

Book Reviews

The Case Law System in America

The Case Law System in America. By Karl N. Llewellyn. Edited with an introduction by Paul Gewirtz.* Translated from the German by Michael Ansaldi.** Chicago: The University of Chicago Press, 1989. Pp. xxviii, 127.*** \$24.95.

William Twining†

I had with each case carried the analysis of its import to the limits of my ability. Yet again and again, as our discussions proceeded, he would challenge or add, defend what he had added, if defending were needed, with inexhaustible brilliance, until I in awe one day queried, "Karl, how do you do it?" "Why, Ad," he replied, with more pride in his profession than in himself, "I am a case-trained lawyer—and what is more, I am one of the three best in the country!"

E. Adamson Hoebel¹

In 1928-29, Karl Llewellyn spent a semester at the University of Leipzig as a visiting professor. This was the first of two academic visits that marked an important stage in his intellectual development. He had first graduated from Yale Law School in 1918² and, until 1928, almost all of his teaching, writing

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1. Hoebel, *Karl Llewellyn: Anthropological Jurisprude*, 18 RUTGERS L. REV. 735, 742-43 (1964).

2. Llewellyn received his LL.B. from Yale in 1918, and his J.D. in 1920.

and professional activities had related to contracts and commercial law, especially sales. He had long been interested in theoretical issues and he had been an enthusiastic, though relatively junior, participant in the intellectual ferment that culminated in the Columbia curriculum discussions of 1926-28. If one discounts *The Bramble Bush*³ as a contribution to jurisprudence,⁴ it is striking that Llewellyn's first two theoretical works of substance were both developed in Leipzig and written in German. *Präjudizienrecht und Rechtsprechung in Amerika*⁵ published in 1933, was a slightly revised version of the lectures, cases, and materials that formed the basis for a course that he gave during his first visit. *Recht, Rechtsleben und Gesellschaft* was an expanded version of a lecture delivered during his second stay in Leipzig in 1931. This was first published in German in 1977, edited by Manfred Rehbinder.⁶ There is as yet no English version. *The Case Law System in America* (hereinafter *Case Law*) is a translation of the text of *Präjudizienrecht*, omitting the cases and materials.

As is well known, Llewellyn had been to school in Mecklenburg, had fought briefly on the German side in 1914 and, according to some, had a better command of German than English.⁷ However, his first visit to Leipzig in 1928-29 provided him with his first sustained exposure to German law and legal scholarship. He read avidly, conversed indefatigably, and made many contacts and friendships. Perhaps even more important, as Paul Gewirtz brings out in his Introduction to *Case Law*,⁸ the task of trying to explain American case law and common law method to a German audience stimulated him to articulate and develop his own ideas at a more general level than he had done previously. His German was fluent, his account of the American system was confident, but in this work his comments on the German legal and juristic scene were strikingly tentative and diffident.

Präjudizienrecht contains only a brief discussion of "free law" theory⁹ and, in contrast to his later work, there is only one passing reference each to Weber and Ehrlich.¹⁰ In 1928 Llewellyn was just beginning his immersion in German

3. K. LLEWELLYN, *THE BRAMBLE BUSH* (1930).

4. See, e.g., the assessment of *Bramble Bush* offered in W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 140-52 (1973).

5. The title page reads: PRÄJUDIZIENRECHT UND RECHTSPRECHUNG IN AMERIKA: EINE SPRUCHAUSWAHL MIT BESPRECHUNG von K.N. Llewellyn, *Professor des Rechts an der Columbia University in New York, unter Mithilfe bei der Auswahl von William A. Leider, Rechtsanwalt in New York, und bei der Verdeutschung von Wolfram v. Metzler, Referendar in Berlin. Verlag von Theodor Weicher / Leipzig. 1933* [hereinafter PRÄJUDIZIENRECHT].

6. K. LLEWELLYN, *RECHT, RECHTSLEBEN UND GESELLSCHAFT* (M. Rehbinder, ed.) (1977) [hereinafter Rehbinder].

7. For details of Llewellyn's German connections, see W. TWINING, *supra* note 4, and Rehbinder, *supra* note 6.

8. Pp. xii-xiii.

9. Pp. 2-4, 76-78.

10. Pp. 82 (Weber), 47 n.2 (Ehrlich). On Weber, see *infra* note 26.

legal culture. Sensibly, he did not claim to be doing comparative law.¹¹ Rather, he adopted the standpoint of an American legal scholar interpreting one aspect of his own system for German colleagues.¹²

Llewellyn's central concern was to describe and interpret the main features of the case law system as it operates in practice with particular reference to the tensions between factors which generate judicial discretion and factors which constrain it—the "leeways" and "the steadying factors."¹³ The method adopted is "show and tell." His German audience was presented with, and expected to study in detail, translations of judicial opinions (mostly unabridged) in nearly sixty reported cases, about half of them from New York state courts. These cases were not merely there as illustrations of general points, but rather "to show how the doctrine of precedent actually works"¹⁴ through concrete examples. Llewellyn was careful to emphasize that this was a small and not necessarily representative sample of appellate cases. What he was doing, of course, was dramatizing the common law method. This was a case-lawyer acting like a case-lawyer before an audience of civilians. Llewellyn used a similar approach—and some of the same cases—in *The Common Law Tradition*¹⁵ and in his materials on "Elements" (which formed the basis of Mentschikoff and Stotzky's *The Theory and Craft of American Law—Elements*).¹⁶ About two-thirds of *Präjudizienrecht* consists of a quite elementary introduction, a commentary on some of the cases, and a comprehensive, but succinct, statement of his own interpretation of the case law "system."¹⁷

11. Llewellyn's Introduction begins: "What is striking and mysterious in comparing two legal systems is the ways they are similar and the ways they are different." P. 1. However, Llewellyn makes no attempt at sustained comparison, but merely makes brief and generally cautious references to German sources and ideas on a number of specific points. See also the remarks at 108-09.

12. Gewirtz states that *Case Law* "stands between *The Bramble Bush* (1930) and *The Common Law Tradition* (1960). This place 'in between' gives the present book a unique strength: greater complexity and sophistication than *The Bramble Bush* and a greater directness and conciseness than *The Common Law Tradition*." P. xiii (citations omitted). He attributes these differences to Llewellyn's different conceptions of his audiences and to the fact that the Leipzig lectures provided him with the opportunity "to undertake a different kind of scholarship, a 'study of the sociology of case law.'" P. xiv. Though Gewirtz is correct that the difference between audiences is crucial, it is worth stressing that *The Bramble Bush* and *Case Law* are almost contemporaneous. On those works' very different audiences, see pp. xxxiii (first-year law students and German lawyers) and xxxvi (scholars). The Leipzig course preceded the first "Bramble Bush" lectures in 1929. Although *Präjudizienrecht* was not published until three years after the first tentative printing of *The Bramble Bush*, it is reasonable to infer that the final text did not involve substantial changes after 1928-29. If this is correct, *Case Law* represents a more considered and scholarly statement of Llewellyn's views in 1928-30 than *The Bramble Bush*. This supports the thesis that *The Common Law Tradition* does not mark a significant retreat from his earlier views.

13. The term "steadying factors" comes later (notably in K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960)), but the idea is implicit in *Case Law*.

14. P. xxxiii. (emphasis in original).

15. K. LLEWELLYN, *supra* note 13.

16. S. MENTSCHIKOFF & I. STOTZKY, *THE THEORY AND CRAFT OF AMERICAN LAW—ELEMENTS* (1981).

17. One of the central themes of *Case Law* relates to whether American treatment of case law is "systematic." See index, p. 125, for numerous citations to "system in case law". Llewellyn was not quite as skeptical as Charles Sampford or Brian Simpson. See C. SAMPFORD, *THE DISORDER OF LAW* (1989); Simpson, *The Common Law and Legal Theory*, in *LEGAL THEORY AND THE COMMON LAW* 24 (W. Twining, ed.) (1986) ("more like a muddle than a system").

Despite the brevity of Llewellyn's own text, *Präjudizienrecht* was immediately recognized in both Germany and the United States as an original, profound and balanced contribution to legal theory.¹⁸ But for political events in Germany,¹⁹ the book might have become better known and Llewellyn might never have acquired his misleading reputation as a radical iconoclast. For this was a balanced, perceptive, and remarkably mature evocation of an essentially romantic vision of the common law tradition.

The publication of an English version of Llewellyn's text is both welcome and timely. The translation is elegant and exact, the editing is judicious, and Professor Gewirtz's Introduction is helpful. Clearly it would not have made sense in publishing terms to reprint the original cases and materials. Their omission from *Case Law* deprives it of the self-conscious particularity of *Präjudizienrecht* and explains the seemingly bland generality of parts of the English version, some of which cannot be readily understood without reference to the original cases. Nevertheless, the enterprise is worthwhile. Interpretation has become one of the central concerns of contemporary jurisprudence. *Case Law* offers a compact and illuminating introduction to Llewellyn's main ideas on one aspect of these concerns: the interpretation of appellate cases. It also illustrates the close connection between Llewellyn's general sociology of law and his more particular jurisprudential writings.

This judgment requires justification. Skeptics might well ask: First, what does this translation add to our knowledge of Llewellyn? Second, what is new or distinctive about it that makes it topical today?

The first question can be answered quite briefly. To begin with, there is very little in the work that cannot be found elsewhere in Llewellyn's extensive writings on the same subject in English.²⁰ There are, however, some fresh aperçus and some subtle formulations.²¹ Its main appeal is that it contains his most concise and readable statement of his general ideas on case law.²² Llewellyn was on his best behavior. Friends ironed out some of the idiosyncracies of his German, the translator has done some further smoothing, and Karl is presented having been "washed, trimmed, shaved and forced into clean

18. The main reviews are cited by Gewirtz at x, n.3.

19. I have been told that the publisher's stock of *Präjudizienrecht* was destroyed after the Nazis came to power, but I have no direct evidence to support this. It is a rare book.

20. Apart from *The Bramble Bush* and *The Common Law Tradition*, there are numerous articles and manuscripts dealing with topics discussed in *The Case Law Tradition in America*. See the bibliographies in W. TWining, *THE KARL LLEWELLYN PAPERS 47-78* (1968). Perhaps the single most important general discussion is Llewellyn's article *Case Law*, in 3 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 249-51 (1930); see also Llewellyn, *Case Method*, in *id.* at 251.

21. For example, on dissents, see pp. 50-51 (section 41) and on separate opinions, see pp. 52-56 (section 42), and on differing conceptions of legal scholarship *passim*; on "system" see *supra* note 17.

22. But see Llewellyn, *Case Law* (article), *supra* note 20.

linen.”²³ Moreover, *Präjudizienrecht* has been out of print for many years and generally inaccessible, even to those who can read German.²⁴

Second, *Case Law* provides strong evidence of the continuity of Llewellyn’s thought.²⁵ Here, as in his later writings, he carefully charts a middle course between the extremes of formalism and radical indeterminacy. Leeways for decision are inevitable, but judicial discretion is significantly constrained by a number of factors, the most important of which is the particular craft-tradition of American common law adjudication and justification. Despite the leeways, American appellate judging exhibits a greater degree of regularity and predictability than one might reasonably expect, but this is largely in spite of, rather than because of, the doctrine of precedent or formalized rules of substantive law. The common law tradition at its best accommodates both the need for certainty and the need for change. This rendering might serve as a summary of the main thesis of *The Common Law Tradition*. In the later work some of the central ideas are restated and developed in much greater detail, sometimes using different terms, such as the following: steadying factors, styles of judging, situation sense, precedent techniques, the thrust and parry of canons of statutory interpretation, the ABC’s of appellate advocacy. But the two works are very close in spirit and substance. In 1930 as much as in 1960, Karl Llewellyn was an optimistic interpreter, from within, of the common law tradition.

Third, *Case Law* provides some evidence in support of the thesis that Llewellyn’s general approach and most of his central ideas had been formed before he became intimately acquainted with German legal thought and culture.²⁶ His visits to Leipzig stimulated him to articulate and develop his general ideas about adjudication and the sociology of law. He had considerable affinity with several German thinkers and over time he undoubtedly learned much from Max Weber and others.²⁷ There is little evidence of *direct* German influence on the general direction of his thought before 1929, however. By then his main interests and his most important ideas had been formed, at least in embryo. A more plausible view is that, insofar as it is meaningful to talk of German “influence,” it is more discernible in the assimilation of the work of nineteenth-century German jurists by Llewellyn’s American forerunners, such as Carter, Gray, Holmes, Hohfeld and Pound.²⁸

23. Said by Sydney Smith of Jeremy Bentham in a review of *The Book of Fallacies; from Unfinished Papers of Jeremy Bentham*, 42 EDINBURGH REV. 367, 367-68 (1825).

24. See *supra* note 19.

25. See *supra* note 12.

26. P. xii; W. TWINING, *supra* note 4, at 104-09.

27. Llewellyn had some familiarity with the ideas of Weber and Ehrlich by 1928-29, but it seems likely that his more intensive reading of Weber came later. Llewellyn’s papers contain extensive drafts of a projected translation of Weber’s *Sociology of Law* dating from about 1935. See also Reh binder, *supra* note 6, *passim*.

28. W. TWINING, *supra* note 4, at 108. Earlier John Austin had been a major conduit of German juristic ideas into Anglo-American jurisprudence. See W.L. MORISON, JOHN AUSTIN 60-63 (1982).

Why should anyone other than aficionados wish to read this book in 1991? Paul Gewirtz stresses its topicality.²⁹ The book presents a moderate alternative to arguments about radical indeterminacy associated with the critical legal studies movement. Llewellyn, Gewirtz suggests, helped to create an “enduring crisis” by demonstrating the indeterminacy of legal rules, but he also showed a way out of the crisis by finding other props of “legal certainty” in the operating techniques of lawyers and judges, the facts of particular cases, and “real-life norms.”³⁰ Gewirtz compares Llewellyn to Stanley Fish, suggesting that both find the main constraint on free interpretation of texts in the know-how of an interpretive community rather than in formal rules. However, Gewirtz finds Llewellyn more balanced and subtle than Fish, in that Fish emphasizes practice to the exclusion of rules, whereas Llewellyn saw doctrine and the judge’s sense of duty as guiding and giving direction to the exercise of judicial technique in arriving at justifications for their decisions.³¹

This interesting argument contains an element of truth, but it involves a somewhat anachronistic interpretation of *Case Law*.³² In 1929 Llewellyn saw himself as steering a middle course between two extremes: “the deductive model” of legal formalism and the “free law movement,” the latter of which he saw as being directed against literal interpretation rather than in favor of radical indeterminacy.³³ Today the simplicities of the deductive model have been superseded by the much more sophisticated theories of Herbert Wechsler, Ronald Dworkin and others.³⁴ Llewellyn, not always convincingly, used analogies from art, architecture and general aesthetics.³⁵ He might well have been intrigued by some recent invocations of analogies from literature and literary theory, but one can only speculate about his likely reactions to the uses to which they have been put by Dworkin, Fish, and James Boyd White, by deconstructionists, and by others. It might have depended in part on timing and mood, although it is unlikely that he would have abandoned his middle-of-the-

29. Pp. xv.

30. Pp. xvii-xviii.

31. Pp. xviii-xx.

32. On anachronistic “conversational readings” of juristic texts, see Twining, “Reading Bentham,” Maccabean Lecture on Jurisprudence, Lecture Delivered to the British Academy (October 24, 1989); lxxv PROCEEDINGS OF THE BRITISH ACADEMY 97-141 (1989). I am rather more sympathetic to Fish than either Gewirtz or Dennis Patterson, who dismisses the comparison between Fish and Llewellyn. Patterson, *Law’s Practice*, 90 COLUM. L. REV. 575, 589 n.55 (1990). To my mind they are both subtle, but rather different, thinkers.

33. As Llewellyn wrote in *Case Law*:

Nonetheless, it has long since become clear that the exertions of the “free law” proponents even in the heat of battle were directed not against a true legal certainty or against the continuity of decision making, but rather against a “literalness” of interpretation that corresponded neither to the nature of language nor to that of the best legal tradition.

P. 78 n.3.

34. The “neutral principles” debate began shortly before Llewellyn’s death. K. LLEWELLYN, *supra* note 13, at 384-93. Unfortunately, Ronald Dworkin does not deign to take Llewellyn seriously. On a charitable reading of each there may be more affinities than meet the eye.

35. See W. TWINING, *supra* note 4, at 568 (“legal aesthetics” index entry).

road position. He would almost certainly have been skeptical of some of the more abstract arguments. For in both *Case Law* and *The Common Law Tradition*, Llewellyn, the case-trained lawyer, was still trying to describe, evoke, and interpret common law method in concrete terms from within, rather than to apply to legal phenomena abstract ideas, conceived in other contexts, at relatively high levels of generality.

There is another aspect of *Case Law* that distinguishes it from Llewellyn's other writings on the subject, especially *The Common Law Tradition*, and that can be claimed as a distinctive contribution to the subject. Among the many criticisms that have been levelled at the *The Common Law Tradition*, two related points stand out. First, by failing to place his study of state appellate courts clearly in the context of the total picture of all courts, of all litigation, and even of all dispute settlement in American society, Llewellyn adopted an unduly narrow perspective and glossed over a number of important issues.³⁶ This is surprising because his own "law jobs" theory was, and remains, the best vehicle for performing this function. Sadly, the contextualist failed to place his most substantial particular study in context. Second, Llewellyn adopted a peculiar methodology for a purportedly realistic empirical study of particular legal institutions in action. He thus missed an opportunity to link his sociology of law to his more specialized work and laid himself open to charges of "barefoot empiricism."³⁷

Case Law is particularly interesting in light of this missed opportunity. A constant theme of the book is that the case law system in action should be viewed from an anthropological (sometimes sociological) perspective.³⁸ Despite the relative informality of the presentation, Llewellyn was also clearly concerned about some of the methodological problems of the enterprise. And throughout, he makes it clear that he is acutely aware that the study of appellate judicial practice with respect to precedent is a narrow topic that needs to be set in a broader context. The last paragraph of the Conclusion is worth quoting in full:

36. See *id.* at 248-57, 268-69.

37. See *id.* at 268. On "barefoot empiricism" see Schubert, *The Future of Public Law*, 34 GEO. WASH. L. REV. 593, 601 (1966), discussed in W. RUMBLE, AMERICAN LEGAL REALISM 170-75 (1968).

38. See P. 126 ("Sociology of Law" index entry). Llewellyn seems to use "anthropology" and "sociology" almost interchangeably and rather loosely in *Case Law*. But see p. 47 n.2.

Interestingly, Llewellyn's combination of broad historical and geographical perspectives with his kind of "sociology" anticipated a recent trend in legal anthropology. For example, at a conference held at Bellagio in 1985, a number of distinguished legal anthropologists admitted to having neglected the broader historical and geographical contexts in their earlier localized studies of groups or "tribes." They also acknowledged the importance of studying "discourse." See generally HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY (J. Starr & J. Collier eds. 1989). Furthermore, on an earlier occasion I heard Hoebel publicly acknowledge that *The Cheyenne Way* neglected Cheyenne concepts and ways of thought. See K. LLEWELLYN & E.A. HOEBEL, THE CHEYENNE WAY (1941).

Llewellyn, on the other hand, shows in *Case Law* that he was acutely sensitive to history, discourse, and geographical context. In this respect at least, he would have found himself very much in tune with these "new directions."

I regret that the area studied here is such a narrow one. Only upper court cases are treated; and then, only the relation between decision making and legal rules. Thus, it deals only with the appellate level; with legal doctrine and the case law system at this appellate level; with the creation, development, handling, and effects of legal rules *at this level*. There is nothing about the extremely important trial court level, about how procedure affects the workings of legal rules; virtually nothing about the influence of legal rules on the practice of law, particularly the practice of those lawyers who are primarily client counselors. There is truly nothing about the influence of legal rules on the lives of people whose interests the law affects. While such a narrow field of study may seem rather paltry, I nonetheless would wish to say: It only looks that way. For a science is made up of only modest, small-scale works. In the area worked on here, at least, we are able to have known facts before our eyes—which, in legal study, has not been all that common. Admittedly, the exclusive focus on appellate court decisions and legal rules plays into the lawyer's peculiar prejudice that these decisions are precisely what matters, in and of themselves, regardless of the effects they may have on the society from which they spring. But perhaps it is precisely here that hope lies. Once we get to thinking about what these legal rules really are, what their meaning really is, what the nature *even* of supreme court decision making is, then we must already be drawing closer to life and finding in ourselves the urge to obtain more firsthand knowledge about the whole purpose of law, its utility to society in general. But once our legal fraternity feels this urge within it, the smaller problems—like questions about the nature and growth of precedent—will be solved through a new wealth of illuminating facts.³⁹

It would not be difficult to criticize Llewellyn's rather loose use of "sociology" and "anthropology" in this context or his somewhat anecdotal approach to "sampling" cases. However, my concern here is to construct a more charitable interpretation by trying to clarify the connection between Llewellyn's general sociology of law and his particularistic writings about case law and common law methods.

The passage quoted above shows that Llewellyn was already sensitive to the broader context of this particular study. Although *Case Law* precedes his intensive reading of Max Weber,⁴⁰ his collaboration with Hoebel, and the development of the "law jobs theory," he was already well-read in anthropology and had begun to work on a project on "Mechanisms of Group Control," some fragments of which survive in his Papers.⁴¹ As *Recht, Rechtsleben und Gesellschaft* shows, the period 1927-33 marks a crucial phase in the development of his general sociological ideas. *Case Law* clearly illustrates how closely his sociological and legal concerns were intertwined. More attention has been

39. P. 114 (emphasis in original).

40. See *supra* note 27.

41. K. Llewellyn, *Mechanisms of Group Control*, (1927) (available in Karl Llewellyn Papers, University of Chicago Law School (1927-33)); see also W. TWINING, *supra* note 4, at 170, 434 n.3.

paid to Llewellyn the "rule skeptic" and interpreter of realism than to his sociology of law, and these have often been perceived as two largely separate phases of his work. In *Case Law*, far from being an intellectual schizophrenic, the anthropologist and lawyer speak with a single voice. The work attempts to present an anthropological perspective on a particular legal phenomenon. At a time when the sociology of law is thought to be in crisis and is marginalized within legal scholarship, this integration is suggestive, even if the underlying conception of sociology seems a little dated.⁴²

The phenomenon under consideration is a particular kind of practice, *viz.*, "the operating technique"⁴³ of judges in dealing with prior precedents. The data are derived almost entirely from judicial opinions, which Llewellyn explicitly acknowledges are reasoned justifications for decisions.⁴⁴ This undermines any sharp distinction between "what judges say" and "what judges do," for a description of what judges do is being derived from what they say in their opinions. Rather, the key distinction is between the *doctrine* of precedent and precedent *techniques*. The doctrine of precedent consists of formal rules that prescribe what a judge must (not), may (not), can (not) do with prior cases.⁴⁵ Precedent techniques, on the other hand, are the actual kinds of moves judges in fact make (*e.g.* distinguishing, overruling, discrediting) in interpreting and arguing about prior cases within or in spite of the doctrine.⁴⁶ Both the doctrine and the techniques are part of judicial *reasoning*. Because the doctrine of precedent is both vague and permissive, even in jurisdictions where it is allegedly "strict" (as in England), it is relatively easily formulated in quite simple terms.⁴⁷ On the other hand, the techniques available to judges are much more varied and more complex, requiring a richer and more subtle vocabulary to describe them.⁴⁸ Llewellyn's unique contribution to the study of precedent was to give an account of both doctrine and techniques, and no one has ever succeeded in giving a better account. The objection to nearly all traditional discussions of precedent is that they either concentrate exclusively on doctrine or give very thin accounts of the operative techniques.⁴⁹ Llewellyn's insight

42. It is beyond the scope of this review to explore in detail Llewellyn's conception of sociology and, in particular, whether he can be rescued from charges of "extreme functionalism." A. HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* 58 (1978); *see also id.* at 48-53.

43. P. 48 (emphasis omitted).

44. P. xxxiv.

45. This passage is a restatement of Llewellyn's views in my own words, based on several of his writings in addition to *Case Law*.

46. For example: "I need not follow this case because . . ." (distinguishing); "I am bound to follow this case because . . ." (invoking the doctrine of precedent); "This case is wrongly decided, because . . ." (overruling).

47. W. TWINING & D. MIERS, *HOW TO DO THINGS WITH RULES* 269-71 (2d ed. 1982).

48. See the admittedly crude list of sixty-four "Available Impeccable Precedent Techniques" in *THE COMMON LAW TRADITION*, *supra* note 12, at 77-91; *see also* W. TWINING & D. MIERS, *supra* note 47, at 276-86.

49. *See, e.g.*, R. CROSS, *PRECEDENT IN ENGLISH LAW* (3d ed. 1977); *PRECEDENT IN LAW* (L. Goldstein ed. 1987). A significant exception, much admired by Llewellyn, was E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949), but this work did not purport to give a comprehensive account of the range of precedent

was to make the examination of doctrine and techniques part of the sociology of law.

One of the most interesting passages in *Case Law* is headed "Black-letter Law versus My Approach: Toward a Sociology of Doctrine."⁵⁰ Much later, in the unpublished materials on *Law in Our Society*, the idea of a "sociology of dogmatics" was carried a little further, as part of a general theory of the crafts of law. Llewellyn was planning to develop this idea as part of a projected series on law in society in connection with a proposed third academic visit to Germany. Unfortunately, he died before the project was completed.

Perhaps the most interesting aspect of *Case Law* is that it represents an early attempt to integrate the sociology of law with a very detailed technical study of material that is at the core of more traditional legal scholarship in both common law and civil law systems. Llewellyn's contemporaries (and most later writers) saw little or no connection between analysis of doctrine (and "law talk" generally) and the sociology of law. Llewellyn was, therefore, unusual in developing the idea of a sociology of dogmatics. In this way, he focused on what today would be called "discourse." This is one potentially fertile field for the kind of rapprochement between technical, legal, and sociological perspectives that Llewellyn was concerned to promote. This, even more than his insights on the leeways and constraints of judicial interpretation, justifies the claim that *Case Law* deserves attention today. It is to be hoped that before long it will be joined by an English translation of *Recht, Rechtsleben, und Gesellschaft* and an equally well-edited version of *Law in Our Society*.⁵¹

techniques in regular use.

50. P. 89-95. The original German reads: "Die hier vertretene Ansicht und die Dogmatik: Zur Soziologie der Dogmatik." PRÄJUDIZIENRECHT, *supra* note 5, at 89. This is one point at which we might question the translation. Llewellyn in his late writings used the term 'dogmatics,' in the German sense, to refer to the systematic study of doctrine. See, e.g., K. Llewellyn, *Law in Our Society* (unpublished manuscript), Lecture XIV. Theory of Dogmatics (1952).

51. K. Llewellyn, *supra* note 50.

The Roots of Deference

Administrative Law: Rethinking Judicial Control of Bureaucracy. By Christopher F. Edley, Jr.* *New Haven: Yale University Press, 1990. Pp. xiii, 270. \$30.00.*

Stephen F. Williams†

Acts have unintended consequences; a book may undermine its thesis. For this reader, at least, Christopher Edley's *Administrative Law: Rethinking Judicial Control of Bureaucracy*¹ does just that.

Edley's central argument is that judicial review is distorted by an arbitrary division of decisionmaking into three separate modes—a "trichotomy" of science, politics, and adjudicatory fairness. He views the three as loosely corresponding to the division of issues into fact, policy, and law, and in turn relating to the classical operations of the executive, legislative, and judicial branches.² Edley acknowledges that the three modes of thinking are in a sense different, forming a "trio" that he views as quite legitimate. He reserves the pejorative metaphor "trichotomy" for the judicial tendency to use the three as pigeonholes and to break down the gestalt of an agency's decision, and he traces that tendency to reliance on formalistic notions of separation of powers.

In Edley's view the trichotomy not only has dubious ancestry but generates practical mischief. His main concerns, apart from difficulty of application, are that the trichotomy leads courts to extend undue deference to administrative agencies and enables them to shift issues among the law-fact-policy categories by sleight of hand, thereby justifying outcomes arrived at on other grounds. He would sweep aside the entire structure and replace it with "sound governance" review, which would proceed untrammelled by ideas of special institutional roles.³

But Edley, to his great credit, includes in the book a highly instructive discussion of the Conseil d'État, France's ultimate court of administrative review, that seems to suggest a quite different view: namely, that even where

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1. C. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990) [hereinafter cited by page number only].

2. Pp. 15, 21.

3. P. 235.

formal separation of powers claims are weak or nonexistent, the differences between a specialized agency on the one hand, and any generalist, multimembered, complaint-activated reviewing body on the other, will produce not only deference but degrees of deference that vary, as here, with the character of the challenged component of the agency decision.

The Conseil d'État lacks several of the attributes that make federal courts special. Neither constitution nor statute guarantees the members' tenure, though tradition, Edley reports, does so.⁴ Though many will have studied law, often as undergraduates, it does not appear that they will have practiced it,⁵ even for the adjudicatory section, not all will even have studied law.⁶ Besides adjudicating, the Conseil provides advisory and administrative functions, most importantly, advising on draft legislation and regulations. It is a civil service organization, its members sometimes serve tours of duty in executive agencies, and it has, Edley says, a "close relation to the executive."⁷

As the formal indicia of separation of powers are missing, Edley candidly notes his expectation of a "strikingly different jurisprudence,"⁸ but reports that in fact he discovered "many of the themes of deference to expertise, fact-law-policy distinctions, and so forth that are so prominent in United States law."⁹ Though sensibly noting that any comparison is difficult—is the standard of comparison to be "the D.C. Circuit, circa 1975"¹⁰ or something less imperial?—Edley believes that Conseil decisions are no more interventionist than such American ones as *NLRB v. Hearst Publications*,¹¹ *Benzene*,¹² and *State Farm*.¹³ He attributes this similarity of results to the fact that French administrative law has the same "project" as our own, "control of illegal and abusive discretion."¹⁴

4. P. 241; see also L. BROWN & J. GARNER, *FRENCH ADMINISTRATIVE LAW* 54 (3d ed. 1983) ("unthinkable" to dismiss member of Conseil for political considerations).

5. Most of its members come from the École Nationale d'Administration, which draws its students by two sets of examinations, one for university graduates (most of whom will have studied law as undergraduates) and one for members of the civil service. L. BROWN & J. GARNER, *supra* note 4, at 53.

6. P. 241.

7. P. 243.

8. P. 244.

9. *Id.*

10. *Id.*

11. 322 U.S. 111 (1944).

12. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980).

13. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

14. P. 245. The Conseil appears at least nominally more ready than our courts to set aside an administrative act on the basis of an unspoken but quite apparent improper motive. See, e.g., *A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM* 486-87 (2d ed. 1977) (excerpting decision setting aside restriction of specific dance hall's hours where order stated plausible grounds but deciding officer was sole competitor of restricted dance hall). In France such interventions are viewed as corrections of *detournement de pouvoir* ("abuse of power"). See *id.* at 474; L. BROWN & J. GARNER, *supra* note 4, at 147-51. One suspects that many such cases would here be addressed as possible violations of constitutional or statutory restrictions on conflicts of interest. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973) (state board composed solely of optometrists barred by due process from adjudicating its own charges of "unprofessional" conduct against fellow optometrists whose business board members would inherit); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (trial for traffic offenses before mayor, who was responsible for village finances and whose

That, of course, relocates the question. Why should its “project” be the same? At least one possibility is that institutional features—even ones not conventionally seen as bespeaking separation of powers—destine the projects to be similar. Structure defines purpose, perhaps. Three features catch the eye immediately: like our federal courts, the Conseil is generalist, multimembered, and reactive, reviewing only at the instance of complaining parties.¹⁵ For the federal courts, of course, the last feature flows from the case or controversy requirement and thus in part from separation of powers.

The generalist is obviously at a disadvantage against a specialist on the latter’s turf. The assumption of agency “expertise” may be a source of innocent merriment in academic analysis of agency-court relations, but agency staffs typically are expert even where agency heads are not. Particularly in scientific matters, a panel of generalists must at a minimum invest a great deal of time to reach a confident conclusion that the specialists erred. Thus, scarcity of resources in the reviewing body, particularly time, compels a degree of deference. It inclines the reviewers to concentrate on the issues that keep coming back to them, such as procedural requirements and broad aspects of substantive law, but not the more interstitial ones often characterized as application of law to fact.¹⁶ On the recurrent issues, the return on investment of effort will be greatest.

Working in panels¹⁷ also militates for deference—it blurs edges and discourages the taking of any strong line. This is just the flip side of the framers’ provision for a unitary executive. As the concentration of responsibility in a single person permits “energy” in the executive,¹⁸ its diffusion in a panel saps energy. Even when administrative authority is vested in a multimembered agency, at least the possibility of presidential influence (as through appointments, removal,¹⁹ designation of chair, OMB review, etc.) may save the potential for vigor.

The many-headed character of a review panel is most obviously disabling when an issue involves allocation of agency resources, as do attacks on agency

court through fines provided substantial portion of village funds, violated due process guarantee of disinterested and impartial judge).

15. The reactive character of a body may not seem purely structural; perhaps it is midway between structure and purpose.

16. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 COLUM. L. REV. 986, 990 & n.35 (1987).

17. See L. BROWN & J. GARNER, *supra* note 4, at 49 (describing composition of Conseil’s panels, often adding up to nine members).

18. THE FEDERALIST NO. 70 (A. Hamilton); J. RABKIN, *JUDICIAL COMPULSIONS* 66-67 (1989); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599-602 (1984); see also A. VON MEHREN & J. GORDLEY, *supra* note 14, at 480-81 (excerpts from Conseil decision declining to interfere with executive discretion over passport issuance and geographic restriction, noting inability of courts to act with “the energy and the rapidity essential to the effective functioning of public service”).

19. To the extent the president retains that power. See *Morrison v. Olson*, 487 U.S. 654, 690-93 (1988).

delay or nonenforcement decisions. The compromises, blurring, and averaging that are common to multiple decisionmakers—not to mention the inconsistencies that flow from accidents of group decisionmaking, such as the sequence in which issues are addressed²⁰—are at least at cross purposes with the prerequisite of resource allocation: a willingness to “zero out” some worthy projects. Drastic action is uncollegial. Not surprisingly, we find great deference to agencies on matters of timing and a presumption of nonreviewability for nonenforcement.²¹

Finally, having a jurisdiction limited to resolving the complaints of affected parties induces deference in the reviewers. Again the issues of agency resource allocation, which lie at the root of most disputes over agency delay or nonenforcement, illustrate the point most powerfully. A president (with the help of a brainy aide) can get an overview of a department's total operations and decide that one set of programs is weak or even counterproductive, while others have unrealized promise. He may err, and the department may well resist his orders, but few will argue that the president has stepped out of his role. Not so for a review panel activated only by the complaints of burdened parties.²²

Of course, the formally distinct features of the federal courts—constitutional life tenure, the case-or-controversy requirement, and the insulation from other branches and from informal influences—reinforce the predispositions that flow from the attributes fully shared with the Conseil d'État. Why should a body so constituted interfere with an executive agency's policy judgment, except to bring it into conformity with law?²³ But Edley's discussion of the Conseil suggests that even in the absence of these formal characteristics, reviewing courts would show great deference, sharply differentiated by type of issue.

Curiously, Edley has relatively little to say about one leading modern case that suggests that courts have not been as bamboozled or hamstrung by the “trichotomy” as he supposes: *Chevron U.S.A. Inc. v. NRDC*.²⁴ Its now famous supposition that Congress delegated to agencies those interpretive issues that it did not resolve with reasonable clarity seems to rest on a notion that even

20. See generally Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

21. Cf. L. BROWN & J. GARNER, *supra* note 4, at 84 (no complaint possible for failure to initiate prosecution). Brief research has not revealed whether the Conseil d'État extends this deference to nonenforcement decisions generally, as per *Heckler v. Chaney*, 470 U.S. 821 (1985). Cf. L. HURWITZ, *THE STATE AS DEFENDANT: GOVERNMENTAL ACCOUNTABILITY AND THE REDRESS OF INDIVIDUAL GRIEVANCES* 74 (1981) (arguing that Conseil's role as avenue of redress for individual complaints limits its ability to “encourage or spur good future behavior,” in contrast to that of an ombudsman).

22. Of course, this is reinforced by the nature of judicial factfinding, which is singularly inapt for assessing program priorities.

23. The Conseil d'État claims in quite strong terms not to substitute its view of sound policy for that of administrators, but it does enforce “general principles of law,” derived neither from statute nor constitution and apparently of subconstitutional character. See A. VON MEHREN & J. GORDLEY, *supra* note 14, at 429-31, 458-60, 472-73, 480-84. The effect may be rather similar to our due process jurisprudence, but subject to statutory amendment. See *id.* at 472-73.

24. 467 U.S. 837 (1984).

though such issues are, in a sense, ones of “law,” they are also issues of policy.²⁵ Placing their resolution in the politically responsible executive branch limits the courts to enforcing what Congress has said (either explicitly or by implication from its explicit language). This matching of task to institution hardly seems the work of a body caught up in nonfunctional categories or abstractions. Yet Edley seems to sweep it aside, largely on the ground that under *Chevron* a reviewing court may emphasize either the “law-ness” or the “policy-ness” of an issue.²⁶ But the fact that it is difficult to decide whether Congress has really resolved an issue hardly undercuts the functionalism or realism of the Court’s ruling.

More generally, Edley’s thesis suffers from one key misconception and from a failure to pose a fundamental question about the nature of the reviewing enterprise. The misconception lies in his image of the dynamics of judicial review. He seems to assume that a court fits *the decision as a whole* into one of his three “paradigms,” and then assesses it in light of the appropriate level of deference. In its more cynical form, the assumption is that a court decides on the outcome and then picks a paradigm with a deference level that will make its justification easy.²⁷ Thus he says of the majority opinion in *State Farm*: “The misidentification of the paradigm as science rather than politics gives the Court’s decision an odd quality.”²⁸

But agency decisions typically must rest an outcome on all three of Edley’s paradigms, in varying mixes. In *State Farm*, for example, the agency had at the outset of the rulemaking process revealed a political judgment in the least appetizing form imaginable. Far from stressing the financial burden that passive restraints would impose on auto buyers, it explained that it was reopening the issue because of “the difficulties of the automobile industry.”²⁹ This gaffe might well have undercut any effort to find in the statute a power to reject a safety device on the grounds of standard cost-benefit analysis, and, for whatever reason, the agency never made such an effort (at least so far as the public record shows). Rather, it appeared to adopt a substantive standard tilting strongly toward regulation, under which it would require a proposed safety device if it offered any significant benefits (at least if they were not overwhelmed by costs).³⁰ It then found that passive restraints did not measure up even to this criterion. Given those agency choices, the vulnerable point of the

25. *Id.* at 864-66.

26. P. 147.

27. As Edley joins Judge Friendly and the D.C. Circuit in recognizing that the “substantial evidence” test for fact findings and the “arbitrary and capricious” test for policy judgments connote in effect the same degree of deference, he implicitly acknowledges that the fact-policy (or science-politics) distinction is of little effect. *See* p. 112; *Industrial Union Dep’t v. Hodgson*, 499 F.2d 467, 473 (D.C. Cir. 1974); *Associated Indus. v. Department of Labor*, 487 F.2d 342, 350 (2d Cir. 1973).

28. P. 65.

29. 463 U.S. 29, 38 (1983).

30. 46 Fed. Reg. 53,419, 53,423 (1981) (finding “possibly minimal safety benefits” but “substantial costs”).

decision was its science, and there the challengers attacked. Thus, the Court did not “identify” a paradigm; the agency and litigants did. Had the agency invoked an authority to rely on standard cost-benefit analysis, presumably the Court would have asked whether the statute permitted such a view and (if so) whether the agency had arrived at it without being arbitrary or capricious.

Similarly, Edley seems to view the Court’s approach in the *Benzene* case as another arbitrary choice of paradigm, but the opposite one. He observes: “Rather than directly challenging and overruling the ‘expert’ judgment of the agency on the merits of its estimate of the health threat, the Court was persuaded by the complaining industry to view the question as one of statutory interpretation.”³¹ But again the agency’s approach determined the controlling paradigm—or, to put it more simply, the battleground for judicial review. The agency had taken the view that if a chemical in the workplace posed any risk, the statute authorized it to set an exposure limit at the lowest feasible level. And it viewed all carcinogens as posing some risk.³² Thus, on its view of the law, the “science paradigm” was wholly irrelevant,³³ at least if industry could not claim zero risk. Naturally the industry attacked the agency’s legal analysis. And once it persuaded the Court to find a “significant risk” threshold in the statute, there was no occasion for the Court to address the scientific issues, as the agency fact-finding did not even purport to satisfy this standard.

Because an agency’s order must have adequate underpinnings in fact, law, and policy, Edley’s concern that courts will misidentify or manipulate paradigms is misplaced. The three “modes” of thinking interact. An agency’s caution in one domain may require it to extend itself in another, just as a stretch—going to the edge—in one may enable it to occupy safe territory in another. A broad law-policy judgment by the agency in *State Farm* might have sustained its rejection of passive restraints despite the frailties of its science, but it chose a narrower view of its mandate and thus needed “stronger” science. In *Benzene* the agency tried to rely on a broad legal judgment (which if successful would have absolved its science of any flaw) but came a cropper. Every agency order hangs on a kind of chain, and the challengers naturally go for what they perceive as the weakest link; the court must decide if it is strong enough. Edley, though emphatic (and correct) that agency decisions draw on all three of his modes of reasoning, disregards the agency and party choices that typically make one mode pivotal in court. The effect is to impute to courts rather fanciful opportunities to choose among modes and thus degrees of deference.

The question that Edley declines to ask is how to set the goals for judicial review. Opposed as he is to separation of powers, he frames as a better “pro-

31. P. 76-77.

32. 448 U.S. 607, 624 (1980).

33. See *id.* at 625.

ject” for administrative law the advancement of “sound governance.”³⁴ (Is this a derivative of Dworkin’s task for the Herculean judge, making law “the best it can be”?)³⁵ Of course sound governance is as hard to oppose as God and motherhood used to be. But setting it as the goal for judicial review seems to suppose no institutional differentiation. Yet if we either removed or disregarded the institutional differences, a harder question would arise: why have judicial review at all? If there are no differences at all, there would appear to be no greater likelihood of getting “better” results, and dispensing with review would save a great deal of time and expense. Two filters may screen out more bad judgments than one, but having two *identical* filters seems hard to justify.

If there are differences between agency and court, but only noninstitutional ones, the answer is similar. Suppose it were shown that judges are smarter than agency heads, or have more time on their hands, or have cleverer clerks than agencies’ staff. Even if all this were true, the simple solution would be to replace the agencies’ current personnel with those who now serve as judges and clerks, and drop judicial “review.” Why not get things right the first time? (This approach is hard to realize in the light of judicial tenure, but for the moment we disregard institutional peculiarities.) That seems to drive us to institutional distinctions as the only justification for having two separate decisionmaking phases. Finding the courts’ role must start with asking about their peculiar institutional traits.

Edley supplies some hints as to how far he would go in breaking the bonds derived from the institutional differences. Out goes the old rule of *Morgan v. United States*,³⁶ which limits the challenger’s probing of agency thought processes to what is formally recorded.³⁷ Courts would be far more accommodating to “plaintiffs’ efforts to use discovery and evidentiary hearings to get a more accurate fix on just what has occurred in the agency.”³⁸ A court might require an agency to use a highly specific scientific methodology—Edley instances the Ames test for bacterial mutagenicity.³⁹ And a court might rest its judgment of how far an agency could go in policymaking on its assessment of whether, and to what extent, the incumbent president had secured a mandate for change in his election campaign⁴⁰—work more for soothsayers than for judges.

34. P. 213.

35. See R. DWORKIN, *LAW’S EMPIRE* 229, 238-40, 254-58 (1986).

36. 304 U.S. 1 (1938).

37. Pp. 54, 237.

38. Pp. 225-26.

39. P. 231; see also p. 262.

40. Pp. 60, 203-04. Edley also argues for judicial monitoring of participation in “bargaining” over agency decisions. Pp. 197-99. But any monitoring of this process, beyond insisting that agencies conduct any regulatory negotiation through meetings noticed in the Federal Register, see Harter, *Negotiating Regulations: A Cure for Malaise*, 71 *GEO. L.J.* 1, 79-82 (1982), would seem to entangle the courts to an extraordinary degree in the details of a rule’s evolution.

Apart from specifics, we can draw inferences from the methodology. Judicial review's source of legitimacy is to be its contribution to sound governance, its role to serve as "an alternative forum for decision making."⁴¹ And the omissions are also telling. Because a relatively early discussion seemed to me quite incomplete without a reference to the scarcity of agency resources,⁴² I tried to keep an eye out for allusions to that problem, or to the scarcity of court or party resources, or to the time costs of the kind of review Edley appears to favor; I found none. Life is short—too short for everyone to do everything perfectly. No word alludes to the possibility that many disappointments with agency performance—especially ones involving delay or inaction—may stem from the agency's choices about the allocation of its intellectual and other resources. Nor is there a hint at any of the special problems of judicial intervention on these subjects.

The book as a whole exudes an enormous enthusiasm for judicial interference with agencies. As Edley was issues director for the Dukakis campaign for two years,⁴³ one supposes him a good liberal. Yet the judges that he urges on to new heights of activism are now more likely than not to be appointees of Presidents Reagan or Bush. What gives?

Edley briefly addresses the point: "What about the conservative judge reviewing a liberal agency's action he or she considers wrong-headed? Does sound governance review invite wholesale nullification of executive actions with which willful judges disagree?"⁴⁴ He suggests three answers. Judges are (sometimes) willful under the current dispensation, their willfulness only masked to a degree by manipulation of the trichotomy. In addition, sound governance review would bring the willfulness out into the open, with emphasis on "the personal virtue of self-revelation."⁴⁵ Finally, he expresses the belief that "the diversity and the independence provided by life tenure and tradition make it likely that the pluralism of political and social life generally will be reflected in the wills of judges."⁴⁶ Especially so, he suggests, if the Senate takes a very active view of its "advise and consent" role.⁴⁷

The last item, of course, is a very practical one; if the Senate can keep conservatives off the bench, then the risks are low. But I think more must be at work. Two possibilities occur to me. One is a supposition that conservatives will rigorously adhere to precedent, liberals not. Thus ground "gained" in any era of liberal dominance will not be at risk, while liberals can use their eras of dominance to correct any conservative activism. But while respect for precedent may be greater among conservatives than among liberals, it is hard

41. P. 235.

42. *See, e.g.*, pp. 54-55 (discussing imperfections of agency decisionmaking).

43. P. xiii.

44. Pp. 232-33.

45. P. 233.

46. *Id.*

47. Pp. 233-34.

to imagine conservatives long feeling respect for so unprincipled a principle as one-way *stare decisis*.⁴⁸

Another possibility is that Edley (and other liberal advocates of activism) cannot imagine any intelligent person finding conservative activism intellectually respectable. If so, and if appointment to the federal bench will typically require a modicum of intellect, it follows that most conservative judges will not find doctrines that meet their own sense of intellectual respectability and yet enable them to implement a conservative agenda. Thus conservative appointments, even if they may not much advance an agenda of liberal activism, at least will not substitute a conservative variant; even without a manipulative concept of *stare decisis*, judicial activism will remain a one-way ratchet. Of course the deprecation of intellectually valid conservative activism implies a finding that, for example, the intellectual quality of a Laurence Tribe is manifestly superior to that of a Richard Epstein. This is surely a quicksand.

We all want "sound governance." To this end we may vote, speak out, or get into politics directly. The desire for sound governance may also play a role in the readiness of some to become Article III judges. Courts have a duty in appropriate cases to curb agency lawlessness, and carrying out that duty contributes to sound governance. But just as masons building a cathedral should not supplant the architect, even though both are creating a work of art, a judge should not supplant the politician or administrator though all are seeking sound governance. "They also serve who only stand and wait,"⁴⁹ and so too those who only construe the law.

48. See R. POSNER, *THE FEDERAL COURTS* 217 (1985).

49. J. MILTON, *On His Blindness* (1652).



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