencing the latter as much as being influenced by them. He accordingly sets out to describe the functional relationship of law to living patterns of institutional and human behavior, addressing himself to questions such as the following: What has been law's role in shaping extra-legal processes in our society? What are the forces and ideas that have given to law its distinctive quality? What has law generally meant to Americans and what have been its contributions to the formation of their social values and political culture? What have been and what are law's limitations and potentialities in structuring social process and organization in the United States? This refreshing tack in legal scholarship helps to answer the plea of another scholar who recently said that the time has arrived "to reinclude within scholarly concern a conception of law as an embodiment of civilization and not merely a vocational adjunct of civilized society."[4]

This study proceeds from no highly refined hypotheses tested and qualified by rigid methods of investigation and verification of the social scientist. This is principally an interpretative essay and whatever it may

1. Professor of Law, University of Wisconsin Law School.
2. HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS (1950).
3. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956).
4. Falk, *The Relations of Law to Culture, Power, and Justice*, LXXII ETHICS 12 (October, 1961).

lack in methodological perfection is more than offset by the power of the author's analysis and his careful selection of detail to illustrate broad themes and general trends. Professor Hurst deliberately avoids what he considers to be the pitfalls of excessive fact-gathering which confuses data collection with understanding, and technique with knowledge, for "the learned writing which lasts, which has significance, is writing which represents its times, but manages also to step outside them."[5] Legal history becomes significant when our ability to gather evidence is disciplined by a keen theoretical perspective. "Our first problem as a legal scholar," says Professor Hurst, "is to serve the legal order, which needs to know more about itself,"[6] and that implies a greater knowledge of law at an operational level.

The author views broadly both law and legal history. Assuming law's paramount role in defining social context, Professor Hurst says:

> For all its frailties and fictions, law operated with force not matched by any other major institution of social order to press men to define ends and means. Hence its product of constitutions, statutes, judicial opinions—and, later, administrative rules and orders—yielded the largest single body of articulated values and value-oriented contrivances in society. At once more diffuse and particularized and partisan, and yet likewise presenting exceptional definitions of values and attitudes, was the vast body of more fugitive documents produced in administering legal order; lawyers' briefs, contracts, deeds of trust, articles of private association, documents evidencing personal status, such as adoption papers or naturalization certificates, and official forms reflecting the manifold aspects of life involved in tax returns, licenses, and license applications, or the census. Nowhere else did men undertake so much to explain themselves.[7]

Accordingly "legal history of full dimension should deal with the growth of ideas and attributes that pertain to men's social relations."[8] Law, looked at from this point of view, is pre-eminently *social* science, and underlying this approach to legal history is an implicit plea for greater interdisciplinary effort in uncovering law's explicit relation to extralegal phenomena.

With his broad perspective Professor Hurst departs from the typical linear approach to legal history which traces the doctrinal development of a specialized category of law and from the narrow analytical approach which views law as a self-contained system of rules. Here one receives a cross-sectional view of society at various points in time in order to ascertain the reciprocal influences of law and social process. To illustrate law's interplay with social process the author purposely selects his examples, not from the stimulating drama of American legal experience, but from the daily run-of-the mill stuff that one invariably finds when perusing the records of state court reports or thumbing through state or federal session laws. Illustrative

5. Hurst, *Perspectives Upon Research Into the Legal Order*, 1961 WIS. L. REV. 357.
6. *Id.* at 366.
7. HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 12-13 (1960).
8. *Id.* at 13.

of these recurrent instances are the abandonment of the tidewater concept of federal admiralty jurisdiction, the development of the law relating to industrial accident, an action to collect a money award on account of damage to an automobile under a statute requiring towns to keep their roads in sound repair, an 1860 Wisconsin action demanding specific performance on a contract to convey title to land owned by the United States, and the shaping of public policy towards the production and marketing of milk.

Professor Hurst begins by inquiring what law has meant in the experience of the American people and he concludes that law's distinctive role in the United States is marked by four features. First, law possesses a legitimate monopoly of force and violence in the community, implying the capacity of government to call to account all forms of non-official power. Second, law is equated with constitutionalism suggesting limitation upon the exercise of power; law in the United States has been used to achieve and secure values higher than itself. Thus we treat law as a means rather than as an end. Third, law has meant formal procedure; that is, the process of individual as well as collective goal seeking in this society is circumscribed, canalized, and ultimately legitimated by submission to the rigor of procedural due process. Finally, law has traditionally been used "as a major means for allocating human and other than human resources among competing life satisfactions."[9] Here the author stresses an aspect of law's role in American history in need of greater elaboration than it has received. Law's positive contribution to social process in the 19th century, for example, seems to have been grossly underestimated because of undue emphasis upon constitutional restraint and the market allocation of resources in historical writing. Law in actual fact played a very significant role in structuring social process and in promoting economic development throughout the 19th century;[10] the market-law relationship was one of intrinsic tension and reciprocity, the interplay between the two expressing a "good deal of our way of life, reaching into values and attitudes that concern much more than merely doing business."[11]

The four principal essays in the book are organized around broad concepts facilely employed to explain the functional relationship of law to social process. The first essay ("Drift and Direction") is concerned with the non-legal influences and pressures which shaped law's distinctive character in this society. The remaining essays ("Initiative and Response," "Leverage and Support," and "Force and Fruition") attempt to explain law's influence upon events.

While Professor Hurst indicates that law has been used to direct events,

9. *Id.* at 4.

10. See Auerbach, *Law and Social Change in the United States*, 6 U.C.L.A.L. REV. 519-23 (1959).

11. HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 5 (1960).

he believes that much of our legal growth has been determined by "the cumulative drift of circumstance or in response only to the most immediately perceived functional demands of social institutions."[12] In this society legal growth was conditioned by the unprecedented availability of land, an independent and robust population, the development of technical competence, the range of opportunity, and the magnitude of our objectives, conditions generative of boiling optimism, swirling activity, dynamic growth, and ambitious goals. From the matrix of this maelstrom evolved a law alert to the possibilities of the hour, but heedless of the needs of the future. Law responded to immediacy and to instant demand (drift) by sanctioning private endeavor and by maximizing personal satisfactions; thus law was used to ratify agreements between private decision-makers (property and contract law), to legitimize market operations (assignment of public functions to private groups and the use of the corporate franchise), and to create an atmosphere conducive to the release of individual initiative. The public interest seems to have had no specific identity apart from the cumulation of private goal-seeking.

Yet law was subject to contrary pressures. As the frontier began to close and as men perfected their fact-finding capabilities, legislatures started to seize the initiative from the judiciary by focusing upon goals broader than immediate fulfillment of private desire. Law's response to tensions growing out of the development of science and technology was hardheaded assessment of the social and human costs involved in unimpeded private endeavor. These polar tendencies in our historical experience (drift *versus* direction and private wants *versus* public needs), Professor Hurst suggests, constitute a major theme in our law which should be studied more closely.

Law's relation to the American drive for personal self-realization is also a variant of the same theme. Culturally, Professor Hurst notes, we were irrevocably committed to pragmatism which measured value by the success of practical operations. We combined respect for the dignity of man with belief in the individual's capacity to govern his own destiny. Governing one's own destiny, however, implied incessant activity capped by accomplishment yielding a personal sense of meaningful direction. Law sanctioned these efforts and contributed to the growth of this society by helping to generate *purposeful* initiative in human affairs. This, the author believes, is law's most noble function. Specifically, law was used to serve human creativity by sharpening men's perceptions of cause and effect, by expanding their range of choices, and by enlarging their goals. Law fostered *directed* effort by its emphasis upon procedural regularities and by stimulating "creative tension between form and substance and between

12. *Id.* at 28.

generals and particulars."[13] From the ensuing dialectic there emerges thrust giving direction to affairs. In effect, Professor Hurst argues that by funneling substance (policy-making) through law's forms (procedures by which courts, legislatures, and other official bodies reach decisions) we refine issues, sharpen our perceptive powers, and discipline our feelings. Law, as processor, accordingly refines the product (policy-decision) in casting off superfluities which becloud vision and by augmenting individual and collective awareness of where we are and where we are going.

Similarly law fosters tension between generals and particulars. Generalizations (customs, institutions, and the standards within and by which Americans live and work and forge public policy) are continuously challenged by the particularity of daily experience resulting eventually in the destruction, qualification, or refinement of the former. Political scientist David Easton notes that "changing social environment, operating on the plastic nature of man, is constantly creating people who respond differently to similar situations."[14] Professor Hurst adds that as men grow in knowledge and competence they refine their perceptions of generals by translating them into legal forms (statutes, administrative decisions, etc.) which define their values and their goals. He states: "Effective generalization reduces confusing, apparently unrelated variety to statements of relative simplicity, yielding perception of relations that can be manipulated. . . . [T]ranslation of this insight into action typically involves orderly recreation of variety, defining limited objectives and contributing specific means to realize the new knowledge in the context of varying circumstance."[15] The author illustrates this process by tracing the development of the regulation of the milk industry in the United States. He notes that the legal control of the production, marketing, and handling of milk proceeded from very broad to specific definition as our knowledge of the uses and abuses of this basic life substance increased until we achieved "regulation adequately adapted to the circumstances of the product."[16]

The milk legislation also illustrates the "leverage" and "support" functions of law in the United States. Professor Hurst notes that law originally penalized the illegal sale of unwholesome foods and, as a result, "lent law's help [support] to maintaining the biological requisites of life and the service requisites of an acceptable market."[17] Law's support role was also reflected in licensing legislation preservative of broad standards governing milk production and in the allocation of public funds to build and sustain all-weather road systems, thus indirectly assisting and stimulating the growth of the dairy industry.

13. *Id.* at 131.
14. EASTON, THE POLITICAL SYSTEM 32 (1953).
15. HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 134 (1960).
16. *Id.* at 96.
17. *Id.* at 182.

On the other hand, law created leverage in stimulating the release of creative initiative when it authorized the formation of city and state health authorities and state agricultural departments, just as when it sanctioned, and aided, the work of state agricultural extension centers, agricultural societies, and dairymen's associations. Law, indeed, makes its greatest contribution to civilization when it formulates purpose and creates new centers of initiative arising out of greater human awareness of cause and effect and results in greater rationalization of the life of society. Where law's leverage function failed, as in public lands disposition and in the allocation of forest and timberland resources, law's role was accompanied by a corruption of the purity of America's major philosophic strain which Professor Hurst dubs "bastard pragmatism." Here Americans tended to confuse private fulfillment with broad public interest, quantity with quality, and narrow opportunity with intelligence.

Professor Hurst concludes with a consideration of law's use of force in the United States. Though affirming as one of its chief characteristics the legitimate monopoly of violence, law's *actual* force has been of marginal significance in this society, suggesting commitment to the twin values of individualism and constitutionalism. At very few points in United States history has the law's force been applied directly to counter violence not sanctioned by law. In fact, the frequent employment of law's force to domestic affairs would involve excessive conflict repressive of creative endeavor and indicative of a lack of basic consensus about the purpose and nature of government.

It is more accurate, says Professor Hurst, to speak of "reserved violence" or the "potential force of law" in assessing this aspect of law's contribution to social process. Law's "reserved violence" kept private decision-making centers in line; the ultimate threat of law's force merely helped to strengthen habits imposed by the procedural emphasis in our law. Correlatively, the "potential force of law" insured the neutrality, integrity, and independence of the political process itself, within which all legitimate private power centers were permitted to contest for the perquisites of power. This implied law's acceptance of pluralism as a political way of life; law demanded that all groups at least be able to participate and compete in policy formation.

But the protection of the political process also demanded self-control on the part of government lest it arrogate to itself functions that do not properly belong to it. Thus law subjects military authority to civilian control and provides other devices for bringing civil authority to account. Moreover, man is not exclusively a *political* animal. Law merely underwrites men's *partial* commitment to political society so that ample room is left to allow man to develop his capacities, originate new centers of activity, and seek meaning in other phases (economic, social, religious, etc.) of his life.

There is little in this volume to which the reviewer takes serious exception. Professor Hurst argues his case persuasively and, I think, captures the meaning of American legal experience as few of his contemporaries have done. Indeed, he has an uncanny facility for making important sense out of the most commonplace legal materials and fitting their meaning into the broad framework of our legal, intellectual, and social traditions.

My congeniality toward this book, however, is not without some reservation. Professor Hurst is presenting what he thinks are the *distinctive* characteristics of law in the United States. I wonder whether a similar study of law in England, let us say, would disclose the same traits and ambiguities, for I suspect a basic consanguinity between the roles which law has played in the two societies.

A basic assumption of the book is that American law is a product of its environment. One cannot, of course, gainsay that experience has contributed to the structure of our law, but Professor Hurst's heavy stress on the influence of physical setting in the shaping of American law and character at times seems to come uncomfortably close to an environmental determinism reminiscent of Frederick J. Turner's frontier thesis.[18] Could one, for instance, argue with equal effect that the characteristics of our law are a result of cultural inheritance and habits of mind developed anterior to physical contact with reality in America? The comment would at least seem to suggest the virtue of comparative study in this area.

Professor Hurst has an abiding interest in Wisconsin legal history. But I wonder whether Wisconsin, from whose legal experience many of his illustrations are taken, can be considered a microcosm of the United States. It occurs to me that law's characteristics as well as its relation to social process might yield differing interpretations depending upon whether one is concerned with law's historical role in the settled communities of the eastern seaboard states, or in Louisiana where French influences have been predominant, or in California with its Spanish heritage, or on the Wisconsin frontier where law was fashioned from the confluence of common law with the common sense of the pioneer.

These questions, however, do not detract from the tremendous appeal of this book. Reading it is a rewarding intellectual exercise. And if Professor Hurst's conclusions are not accepted by all who read this volume, no one will deny that he has furnished stimulating propositions susceptible to further inquiry, or that he has raised terribly important questions relative to the interplay between law and society, or that he has underscored the desirability, if not the necessity, for a reorientation in legal research generally.

DONALD P. KOMMERS*

18. TURNER, THE FRONTIER IN AMERICAN HISTORY 1-38 (1920).

* Assistant Professor of Government, Los Angeles State College.

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

Only in the 20th century and in the United States could such a subject be treated in such a manner and for such a purpose. This century ushered in the winds and light of psychoanalysis; Freud struck a vibrant cord with his revelations and its reverberations have now reached to the administration of justice. "What is new in juristic thought today," said Justice Cardozo "is chiefly the candour of its processes; . . . from time immemorial lawyers have felt the impulse to pare down the old rules when in conflict with present needs." Unawares, our predecessors disguised from themselves their role in the realities of developing law in fresh adaptations, protesting an inherency of the new in the old, a pre-existence, awaiting emergence, in the process of which they played only a declaratory part. Modification is not then a new phenomenon; but Professor Llewellyn in consummate candour has engaged the task of an investigation of factors operating subjectively and objectively in the adjudicative process of appellate court judges in the United States; and he displays for unfeigned admiration an analysis pursued to that ultimate detail which today characterizes the extreme elaboration of most of America's organizational activities from football to the Pentagon. We are presented, among a profusion of other specifics, with 15 major steadying factors in such adjudications, and 64 tissued differentiations of techniques available in the treatment of precedent. In addition to the more or less visible influences on judges and court action, other factors, obvious though invisible, concealed within the workings of the law, debouch in relatively clean contours as of mental precipitation; their manipulation in balanced re-shaping, strengthening, restriction and expansion, proceeds within indicated "lee-ways." Still others elude precipitation or analysis; faintly luminous and thinly diffused, as indicated by their names, instinct, shrewdness, horse-sense, sense of justice, hunch, and others, they cannot be possessed by mere willing; felt rather than glimpsed as extra-rational, they trail intellect like shadows. But as does conscience, they hover and intrude and resist expulsion. They go ultimately to the ethic or "wisdom" of life as a datum, and not even the analytical power of the author can sort their elements out.

He has been stirred to this work by what he takes to be a crisis in widespread critical disparagement of appellate decisions, directed against the treatment of problems daily presented to those courts. Legal education generally is seen as deficient and the production of competent lawyers to suffer accordingly. The case is for "reckonability" of judgments: that they be more predictable. In the end, Professor Llewellyn finds no warrant for the general dissatisfaction and that appellate courts are giving a good account of themselves. Nevertheless there is room for improvement and it is the object of the treatise to arouse the Bar, Bench and Schools to a

fresh appreciation of the functions involved and, among other things, of understanding the art and technique of law's movement. In offering many suggestions of substantive treatment of this, and notwithstanding disclaimer, he achieves a legitimate association with Sir George Jessel, a judge of unusual stature, who, while acknowledging that he might at times have been wrong, never had any doubt of his rightness.

This prescription of technique to sustain the tradition of law in viability is addressed mainly to the "felt" necessity of that greater "reckonability"; and while past stereotyped locutions or formulas in opinions may have answered sufficiently the questions of "historians of culture or government," they afford persons with pending litigation comfort as "chilly as advice of general trends" offered to a business man contemplating a particular venture. The desideratum is a fair regularity of outcome through the artistic resolution of factors furnishing modes of reaching decision; of that apparatus he supplies the specifications.

The initial and primary stages of function are situation-sense, type-situation, situation-problem. With the counters applied to these and supplemental elements reached through mastery of the factual areas, there will be conjured up that "singing reason" which in the words of Levin Goldsmidt reveals the situation's "Immanent Law." No reflection is intended by the use of quotation marks: the emphasis placed on "situation" is, if I may say so, a thoroughly sound emphasis. Together the formulas are designed to advance a front of living law, evolving in steadiness and balance with the parallel modifications in features of social life within the law's scope, exhibiting continuity and change in predictable uniformity and reasonable certainty.

This portrait of the body of law in slow movement through time by adaptation and modification of rules, precepts and principles, consistent and harmonious, absorbing and giving effect to new factors in organic growth, is strikingly presented in a unique vocabulary; and the complex of ideas offered to shape that advance is no less so. Apart from statutory interpretation, the germinating principle of this advance, the dynamic of precedent, holds primacy of attention. By the prescriptions laid down, its workings are to be freed of much of present stultifying features. With doctrine so cleansed the courts can bring about reshaping and re-direction while preserving identity in new growth and harmonizing law with life.

As the author drives his ideas through many pages, situation-sense, situation-type and situation-problem create their own problems: how is that view of situation reached which reveals the "Immanent Law"? What are the signs of recognition? In rational objective factors, there is the weight felt to be attributed to or felt to inhere in them severally or in linkage, from which a view or conception arises as dominant; but this attribution and its weight or value depend in turn upon "judgment" for

which there is no scientific measurement. That may follow experiences of like factors; but in too many cases subtle forces already mentioned, sense of justice, instinctive tendency, even the deepest analysis gives up as both impenetrable in themselves and ineradicable from adjudication.

The interesting feature of the utility of these conscious and self-conscious means is the character of their functioning: to act as censors of the mind which is to respect them. Conceptualized in an awareness of their operating influence, they would constitute in their highest manifestation a code of precepts the effect of which, on the adjudicating process itself, is appreciated in the course of the process: the mind in awareness of the mode of its own activities is placed under the observation of admonitory and other prescriptions become quasi-immanent in the process. Can the intellect consciously implant factors of aid or admonition so as to co-aet with the processes of judgment as alert sentinels, presiding presences of influence, evidencing in awareness conflict with the processes, a communication of the nature of a sense of resemblance, dissimilarity or analogy?

That seems to be a matter of degree. Something analogous may be possible after a drastic discipline in simple or uncomplicated intellectual action. A sensitivity, for example, toward language can become reactive from any, even the slightest, departure by self or others from standards of expression; so habituated it will take on, unawares of the conscious mind, a settled unobtrusive vigil for verbal dereliction. But to propose such a censor for complex reasoning, as observer in quasi-immanence, a subconscious observer reporting conflict with admonition, seems to be beyond the mind's power. Fallacious reasoning may reveal itself in conclusions reached but that is different; a subsequent catechizing of one's self on the observance of rule by rule throughout the whole gamut may be conceived, but assuming it possible, that again is not the same. And on this, we have Professor Llewellyn:

> That problem goes to whether a craft like appellate judging can without destruction of its fineness, its sureness, its soul be subjected by its practitioners to self-conscious intellectual analysis. In another aspect, the problem goes to whether articulate principles or rules for doing, phrasings for the inculcation or transmission of knowhow, will not cripple or kill, rather than further and better the doing of the job. There is the old tale of the centipede who, once set to ponder how he managed the coordination of his regiment of legs, discovered in panic that he no longer could. There is the feeling, half-mystic, close akin to those only partly intellectual ideas of the "true" rule and of "finding" the law, that the working processes of a right-minded court have in them something of the ineffable, that they can grasp by a sort of inspiration a result beyond the powers of the members; the feeling that there is some Delphic or Sibylline attribute somehow or at least sometimes at work; and such feelings have more basis than is readily granted by the wiseacre who has once or twice seen judges in a wrangle or "knows" the scuttlebutt about some compromise.

Self-consciousness can be an enemy of art and is repelled in the career

of intellectual intensity; but it is a civilizing agent in ridding the mind and personality of excrescences which deface both. As a reflective censor it can free thought from many traps and entanglements; but even at the cost of some degree of unevenness, we cannot afford interruptive frustration by it of free concentrated "objective" thinking.

That is not to say that this brilliant exposition, seriously grappled with by one capable of self-examination, will not afford benefit. Most appellate judges can surely be expected to have reached some degree of capacity to sense their own predilections or biases, in whom at least the factors of gross influence have been nullified; and with deeper probing the clarification of other ideas from shadowy form into clearer outline will follow. That the normal course of reaching judgment except perhaps in special cases will be materially affected by all this incantation is doubtful; justice is rough and will remain so. Most of the subtle items brought into relief are already more or less wrapped up in shrewdness, "horse-sense," and similiar attributions. How many of Professor Llewellyn's "giants," Holt, Mansfield, Blackburn, Hamilton, Kennedy, Cowen, Hough, Hand—all, it will be noticed, outstanding in Professor Llewellyn's field, Commercial Law—have deeply concerned themselves with such excursions into the subjective as are suggested? What they have exhibited in their work has been a mastery of external situation, absorbing its spirit and internal principle through imaginative grasp and probing of the interplay of interests to the lowest levels of purpose and motivation, penetrating situation to its foundations. Analysis reaching into such minutiae as is proposed would—I risk saying—make these giants (with the probable exception of the last), like Quintilian, "stare and gasp." Their faculty of empathy is not to be equated much less identified with awareness of classified atoms or the anatomy of their own subjective states.

Is not mind of known disciplined habit, dominating most of the factors irrelevant to judgment, though grounded in deep assumptions, precisely what is intended to be placed in the seats of justice? The discipline of office produces adjustment of perspective to factors lying behind situation. Chiefiy when assumptions, whether apprehended or not, are taken as absolutes, do difficulties arise. If it were given us to be able to detect in rational grasp every psychic factor or influence, whatever its source, underlying judgment, the adjudications of the common law from the earliest years and their adaptations would probably have led to much less of the imperfection at which this critique is mainly directed. With the modifications, substitutions or additions of factors equally well apprehended and calling for new formulations, experience would give greater range and soundness to determination. But even with all this, dominance of factors in reaching conclusions would still in general be affected by an elusive potency. As in the quest of the scientist Cure, a presence unaccounted

for would remain. Situation-sense (so properly stressed)—what is the secret of its selection? Objectively it is the product of the given mind in experience and the choice which it makes, when wise, would seem to be that view which will ultimately be accorded general acceptance, an effect authentically anticipated through a calculation, in part, of an un-apprehended factors. Is this the expression of hidden, stored-up experience? Is the categorical imperative immanent in the mind's ethical intelligence?

Nevertheless the treatment of precedent by Professor Llewellyn in bringing into focus such techniques as ignoring them, making spurious distinctions, attributing foreign grounds, crude blurring over and the like, as well as stirring us all to an awareness of what is set out generally, is a most valuable act of candour. Few are the precedents which by closer examination of the facts and deeper probing of the reasoning, do not yield a clearer enunciation of their essential idea. When that remains without effect, honesty demands straightforward dealing. Yet the fiction of predetermination, of pre-existence, was, in its time and place, (and to a faint recollection, as Dean Pound once expressed himself) not without benefit and justification. It is easier, of course, to formulate a mode of giving growth to rule and precept than to follow its instruction. (Vide Portia.) At times there is somewhat of academic self-assurance in pronouncements of "rightness" or "wrongness" on court decision; but even were the courts accessible to—in many respects—our torch-bearers, I see no guarantee that their work would usher us into a legal utopia. Byron once wrote that "Critics all are ready-made"; at least we can say that in some cases that seems to be the case. Courts, listening to competent counsel representing realities of interest charged with more or less emotion, catch the feel of "justice"—a fact fully appreciated by Professor Llewellyn; and though, under microscopic examination, the reasoning at times may appear inadequate, the conclusions ordinarily are not. That "feel" is of psychic elusiveness and instinctive objective recognition characterizes the great law givers.

The author at one point remarks on the "ecstasy" with which, after all appropriate techniques have been accomplished, a direct supporting precedent is found. Apart from the extravagance, the particular idea behind this emotion is not too clear. The satisfaction of reaching judgment after a mastery of situation—even as the author's over the matters exposed here—is sufficient for ending one essay and passing to the next.

It is not irrelevant to interpose here the dictum of Lord Dunedin that "mere citation of authority is inimical to clear decision." Under the pressures of modern court dockets, with the multiplication of authorities from scores of jurisdictions, with only 24 hours a day and even with a life span average of eighty years,—and an ordinary impluse to stretch one's limbs—thinking rather than excessive reading becomes increasingly necessary; and the Grand Style of opinion writing, the stately march from general

conception to particular situation—and as urged, adumbration for future guidance—has had much of its best expression when authorities were fewer. The function of precedent or near precedent is certainly not wholly to furnish complusion or guidance; it serves also to reveal new factual aspects of situations ordinarily beyond the range of realistic imagination.

The volume proliferates topics of interest from the coercion of office to the influence of law clerks; these with their detailed classifications and their elaborations, appropriately—to an American expositor—enumerated, and infused with a well-tinctured gaiety, invite consideration which neither space nor time permits. To say that the work is a striking product of deep, intensive and comprehensive thinking, and masterly grasp, regardless of what may be looked upon by some as deformations in style and wordage—both of which tend to a chronic irruption on the flow of understanding—is simple fact and the least of its deserts.

I. C. RAND*

* Dean of the Faculty of Law, University of Western Ontario.