
Samuel J.M. Donnelly
BOOK REVIEWS


Reviewed by Samuel J.M. Donnelly***

Biographies of two giants have appeared. David Wigdor has written Roscoe Pound: Philosopher of Law and William Twining has given us Karl Llewellyn and the Realist Movement.

Pound and Llewellyn were leaders of movements which had great influence on legal philosophy and legal education during the twentieth century and which became part of the personal history of many American lawyers. Both have contributed to important reforms in their chosen fields of action, Pound in judicial reform† and Llewellyn in commercial law.‡ Both, in overlapping sequence, have altered profoundly the way in which we view law and the legal and judicial process. Each has given us a perspective, a vision which was not ours before, and together their philosophies have established much of the context for the progressive development of American law.§

Both of their visions may be described as developments of insights found in the thought of Oliver Wendell Holmes, Jr.¶ It

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3. Of course, this was with the cooperation of others.
4. Holmes undoubtedly provided some of the inspiration. The discussion which follows should be understood as a simplified model designed to facilitate the comparison of Pound with the legal realists.

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has been noted\(^5\) that there are two segments to Holmes' seminal speech, *The Path of the Law*.\(^6\) In the earlier part Holmes put forward his famous dictum: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."\(^7\) Later in his talk, Holmes undertook to advise judges:\(^8\)

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. . . . I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.

Pound contrasted mechanical and sociological jurisprudence and urged lawyers and judges to weigh the social advantages of their rules and to look upon law as social engineering.\(^9\) That aspect of Pound's thought could be related to the second portion of Holmes' speech. Legal realists such as Llewellyn were more concerned with insights found in the first portion. While doubting the usefulness of the tools then in vogue for predicting court decisions, they sought, through studies of judicial behavior, to find the "real rules": what the courts would in fact do.\(^10\) Pound urged


\(^6\) 10 HARV. L. REV. 457 (1897).

\(^7\) *Id.* at 461.

\(^8\) *Id.* at 467-68.


The main problem to which sociological jurists are addressing themselves today is to enable and to compel law-making, and also interpretation and application of legal rules, to take more account, and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied.

*Id.* at 512-13.

\(^10\) See K. LLEWELLYN, *JURISPRUDENCE* 21 et seq. (1962); see also Llewellyn, *A Realistic
sociological studies for the purpose of finding a basis for social policy. The legal realists employed the social sciences to study the behavior of judges.¹¹

A further and fascinating contrast developed from these points of departure. While Pound started with a prescription for the decision making process of judges (be concerned with social advantage), the direction of his scholarship would lead him to studies of rules including analysis of their social advantages.² The realists concerned with predicting judicial behavior (the real rules) moved ultimately to studies of how judges ought to behave, for example, to a concern for the craftsmanship of appellate judges.¹³

The Men

Despite these contrasts Pound and Llewellyn were in many ways similar. Both had substantial intellectual interests outside law which influenced their legal scholarship. Pound devoted much of his youth to the study of botany, and according to Wigdor did some excellent work in that field.¹⁴ Llewellyn maintained an interest in poetry¹⁵ and the social sciences. His poems¹⁶ decorate his works on jurisprudence, and *The Cheyenne Way*,¹⁷ a study of Indian law written in collaboration with E. Adamson Hoebel, an anthropologist, has changed the approach of social scientists to the study of primitive law.¹⁸ Both had an interest in comparative law. Pound’s interest began in his first and only year of law school when Professor Gray recommended Sohm’s

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¹² *See K. LLEWELLYN JURISPRUDENCE 77, 78 et seq. (1962).*

¹³ *See, e.g., Pound’s theory of interests discussed in Pound, pp. 213-14; see also Pound, *A Theory of Social Interests*, 1920 PUBLICATIONS OF THE AM. SOCIOLOGICAL Soc’y 15 (1921); Pound, *Interests of Personality*, 28 HARv. L. REV. 343 (1915). In 28 HARv. L. REV. 343 at 344 Pound states: “Strictly the concern of the law is with social interests, since it is the social interest in securing the individual interest that must determine the law to secure it.” Compare this view with K. LLEWELLYN, *JURISPRUDENCE 14 et seq.* (1962).*

¹⁴ *See K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 215 et seq.* (1960); *see also the concern of Jerome Frank with craftsmanship in such passages as J. FRANK, COURTS ON TRIAL 247 et seq., 292 et seq., 316 et seq.*

¹⁵ *See generally Pound, pp. 49-67.*

¹⁶ *See K. LLEWELLYN, BEACH PLUMS (1931) (poems); LLEWELLYN, pp. 117-23, 555.*

¹⁷ *See K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 398 (1960); K. LLEWELLYN, *JURISPRUDENCE 214 (1962).*

¹⁸ *See LLEWELLYN, p. 166.*
Institutes as a basis for understanding Roman law. Llewellyn wrote and lectured in German. Both had a great interest in the practice of law. Although Llewellyn spent only two years in practice before beginning his teaching career, his later work with the Uniform Commercial Code brought him into extensive contact with the bar. Pound was a practicing attorney and a judge before becoming a professor of law. Perhaps most significantly both were considered radicals in their early years of fame and were attacked in their senior years for conservatism. Pound’s opposition to the New Deal is well known. The Uniform Commercial Code has been criticized as ignoring consumer concerns despite such provisions as UCC § 2-302 which have become the basis for many consumer oriented decisions. Their mature philosophical thought, according to some, turned conservative and failed to fulfill the promise of their youth. Despite the enormous impact which each had upon our current vision of law, their final large works, Pound’s five volume treatise on Jurisprudence, and Llewellyn’s Common Law Tradition, were not carefully thought through, systematic presentations of lifetimes of great thought.

The Books

Pausing at this point to perform one of the functions of a book reviewer, I can say that both books are useful. The Wigdor biography of Pound is a pedestrian achievement by a scholar who is not a lawyer and who, perhaps for this reason, fails to bring any profound insight to his study of Pound. It is nevertheless useful to have Pound’s life, professional career and writings described in

20. Llewellyn, pp. 106-07. See also the fascinating episode in which Llewellyn during World War I served as a volunteer with the 78th Prussian Infantry, was wounded and awarded the Iron Cross. Pp. 91, 479-87 (Appendix A).
21. Id. at 101-02.
22. Id. at 270-302.
28. See Pound, pp. 207-32; Llewellyn, p. 266.
an orderly way. The Twining biography of Llewellyn is a substantial scholarly achievement containing a careful and thorough analysis of Llewellyn’s work. Twining originally read law in England and then, before embarking on his biography, spent some time studying under Llewellyn. He is also the compiler of the Llewellyn bibliography. With his English background Twining is able to comment on Llewellyn from an interesting perspective, but perhaps misses some aspects which would have been apparent to one raised in the tradition of American Legal Realism.

Some Principal Thoughts

Having stated my recommendation in regard to the books, it may be worth counterpointing some of the principal thoughts set forth by the authors, particularly Wigdor’s view of Pound’s organicism and Twining’s analysis of Karl Llewellyn’s notion, “situation sense.” One can set the stage for both discussions by reviewing a controversy which took place in the early nineteen thirties.

When Llewellyn first came to prominence as a leader of the Realist movement, the two titans clashed in a series of three articles. In 1930, Llewellyn undertook to gather certain themes discussed by the new thinkers in an article entitled, A Realistic

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32. In addition Twining places Llewellyn in the context of legal realism and explores legal realism through his analysis of Llewellyn’s thought. See LLEWELLYN, pp. 3-83, 375-87.
33. See LLEWELLYN, p. xi.
34. W. TWNING, THE KARL LLEWELLYN PAPaRS (1968); see also the select bibliography in LLEWELLYN, p. 555 et seq.
35. See LLEWELLYN, p. vii where the Foreword’s author, Robert Stevens, states:
   But for the English trained lawyer, the Realist “Movement” has often seemed an impenetrable barrier to comprehending the American approach to law. Can a society which spawned such a reportedly bizarre Movement as the Realists have any theory (or solutions) which might possibly be relevant in the English context? This volume not only makes an answer to that question possible, it also offers the first coherent exposition both of the Movement itself, and also of the American approach to law which underlay the rise of the Realists. At last the mythology about the Realists—which was carried to excess in England—has been questioned, and that force which we know as the Realist Movement can be seen in perspective through the work of its leading figure—Karl Llewellyn.
   The insights of such a volume will inevitably be vital not only for the English linguistic philosopher or legal sociologist, but for any English lawyer or scholar concerned with the American legal scene.

36. POUND, pp. 207-32.
37. LLEWELLYN, pp. 216-27.
In that article he criticized Pound who replied with an article attacking the entire realist school. Llewellyn and Jerome Frank collaborated in a defense finally authored by Llewellyn. Some points made by Llewellyn against Pound are worth reviewing.

Llewellyn contended that Pound had a sophisticated, rule-oriented understanding of law. He explained:

"Precepts" as used by Pound, for instance, I take to be roughly synonymous with rules and principles, the principles being wider in scope and proportionately vaguer in connotation, with a tendency toward idealization of some portion of the status quo at any given time. And I think as you read Pound that the precepts are central to his thinking about law. Finally, he stresses—and we meet here a very different order of phenomena—"the traditional techniques of developing and applying" precepts. Only a man gifted with insight would have added to the verbal formulae and verbalized (though vague) conceptual pictures thus far catalogued, such an element of practices, of habits and techniques of action, of behavior. But only a man partially caught in the traditional precept—thinking of an age that is passing would have focused that behavior on, have given it a major reference to, have belittled its importance by dealing with it as a phase of, those, merely verbal formulae: precepts.

In his biography of Pound, Wigdor speaks of the conservative streak in Pound's legal analysis in different terms. Beyond the pragmatic instrumentalism in Pound's thought, one could find a strong element of organicism akin to that found in nineteenth century social theory but also with roots in the evolutionary

38. 30 COLUM. L. REV. 431 (1930); K. LLEWELLYN, JURISPRUDENCE 3 (1962).
40. Llewellyn, Some Realism about Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222 (1931); K. LLEWELLYN, JURISPRUDENCE 42 (1962). One should not misunderstand this dispute. Llewellyn found a vital insight missing in Pound's analysis of the law. Pound was deeply disturbed by the skepticism of the legal realists. Yet the realists, including particularly Llewellyn, acknowledged that Pound had profoundly influenced their view of law.
41. K. LLEWELLYN, JURISPRUDENCE 6, 7 (1962).
42. See Pound, pp. 183-206.
43. Id. at 212. Query whether that organicism reflects a proper concern with maintaining legal theory as a viable means of collaboration between legal decision makers and with those who are to be governed by rules. Llewellyn shows a similar concern. See, e.g., K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 291-94 (1960).
botany to which Pound had devoted so much of his youth. According to Wigdor, the "common law tradition offered Pound a familiar channel to organicism" and the organicism which he found in that tradition "competed with instrumentalism in a relentless intellectual tug-of-war." The reluctance to tear the law's seamless web led Pound to hold a distaste for social legislation despite the radical reform flavor to his continual insistence upon social engineering. While urging procedural reform he favored a gradual evolutionary development. Organicism for Pound "established the boundaries within which instrumentalism could operate" and hence "had serious consequences for Pound's intellectual development." Wigdor asserts that the ambivalence created in Pound's thought by the struggle between organicism and instrumentalism prevented him from developing the great systematic approach to the common law that he had proposed.

I prefer Llewellyn's critical explanation of Pound's inability to produce his great systematic work. In his 1960 review of Pound's five volume work, Jurisprudence, at a time long after their earlier dispute, Llewellyn found the same greatness he had seen in Pound at that earlier point and the same failure to achieve a significant insight. In discussing Pound's analysis of Gény in that five volume work, he states:

This is Pound's sniffer at work. It is an amazing sniffer. It reminds me most of the general genius of the American case law judge: most of the time it is amazingly on target. And so rarely in the bull's eye. For Pound is of course not in the bull's eye here. He recognizes the importance of technique, in general. But he turns his back, then, on the craft aspect, the daily working aspect for daily working lawyers, of this great Méthode of Gény's—even while, I repeat, he is sniffing out the greatness which has been missed by almost every other American writer except Cardozo. . . .

Let me try to state it this way: Pound has contributed for

44. POUND, p. 211.
45. Id. at 230.
46. Id. at 216.
47. Id. at 231.
48. Id.
49. Id.
my guess, more than any other individual (unless perhaps John Dewey) to making legal thought in this country result-minded, cause-minded, and process-minded. Yet such lines of thinking leave little mark upon the whole, and almost no mark upon the structure of these final volumes.

Llewellyn suggests that while Pound did not take readily to analysis of process, methodology and craftsmanship—"of how things work"—his genius was capable of meeting the need for that type of analysis. As Pound advanced in age, however, his preference for building theories of structure became predominate in his thought.52

Related to Llewellyn’s emphasis on craftmanship, on behavior, on “how things are done,” was his concern with men, with the human element in law. “Behind decisions stand judges; judges are men; as men they have human backgrounds."53 Men also have or lack vision. One concept offered by Llewellyn to describe a judge’s vision, “situation sense,” is criticized by Twining.

After writing The Common Law Tradition, Llewellyn spoke to the Conference of Chief Justices.54 In the course of his speech one can find a typical discussion of “situation sense”:55

As you size up the facts, try to look first for a significant life-problem-situation into which they comfortably fit, and only then let the particular equities begin to register; so that when the particular equities do begin to bite, their bite is already tempered by the quest for and feel for an appropriate rule that flows from and fits into the significant situation type.

The notion of “situation sense” may work best in the context of commercial law. From the time when Lord Mansfield with the aid of his merchant jurors absorbed great segments of the law merchant into the common law,56 commercial judges have sought to understand the customs and practices of merchants. An experienced commercial lawyer who brings to the bench an understanding of typical business operations, arrangements and problems may be able to recognize in the facts presented by disputing

52. Id. at 504.
53. Id. at 42.
56. See C. FIFoot, LORD MANSFIELD (1936).
parties patterns with which he is familiar. The judge without experience in commercial matters who seeks, perhaps with the help of the advocates in the case, to see the facts as businessmen might see them may be able to find more appropriate solutions for the needs of the industry and the parties than if he sought to resolve the dispute solely by applying abstract legal rules.

While recognizing these aspects of "situation sense," Twinning finds it an elusive and unclear concept. At times Llewellyn uses "situation sense" to describe a faculty or ability to perceive in the judge. On other occasions Llewellyn will ask one to seek the sense of the problem-situation. In this use "situation sense" seems immanent in the circumstances. It is unclear, then, whether this term describes the judge's ability to perceive or a pattern in the circumstances.

Again, to some "situation sense" will imply simply a value-free acquaintance with the factual background, as a commercial lawyer may know the business circumstances. Often "situation sense" carries with it a policy or principle which implies a judgement of value. Twining argues that Llewellyn always used "situation sense" in relation to a principle or policy.

The possibility that "situation sense" used to include a value judgement describes not a perception of the judge but a pattern immanent in the circumstances troubled Twining. The suggestion "has a metaphysical ring of the sort that arouses the suspicion of empirically minded jurists." In order to avoid the "metaphysical" implications of "situation sense," Twining restates Llewellyn's views on the use of "situation sense" in a passage worth reproducing in a footnote.

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58. See id. at 269.
59. See id. at 220.
60. Id. at 221.
61. Id. at 222.
62. Id.
63. Id. at 224. It does not trouble me.
64. Id.
65. Id. at 226-27 (footnotes omitted). The "situation sense" is restated as follows:

Situation sense (summary)

Facts: (a) In interpreting a reported case, or in approaching a current case, start by studying the facts as a layman familiar with their general context might see them. Try to grasp what would have happened if things had been working smoothly and what it was that brought the dispute about. Analyse what interests are in conflict and formulate statements of policy that may be relevant.
Twining also remarks that "situation sense" "is most appropriately used in respect to disputes which arise within groups or sub-groups which have an underlying consensus about relevant values." In such circumstances acquaintance with the factual background and the practices of the group will appropriately be accompanied by familiarity with principles or policies accepted by the group and reflected in its practices. These values understood in conjunction with the practices might be used reasonably as a basis for resolving an intra-group dispute.

In my opinion this is one of the most important suggestions made by Twining in his discussion of "situation sense" and I

(b) Try to fit the facts into some socially significant category or pattern, separating clearly irrelevant 'fireside equities' peculiar to this case from potentially relevant elements in the situation. In seeking for appropriate categories the following guidelines should be observed: (i) in categorizing the facts choose 'situational concepts'—i.e. categories which clearly refer to fact situations only and do not straddle facts and legal consequences; (ii) terms used and distinctions drawn by persons familiar with the context of the dispute (either as experts, observers or participants) may provide appropriate categories; (iii) the practices and expectations of such persons may also be of use; (iv) one aspect of the problem is to characterize the facts at an appropriate level of generality. No general formula exists for this but: (a) the facts should be characterized as a type; (b) in first instance, the facts should be characterized fairly narrowly (e.g. hospital employing a doctor rather than employer-employee) and movement up the ladder of abstraction to broader categories should proceed with awareness of the dangers of lumping together disparate social situations under one head.

Values: (a) Sometimes it will be found that after the facts have been categorized, there may be a consensus within the affected group or within society as a whole respecting applicable policies or principles. In such cases the selection of an appropriate situational concept may be sufficient to resolve the problem.

(b) In other instances, a conflict of principles or policies may be found. In such cases the process of categorization should have assisted in identification of the issues of policy, etc. but will not in itself resolve such conflict. However, even if reasonable men might disagree on the choice of conflicting policies, they might share common ground in limiting the range of choices.

Measures: (a) Determine what you consider to be the most appropriate line or direction of treatment and only then; (b) decide on what specific prescription is appropriate.

This procedure provides no cure-all for finding 'appropriate' categories or choosing between competing values. 'No technique or method can ever be a cure-all'. It will not assist in the disposition of marginal cases. Nevertheless it provides a broad framework which should maximize the role of reason in solving problems presented to appellate courts.

66. Id. at 226.

67. But query whether a knowledge of mercantile practices provides an appropriate background standing by itself for resolution of a dispute between a consumer and a merchant.
propose to use it as the starting point for counterpointing his analysis. One acquires “situation sense” primarily from a lived experience within a group. It is the understanding that one acquires from that learning experience of group values and patterns of behavior. But it is not confined to that factual content. It will include learned skills at relating to the group and at resolving problems in a manner satisfactory to the group. It will also include a ready appreciation of the manner in which some seemingly isolated circumstances will fit into the patterns of the group’s behavior.

A model of one who has “situation sense” is the former commercial lawyer who has long represented clients in a particular industry. As a judge confronted with a dispute arising from that industry, that experienced practitioner will recognize the context of the dispute and may say to himself, “I know what is going on there” and thus arrive quickly at a resolution. In circumstances such as these, Jerome Frank’s use of “gestalt” and Hutcheson’s use of “hunching” are related to “situation sense.”

68. By “counterpointing” here I mean to bring out overlooked aspects of “situation sense.” I do not mean to produce an alternative restatement. However, certain ways of developing the notion of “situation sense” which do not find precise echoes in Llewellyn, as for example developments from Twining’s valuable suggestion regarding groups and “situation sense,” deserve comment.

69. Cf. Llewellyn, p. 503, where Llewellyn defines “horse sense” as “that extraordinary and uncommon kind of experience, sense, and intuition which was characteristic of an old-fashioned skilled horse trader in his dealings either with horses or with other horse traders.”


Repeatedly, when one is hard beset, there are principles and precedents and analogies which may be pressed into the service of justice, if one has the perceiving eye to use them. It is not unlike the divinations of the scientist. His experiments must be made significant by the flash of a luminous hypothesis. For the creative process in law, and indeed in science generally, has a kinship to the creative process in art. Imagination, whether you call it scientific or artistic, is for each the faculty that creates.

Id. at 281.

Compare K. Llewellyn, The Common Law Tradition: Deciding Appeals 121 n.154 (1960) where Llewellyn comments:

Hutcheson on “the little small dice” can be read only by a moron as suggesting gambling probabilities. His insistence is on the frequent determinative character of factors not as yet reduced to formula or to any other diagnosis which
While the primary model of "situation sense" is understanding acquired by a lived experience within a group, one can by analogy employ "situation sense" in other circumstances. A judge whose practice was largely in negligence law may seek out the sense of a commercial situation. Ideally he would acquire that sense through a period of experience with commercial problems and those involved in them. Like Lord Mansfield he would cultivate the acquaintance of merchants and learn from them. In other words he would reproduce deliberately, albeit in a more limited way, the lived experience of the commercial lawyer. In the actual flow of a court's work, however, that careful cultivation of commercial experience may be difficult. As a substitute a skilled judge with the aid of experienced and knowledgable advocates who are commercial lawyers may acquire the sense of a commercial situation from briefs and oral argument. By descriptions of behavior patterns those briefs and oral arguments may in a limited and vicarious way carry the judge through a lived learning experience with a group or industry. After diligent effort the judge may then see the sense of the situation and acquire the "gestalt" or lightning "hunch" of which Jerome Frank and Hutcheson speak. In this analogous use, the judge does not originally have "situation sense" but rather seeks out the sense of the situation. He is seeking patterns of facts and related values and in addition some understanding of appropriate ways of solving problems within the group. In a more remote analogy a skilled judge who knows how to seek the sense of a strange situation may be said to have "situation sense."

In the two analogous uses of the term "situation sense," the judge seeks to understand the behavior and values of particular groups of which he is not a member. The judge, then, moves from what might be described as his own "horizon" or "frame" to is communicable by more than such terms as "hunch" or "insight" or "something"—all used in terms of responsible conscience and tradition.


74. Llewellyn continually insisted upon patterns and categories. See id. at 122, 201-02, 268; compare K. LLEWELLYN, JURISPRUDENCE 32 (1962); K. LLEWELLYN, THE BRAMBLE BUSH 48 (1951).

75. See LLEWELLYN, p. 222.


77. Id. at 268.
another "horizon" or "frame." When adjudicating a dispute between members of differing groups such as "merchants" and "consumers" the judge may take care to move into the horizons of both groups and to search out the sense of the situation within both frames. A further use of "situation sense" may be found by analyzing certain techniques used in drafting and suggested for interpreting the Uniform Commercial Code.

The Code

Llewellyn's great non-philosophic achievement, the Uniform Commercial Code, nevertheless grew (organically?) in many respects from his philosophical insights. The sections of the UCC on risk are a classic illustration. Under the Uniform Sales Act the determination of who bore the risk of loss and indeed of a range of other questions would turn on a finding that title or property in the goods had or had not passed. In the complexity of modern business circumstances it was often difficult to determine when title had passed. Courts developed a patchwork of decisions purportedly applying the abstract notion of title or ownership of the goods.

The legal realists in what I would describe as their critical mode doubted the ability to predict court decisions on the basis of such classic "paper rules" as the Sales Act principle which

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78. Cf. id. at 268. The words, frame and horizon, are imposed on Llewellyn because they seem helpful in treating the problem raised by Twining. They are terms frequently used by philosophers such as Martin Heidegger or Bernard Lonergan. See, e.g., M. HEIDEGGER, IDENTITY AND DIFFERENCE 13, 14, 34, 35 (1969); D. TRACY, THE ACHIEVEMENT OF BERNARD LONERGAN 1-21, 104-32 (1970). Although the words have complex uses, in this context they may have the quality of "singing reason," to use one of Llewellyn's favorite terms. One brought up in San Francisco has a different horizon than one brought up in New York City. So too a commercial lawyer has a different horizon than a negligence trial lawyer. Their views of life may be partially framed by such technical terms as "the prudent man" or "unconscionability," as well as by experience with their different clients.

79. In most passages in regard to "situation sense" cited above from THE COMMON LAW TRADITION: DECIDING APPEALS, the judge is moving into an unfamiliar horizon. One aspect of the countering of Twining's restatement of "situation sense" is an elucidation of the manner in which this may be done.

80. UCC §§ 2-509-510.
81. Uniform Sales Act §§ 17, 19, 22.
83. K. LLEWELLYN, JURISPRUDENCE 23-27, 56-57. Llewellyn states the following attitude of legal realists:

(7)  The belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past. This is con-
based risk of loss on passage of title in the goods.\textsuperscript{84} Llewellyn, with his early and continuing concern with increasing the predictability of court decisions, suggested that narrow categories be substituted for such general principles.

A simple carryover from the critical to the creative mode of legal realism can be seen in the manner in which the drafters of the \textit{UCC} changed this older rule and replaced it with the provisions of § 2-509. In that section, the general principle of the Sales Act is replaced by a variety of particular rules which rest upon easily ascertainable concrete phenomena,\textsuperscript{85} such as the rule in \textit{UCC} § 2-509(3) that risk of loss passes from the merchant seller to the buyer when the buyer receives physical possession\textsuperscript{87} of the goods.

A second technique was employed in drafting that rule. Soia Mentschikoff describes it in the introduction to her case book, \textit{Commercial Transactions, Cases and Materials}:\textsuperscript{88}

> The most important drafting concept rests on the belief that relative certainty and uniformity of construction depend on the court's perception of the situation represented by the rule and the reason the rule was adopted and that proper construction follows the reason and is limited or extended by it. The attempt, therefore, has been to draft rules so that both the situation being covered and its reason tend to appear on the face of the language, and to keep the language reasonably open-ended.\textsuperscript{89}

As Twining states, then, the "'rule with a singing reason' was the basic model for the draftsmen."\textsuperscript{90} The reason was to appear on the face of the rule but in relation to a simple type situation. The judge using elementary "situation sense" was expected to perceive the situation, the rule, and the reason for the

\begin{itemize}
\item \textsuperscript{84} Llewellyn, \textit{Through Title to Contract and a Bit Beyond}, 15 N.Y.U.L. Rev. 169 (1938).
\item \textsuperscript{85} See J. White & R. Summers, \textit{Uniform Commercial Code} 137 (1972).
\item \textsuperscript{86} See \textit{Llewellyn}, pp. 331-33.
\item \textsuperscript{87} The word "receipt" in \textit{UCC} § 2-509(3) is defined by \textit{UCC} § 2-103(1)(c) as "taking physical possession."
\item \textsuperscript{88} S. Mentschikoff, \textit{Commercial Transactions, Cases and Materials} (1970).
\item \textsuperscript{89} \textit{Id.} at 6.
\item \textsuperscript{90} \textit{Llewellyn}, p. 324.
\end{itemize}
rule in the situation.\textsuperscript{91}

For example, in \textit{UCC} § 2-509(3), the simple type situation is the normal sale by a merchant seller to a buyer who takes undisputed physical possession of the goods either in the seller's place of business or at the time of delivery. There is no authorization to ship by carrier and no use of a bailee. The rule that risk passes upon physical receipt is designed to place risk on the one who is best able to control the goods and the most likely to insure.\textsuperscript{92}

Fortunately or unfortunately life does not accommodate itself to such simple solutions. There are cases in which the buyer may or may not have had physical possession of the goods. In one case\textsuperscript{93} a helicopter crashed while the buyer accompanied by the seller's instructor was flying it during a training course conducted at the seller's airfield. Soia Mentchikoff in such circumstances would recommend a construction technique akin to the drafting technique described earlier:\textsuperscript{94}

If it is correct that the grand style of appellate judging involved looking at the situation before the court in terms of its type situation and arriving at a conclusion as to what is the best policy, then if you look at the precise language of the statute and at the situation before you and the reason for the language seems to be present in the situation, you can expand by analogy or, if the reason is absent, limit the statutory language. This is a perfectly permissible reasoning by analogy with the statutes instead of with cases; the same principle exactly. You say to yourself, “This is the reason for the rule which is enunciated here; the explicit language does not cover the situation which has arisen, should I apply the policy? Are the situations sufficiently similar so that the reasons that make this a good policy in the situation covered precisely by the language should carry over to the situation which is not precisely covered by the language?”

Where the reason for the rule does not apply to the situation then the court is permitted to refuse to apply it without distorting the statutory language.\textsuperscript{95} “Situation sense” then was employed in

\textsuperscript{91} This is an example of the expected perception of value accompanying perception of the situation.
\textsuperscript{92} \textit{UCC} § 2-509, Comment 3.
\textsuperscript{94} S. \textsc{Mentschikoff}, \textit{Commercial Transactions, Cases and Materials} 11 (1970).
\textsuperscript{95} \textit{Id.}
drafting the Code and may be used when interpreting it.\(^9\)

It is worth noting, on the basis of this discussion, that the Code was drafted with a view to the problems a judge would have in applying its sections to the vast range of fact situations which would arise over time and in many different industries. The Code is drafted not only to set forth in statutory rules certain appropriate social solutions\(^7\) but with a view to further creation of solutions by judges interpreting its provisions. It provides guidance to the craftsmanship of judges seeking to understand and resolve human problems. It is an example of the manner in which the critical concern of legal realism with the behavior of judges was transformed into a creative concern for the craftsmanship of the judiciary.

**English Analysis and American Legal Realism**

While Twining discusses the use of "situation sense" in drafting the *Uniform Commercial Code*,\(^9\) he misses the relation between techniques used in drafting and recommended for interpreting the Code and the legal realists' concern with practices, behavior and craftsmanship.\(^9\) The difficulties which Twining admittedly has with "situation sense" may be traceable to the influence of analytic thought in his legal background. Nevertheless this influence of analytic philosophy provides one of the valuable aspects of his biography of Llewellyn.

It is possible to read portions of H.L.A. Hart's *The Concept of Law*\(^10\) as an effort to incorporate the insights of legal realism into analytic thought.\(^10\) Twining's biography of Llewellyn could be understood as a continuation of that worthy endeavor.\(^10\) Unfortunately the great concern of the analytic school with language, concepts and rules may interfere with an understanding

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97. *Compare* the discussion of the Pound-Llewellyn controversy in the text accompanying notes 38-41 *supra*.
99. *See id.* Twining catches the relation between the critical concern with overbroad categories and the use of narrow categories in some instances in the Code. He does not extensively discuss the Code as a tool designed to be used in decision making by judges employing "situation sense" in the manner described in passages quoted from Soia Mentschikoff.
101. *See, e.g., id.* at 121-50, particularly the discussion of the open texture of law.
102. *See* Llewellyn, pp. vii, 8, 385-87; *see also* W. Probert, *Law Language and Communication* (1972) which is influenced by both traditions of thought.
of behavior, craftsmanship, and human vision. For example, H.L.A. Hart offers a concept of a legal system as a union of primary rules of obligation and secondary rules (of recognition, change, and adjudication) about primary rules.\(^{103}\) Under one reading this concept could be understood as an attempt to incorporate process, behavior and craftsmanship into a model of a legal system. If it is such, then Llewellyn’s comment about Pound seems pertinent:\(^{104}\)

> Only a man gifted with insight would have added... such an element of practices, of habits and techniques of action, of behavior. But only a man partially caught in the traditional precept—thinking of an age that is passing would have focused that behavior on, have given it a major reference to, have belittled its importance by dealing with it as phase of, those merely verbal formulae: precepts.

Twining has made a great and largely successful effort to work himself into the horizon of the legal realists. His background in English analysis, however, may blur his vision of the human elements in law which became important to the legal realists.\(^{105}\)

**Conclusion**

Neither Pound nor Llewellyn were willing to confine their understanding of law within a definition.\(^{106}\) In his robust old age Pound would explain this in words such as the following: “Some think that law is economics, and there is a great deal to be said for this; others think that law is ethics; and some think that law is social engineering. They are all wrong. Law is all of these.”\(^{107}\)

Perhaps this unwillingness to confine their thought, this fas-

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\(^{105}\) By this I mean their concern with the perception and craftsmanship of the judge and their corresponding concern that judges understand others and their life-situations. Both aspects are reflected in the discussion of “situation sense” above. Legal Realists, first concerned with predicting what judges would do, studied judges, discovered their human dimension and incorporated that discovery into their understanding of law. It is their most important step beyond the sociological jurisprudence of Pound. It is more than a contribution to the philosophy of law. It has affected their understanding of legal craftsmanship and the drafting of the *Uniform Commercial Code* which was designed to be interpreted by judges with human perception facing a variety of commercial situations in which humans relate to each other in a variety of ways.


\(^{107}\) This is what I remember of an explanation which Pound gave me (and surely others) during a visit to his office in the early 1960’s.
cination with the multiplicity of relations between society, human life and law is both the strength of Pound and Llewellyn and in the final analysis the obstacle which prevented them from developing a more systematic analysis of their thought. Yet together in overlapping sequence and of course with the aid of many other thinkers, Pound and Llewellyn have moved our understanding of law from the horizon of the late nineteenth century to the more open view of the present. Both have enabled us to use law as a flexible tool for the accomplishment of social purpose. Beyond that one may advance as a tentative suggestion that Llewellyn’s greatest contribution was to make us see the human element in the legal process and to provide us with such tools as “situation sense” to describe the thought of a human judge seeking to understand human problems.108

Both biographies are useful and worth reading. Indeed, Twining’s biography is a splendid achievement. It is interesting, however, that neither biography is written by an American lawyer. Perhaps that is a reflection of the enormous strength of American lawyering, its concern with doing, and one of its weaknesses, a reluctance to theoretically analyze that doing.109

108. See note 105 supra.

109. To some extent one can make the same remark concerning Pound and Llewellyn. One also ought to apply to both the closing comment in Llewellyn’s review (Llewellyn, Book Review, 28 U. Chi. L. Rev. 174, 182 (1960)) of Pound’s five volume work on jurisprudence (K. LLEWELLYN, JURISPRUDENCE 504 (1962)), “Ave Caesar” and add “atque vale.”

Reviewed by Robert J. Egan**

A 1973 staff report of the New York Regional Office of the Federal Trade Commission stated:¹

Debt Collection is a pivotal aspect of the control of consumer fraud. If fraudulent operators are unable to collect their bills, they would go out of business. On the other hand, if consumers can be compelled to pay even if they are cheated, fraud is perpetuated. Unfair collection practices injure both legitimate business and the public.

One of the sorry conclusions of David Caplovitz' book, Consumers in Trouble, is that our present legal system is too frequently and too easily a tool of creditors who utilize high pressure tactics and deceptive practices to sell their wares, and the law to collect their debts. This work probes deeply into the questions surrounding why consumers default, examines how effective various debt collection procedures are in assuring payment, and explores whether such procedures comply with basic conceptions of due process and fairness. The study concludes that the cards are stacked against consumer debtors.

Consumers in Trouble deals with a sample of 1,331 debtors whose names were obtained from the court records of four cities, New York, Chicago, Detroit and Philadelphia. The underlying transaction which gave rise to the litigation in each instance dealt either with the sale of merchandise or the making of a personal loan. Service contracts were excluded. The cities in the survey were selected for a variety of reasons. New York,² for example,

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* Presently a Professor of Sociology at Hunter College of the City University of New York, Dr. Caplovitz is also the author of several other books dealing with consumer credit.
** Deputy Commissioner, New York City Department of Consumer Affairs. B.S. Georgetown University, 1957; M.A. Yale University, 1958; LL.B. Yale University, 1961.
² The sample for New York City is drawn solely from the records of the Civil Court in New York County (Manhattan). P.324. Therefore, in certain categories of consumer transactions the results for New York may not be truly representative of the city as a whole. For example, the New York sample contains fewer automobile sales transactions than the other three cities. This might not have been the case had figures for all five counties that comprise New York City been used.
was included because, among other things, service of process there is left in large measure to professional process servers.3 Furthermore, New York's relatively liberal income execution statute4 juxtaposed with Michigan's stringent garnishment law5 made it possible to determine the effect of such laws on consumer debt collection with some precision. Philadelphia helped to complete this picture because Pennsylvania is one of two states which does not allow garnishment.6

The interviews used in the study took place during 1967. The sample was divided into three income categories. Those with an income in excess of $8,000,7 those with an income ranging from $4,000 to $8,000 and those with incomes below $4,000. Persons with incomes in the $4,000 to $7,000 range made up approximately 54% of the total sample with the other two categories being approximately equal in size. This breakdown somewhat approximates the ratio of installment credit users in the general population.8 The debtors in the sample were mostly young per-

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3. See N.Y. C.P.L.R. § 2103(a) (McKinney 1963), which provides, with some exceptions, that anyone over the age of eighteen who is not a party to the litigation can serve process within the state. Provision is made for service by the sheriff, and in certain instances there is a distinct advantage in using the sheriff. See N.Y. C.P.L.R. § 203 (b)(6) (McKinney 1972). In New York City, anyone who serves process as a business is required, pursuant to Local Law 80 of 1969, N.Y.C. ADMIN. CODE § B32-451.0 et seq. (1972) to obtain a process server license issued by the city's Department of Consumer Affairs. The statute states that anyone who serves five or more process in any year is deemed to be in the business of process serving.


5. The MICHIGAN LAWYER'S MANUAL states:
Garnishment is the one area of the law of Michigan where the creditor is given much of a break . . . . Garnishment is much broader in Michigan than in other states.


7. In most instances, where the family income exceeded $8,000, the study revealed that such income was derived from multiple sources. Either more than one member of the family was employed or one wage earner held more than one job. See p. 16.

8. The statistics in the book were compared by Caplovitz with statistics developed at approximately the same time by the National Opinion Research Council [NORC] on
sons employed mainly in lower blue collar occupations. Most were frequently out of work and were found to have had a lower educational attainment than members of the general population, or for that matter other credit users. The number of black and Hispanic persons in the sample was substantially higher than the percentages of those ethnic groups in the overall population of the cities studied. Whites in the sample were closer in income and occupation to the black and Hispanic members of the sample than they were to whites and blacks in the general population.

The creditors in the study were also carefully examined. The sales transactions were broken down into four categories — direct sales (door-to-door), automobile sales, sales made by low-income retailers and sales made by general retailers. Lenders were divided into banks, small loan companies and credit unions. The direct seller and the small loan company were the type of creditor that appeared most frequently in the cases examined. The black credit users. The figures, expressed in percent form are as follows:

<table>
<thead>
<tr>
<th>Debtors in Study</th>
<th>NORC</th>
<th>Caplovitz Study</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under $4,000</td>
<td>20</td>
<td>24</td>
</tr>
<tr>
<td>$4,000 - $7,999</td>
<td>43</td>
<td>54</td>
</tr>
<tr>
<td>$8,000 and over</td>
<td>37</td>
<td>22</td>
</tr>
</tbody>
</table>

9. Broken down on the basis of type of lender, the data showed the following:

<table>
<thead>
<tr>
<th>Lending Institution</th>
<th>Debtors In Study (in percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bank</td>
<td>32</td>
</tr>
<tr>
<td>Small Loan Co.</td>
<td>60</td>
</tr>
<tr>
<td>Credit Union</td>
<td>8</td>
</tr>
</tbody>
</table>

The figures on banks may be skewed by the New York figures where banks accounted for more litigation than in the other three cities combined. This is probably due in large part to very liberal personal loan policy of the city's largest bank, First National City. See note 2 supra.

With regard to type of seller the data showed the following:

<table>
<thead>
<tr>
<th>Type of Seller</th>
<th>Debtors In Study (in percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct Seller</td>
<td>30</td>
</tr>
<tr>
<td>Auto dealer</td>
<td>27</td>
</tr>
<tr>
<td>Low-income retailer</td>
<td>25</td>
</tr>
<tr>
<td>General retailer</td>
<td>18</td>
</tr>
</tbody>
</table>
and Hispanic debtors most particularly were the subject of suits brought by direct sellers.\textsuperscript{10}

Having determined who the debtors were and of whom they most frequently ran afoul, the study moved on to analyze the borrower's reasons for defaulting. Approximately 80 percent of those surveyed conceded that some act of their own was responsible for their trouble, with 79 percent giving some factor in their own lives such as loss of income or a sudden serious problem, as the first reason for their having gone into default.\textsuperscript{11} However, about 27 percent of those surveyed gave as at least one reason for their default, some improper action on the part of the creditor and over 20 percent gave such creditor action as their first reason.\textsuperscript{12} As might be anticipated from the debtors involved, nearly half were driven into default by a loss of income. Where the debtors gave as a reason for defaulting some act or omission of the creditor, the largest percentage claimed fraud and deception

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\textsuperscript{10} Direct sellers accounted for 64 percent of the actions brought by sellers against blacks as contrasted with only 50 percent of the actions brought against whites. P. 43, Table 3.9. As to lenders, blacks in the study accounted for 74 percent of the small loan company borrowings as opposed to whites who accounted for only 47 percent. The complete figures are as follows:

<table>
<thead>
<tr>
<th>Lender</th>
<th>Whites (percent)</th>
<th>Blacks (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Banks</td>
<td>45</td>
<td>18</td>
</tr>
<tr>
<td>Small Loan Co.</td>
<td>47</td>
<td>74</td>
</tr>
<tr>
<td>Credit Union</td>
<td>8</td>
<td>8</td>
</tr>
</tbody>
</table>

\textsuperscript{11} The reasons mentioned in the book as reflecting debtor mishaps and shortcomings included loss of income, voluntary overextension, involuntary overextension, marital instability, debtor's third party responsibilities (such as acting as a co-signer) and debtor irresponsibility—the "dead beat". Voluntary overextension as used in the book refers to a situation in which the debtor has voluntarily incurred excessive obligations in relation to his income, and a sudden reversal, such as a loss of income, has driven him into default. In an involuntary overextension, the debtor has a manageable debt burden, but an unanticipated reversal pushes the debtor into financial difficulty. The debtors in the study were interviewed, and their reasons for defaulting were broken down into categories. The interviews then attempted to break the reasons down into a primary reason, a secondary reason and a tertiary reason. These categories were in turn divided into two groupings—those classified as debtor mishaps and those which in some way implicated the creditor. The classification scheme is described in chapter 4, pp. 49-55. The findings are set out in tabular form at p. 53, Table 4.1.

\textsuperscript{12} See pp. 54-55, Table 4.2.
as such reason with such causes as misunderstanding or a return of merchandise accounting for only a small part of this group.\textsuperscript{13}

The results of that part of the study which followed the debtors into court strongly supports the conclusion that our present system is heavily slanted in favor of the creditor. Though over 20 percent of the debtors listed as a primary reason for their default a problem involving the creditors' actions and approximately 27 percent listed such conduct as a reason for defaulting,\textsuperscript{14} only two percent of those who went to trial achieved a result seen as favorable to the consumer.\textsuperscript{15}

The indictment of our present legal system contained in this

\begin{table}[h]
\begin{center}
\begin{tabular}{|l|c|c|}
\hline
Reason & First Reason for Default (percent) & Total Reasons (percent) \\
\hline
Fraud, Deception & 14 & 14 \\
Payment misunderstanding & 7 & 6 \\
Partial late payment & - & 5 \\
Item returned for credit & a & 2 \\
Harassment by creditor & - & 1 \\
Miscellaneous & 1 & a \\
\hline
\end{tabular}
\end{center}
\end{table}

A word about the two columns. The first column shows the percentage of debtors surveyed who gave the reason shown as the first reason for defaulting. The second column indicates the percent each reason has of the total reasons given in all categories by the debtors surveyed. Bear in mind that this includes both those reasons which involve the debtor as well as those that implicate the creditor; it also involves situations where the reason may have been given as a second or third reason. For example, a debtor may consider that a primary reason for his default is the loss of his job but he may also consider it unfair that after having made a partial payment, the creditor still proceeded to sue and thus he gives this as a secondary or tertiary reason. The use of “a” signifies a percentage less than half of one percent. See p.53, Table 4.1.

\textsuperscript{13} The reasons given for defaulting which implicated the creditor broke down as follows:

\textsuperscript{14} See note 12 supra.

\textsuperscript{15} P. 222. The overwhelming number of the cases won by creditors were won on a default judgment basis. Defaults accounted for over 90 percent of the creditor judgments, \textit{id.}, and though this in part may be due to defective service of process, other factors must also be considered. Increased consumer education as to rights in a law suit, the greater availability of legal resources and the use of such devices as a “tear off answer” (a detachable portion of the summons which allows the consumer to enter an appearance and answer in the case by simply checking off an appropriate defense and mailing it into the clerk of the court) are all possible approaches to dealing with the problem. An analysis of default judgments in the New York area which was prepared by the New York Regional Consumer Protection Council concluded:

Lack of legal advice and assistance is probably the most pervasive and serious problem for consumer defendants and the most direct cause of the high rate of default judgments.


Published by Scholarly Commons at Hofstra Law, 1975
study focuses not only on the deficiencies of the law, but also on those in the overall system. It discusses, for example, the harassing phone call and the insulting letter from the collection attorney. In all, 59 percent of the debtors in the study had been subjected to some form of harassment as part of the creditor's debt collection efforts. It is unfortunate that the study did not measure how effective this unscrupulous technique is in coercing debtors into settling their debts even where a good defense exists. In a time when Watergate has raised serious questions about the day-to-day ethics of the bar, surely this is an area where grievance committees might cast an investigative eye.

The study also raises the issue of the short supply of lawyers to handle cases such as those of the debtors in this study. Here the author focuses much of his attention on the status of class action legislation and pays relatively little heed to means directed at increasing the supply of lawyers to bring or defend actions where the amount of the recovery involved is relatively small. This is an odd omission when one of the correlations of the study is between the amount of the claim and the fact that a lawyer was retained. As could be anticipated, the smaller the claim, the less likely it is that a lawyer is involved, even where the debtor believes there is a good reason not to pay. Legal services programs across the country continue to receive less than adequate funding, and an important segment of the organized bar continues its resistance to the development of prepaid legal services programs. In New York, efforts persist to achieve a class

16. With its usual precision and attention to detail, the book sets out in tabular form various types of harassment and their frequency by city. See p. 182, Table 10.1.

17. The reference to legal services programs here means those programs funded in whole or in substantial part by the Office of Economic Opportunity, pursuant to the Economic Opportunity Act of 1964, 42 U.S.C.A. 2809 (a)(3)(1974). These services are to be taken over by the new Legal Services Corporation, created by 42 U.S.C.A. 2996 et seq. (Supp. 1975). Regarding the inadequate funding of legal services programs, one recent commentary on legal services problems has concluded:

Thus, the program [legal services] received only one-third of the funds it originally requested and only one half of the financial support that the OEO Director felt was adequate. Comment, Legal Services—Past and Present, 59 Cornell L. Rev. 960, 968 (1974).

18. The position of the American Bar Association on the question of prepaid legal services has changed significantly over the last twelve to eighteen months. In February 1974 at its Houston convention, the ABA adopted a series of amendments to the Code of Professional Responsibility (the "Code") which would have severely impeded the development of prepaid plans, most particularly those using closed panels. See N.Y. Times, May 15, 1974, at 24, col. 3. These amendments were the work of the General Practice Section, a section of the ABA composed primarily of single practitioners and members of small
action statute which could provide consumers with an opportunity to go on the offensive with their problems rather than being left the dangerous option of raising questions of fraud and misrepresentation as defenses in an action brought by a creditor for non-payment. What is the benefit of legislation that creates new rights which cannot be exercised effectively? The effects of such creditor remedies as garnishment, repossession and the deficiency judgment are also considered. In each instance the effect of these remedies goes well beyond simply making the creditor whole again. Eight percent of all debtors in the study subject to garnishment lost their jobs. Many of the debtors who had merchandise repossessed found that when it was sold it brought only a fraction of what they had paid. Thus they not only lost their possessions, but they were left with a sizable debt as well.

Caplovitz continually probes the data seeking to determine what correlations exist between widely varying factors. How do experiences with direct sellers relate to the ethnic background of the debtor, or his education? How do debtors first find out that their problem has now been taken to court? Surprisingly, close to 30 percent discover it initially by some means other than being served with appropriate process in the action. Caplovitz also traces the effect of the debtors' financial problems on their personal lives, and seeks to measure the strain consumer problems place upon family life.

firms. The General Practice Section amendments had been introduced as amendments to amendments to the *Code* prepared by the Standing Committee on Ethics and Professional Responsibility (the "Standing Committee"). The Standing Committee's recommendations were considered by proponents of prepaid programs to be both fair and flexible and, if adopted, would have encouraged the development of such programs. The so called Houston Amendments were decried by consumer groups around the country and in August, 1974 the ABA appointed a committee to review these amendments. At its convention held in Chicago in February, 1975, the ABA House of Delegates adopted new amendments more consistent with those originally recommended by the Standing Committee. See 61 ABA Journal 465 (April, 1975). It is hoped that the most recent position of the ABA represents the direction in which it will continue to head with regard to prepaid legal services programs.

19. A detailed report in support of a meaningful class action statute was submitted in 1973 by the Special Committee on Consumer Affairs of the Association of the Bar of the City of New York. See Proposed Class Action Legislation in New York, 28 Record of N.Y.C.B.A. 481 (1973). In the 1974 session, a great effort was made by consumer groups to bring pressure on the legislature to pass legislation beneficial to the consumer in this area. Two bills were introduced on the matter in that session, one beneficial to consumers and one not. The usual result followed, with both bills dying in committee. For a brief description of the fate of class action legislation in the 1974 legislature, see Community Service Society of New York, Consumer Protection Legislation in New York State (1974).
The book's greatest value rests in this carefully compiled and painstakingly analyzed data. The book's shortcomings are easily visible and frequently conceded by the author. The study was conducted in 1967, prior to the adoption of certain major consumer legislation and the decisions in several major cases. It is also prior to the wide scale expansion of the bank credit card system which has had a very decided impact upon consumer credit. The data collected was drawn solely from consumers, and no effort was made to check the answers with either lenders and sellers or government and private organizations working with consumers. This is so even though the book does discuss such subjective categories for default as billing errors, misunderstanding as to the nature of the debt, and litigation commenced after the debtor believed that the debt was cancelled or a new payment schedule had been arranged. The debtors were all urban resi-

20. Certainly the most decisive piece of federal consumer legislation is the Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq. (Supp. 1974), which embodies such concepts as truth-in-lending, fair credit reporting and a limit on the actions that can be taken by an employer of a garnisheed worker.

In the area of litigation, two major cases were decided which curbed creditor remedies substantially, Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969) and Fuentes v. Shevin, 407 U.S. 67 (1972). A decision in the last term of the Court, however, has seriously undercut the holding in Fuentes. See Mitchell v. W.T. Grant Co. 416 U.S. 600 (1974). In addition, there have been decisions under Title VII of the Civil Rights Act which have hedged an employer's ability to discharge workers for garnishment. See Johnson v. Pike Corp., 332 F. Supp. 490 (C.D. Cal. 1971) and Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974).

There have also been developments at the state and local levels. New York, for instance, has severely restricted the availability of the doctrine of the holder in due course. In 1969 the City of New York pursuant to Local Law 68 of 1968 NEW YORK CITY CHARTER § 2201 (1972), formed the City's Department of Consumer Affairs, and by subsequent legislation has given it a broad grant of authority to deal with fraud, deception and unconscionable practices in the marketplace. Many other local jurisdictions have now established consumer protection agencies, and though these agencies vary greatly in power and responsibility, by and large they have made a distinct contribution to consumer protection.

21. Since 1965, installment credit provided through commercial bank credit cards has almost doubled, going from $4,166,000,000 to $7,846,000,000. According to a Federal Reserve Board report, as of November, 1974, credit cards represented the second largest area of consumer credit held by commercial banks, ranking behind only automobile paper, and thus represented close to 10 percent of all bank consumer credit transactions. 61 Federal Reserve Bulletin A47 (January 1975).

22. To lawyers trained in the adversary system, such ex parte statements are immediately suspect. However, the author dedicates a separate appendix section, Appendix B, (pp. 317-21) to deal with this question. It must be kept in mind that the study seeks to establish trends and patterns, and therefore the accuracy of any one person's statement is less relevant. The likelihood that substantial numbers of persons, unknown to each other, and located in different cities would tell the same contrived story is sufficiently
dents and were located in cities in the northern part of the country, either in the east or the midwest. The author at one point suggests that where creditor and debtor know each other or have established lines of communications, such difficulties as those encountered by the debtors in the study would not arise. It would have been interesting to have had this thesis tested. It would also have been valuable to have had some correlations based upon sex developed; e.g., to what extent do laws that make husbands responsible for the debts of their wives effect default?; to what extent do the problems that single women have in obtaining credit force them into the hands of high pressure “easy credit” retailers? But these omissions do not undermine the substantial body of work that Caplovitz and his staff have done.

Debtors defaulting on their obligations represent only a small fraction of the credit using consumer population. In the Caplovitz study defaulting debtors represented about two percent of all consumers using credit, and though there has been a steady increase in such defaults since 1967, consumer loans in default still represent less than three percent of the total dollar volume of all such loans. Of this small fraction of defaulting debtors, only a small portion constitutes what sellers and lenders would classify as a “dead beat”—someone who has no real intention of meeting his lawful obligations. Many, though overextended, continued to meet their obligations until some sudden calamity such as illness, unemployment or family problems made it impossible. Even in these circumstances many attempted to work out some way to meet their obligations.

In his conclusions, Caplovitz poses several traditional as well

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24. According to the Statistical Abstract of the United States, at about the time of the Caplovitz study, the default rate on consumer credit transactions was 1.82 percent and was projected at 2.70 percent for 1974. See Statistical Abstract of the United States 461, table no. 744. Delinquency for purposes of such statistics is defined as a debt due but unpaid for over 30 days.
25. Caplovitz estimates that only 1 percent of the entire sample never intended to pay from the outset. Others were either negligent or missed payments for such reasons as being out of town, forgetting to make payments or loss or destruction of the merchandise purchased. See pp. 85-90. Certainly such reasons do not excuse the consumer from his obligation, but neither do they support the traditional “dead beat” image.
26. Caplovitz found that both debtors who were and debtors who were not subject to garnishment began to make repayments on their obligations. Certainly, if the voluntarily overextended group of debtors in the study had complied with the stereotype of the
as some highly innovative solutions to the problems he has uncovered. Thus he takes up the cudgels against such traditional foes as the doctrine of holder in due course, and the deficiency judgment. He also poses such novel ideas as a ban on door-to-door sales of items with a market value in excess of $50, and a flexible credit marketing system where interest rates would vary according to a debtor's past performance and the speed of repayment. He suggests a specialized consumer court modeled to some extent on New York City's highly effective Small Claims Court. But the author falters in his effort to reform by not clearly spelling out the principles which must be applied in order to reshape the law and its administration in this area. While he is thoughtful in his attacks on present problems, he does not provide the rules for dealing with the problems that will replace them should the present evils be solved. With a group that is undereducated, underemployed and traditionally powerless, as were most of the debtors in the sample, it is folly to believe that providing them with rights which must be asserted in order to be gained will effectively protect them.

For example, it would be much more equitable to shift the burden of proof in many consumer transactions to the merchant. The direct seller should be required to plead and prove, as part of his case, compliance with the FTC's cooling-off period requirements. Furthermore, ready access must be granted to resources which will provide the consumer with adequate means to assert his claims and to defend his rights.

The use of prepaid legal services programs also must be expanded. The new National Legal Services Corporation

irresponsible "dead beat," the latter group would have been substantially smaller than the former or would not have existed at all. See p. 254, Table 12.13.


28. At the present time the thrust for prepaid programs comes primarily from trade unions. The Laborers International Union has an extensive program in the Washington, D.C. area and District Council 37, AFSCME, the major New York City municipal employees union, has just embarked on a pilot project financed in part by the Ford Foundation and conducted in conjunction with Columbia Law School and Columbia School of Social Work. After an initial setback, a municipal employees union (Teamster Local 237) and a local bar association (New York County Lawyers Association) won approval from the Court of Appeals to establish prepaid programs in New York City to be operated by not-for-profit corporations. See In re Barry Feinstein, 173 N.Y.L.J. 56, March 24, 1975 at 5, col. 1, reversing a decision of the Appellate Division, reported at 45 App. Div. 440, 357 N.Y.S. 2d 516 (1st Dep't 1974). Advocates of prepaid programs are greatly encouraged by this decision and see it as advancing the development of such programs within New York. However, other groups such as church groups, students, and credit unions, are taking an interest in the formation of prepaid programs. With a natural constituency in easy com-
should be urged not only to provide for legal services to the poor, but also to take steps to encourage the development of prepaid programs, particularly where the group to be served falls just short of qualifying for free legal assistance. In a well stated case, Caplovitz advocates the use of neighborhood consumer courts to conduct arbitration proceedings in consumer disputes, but he overlooks one of arbitrations great advantages—arbitrators are not bound by rules of law. Having pointed out that much of the law in the area derives from the same body of law that governs commercial transactions, and that this body of law is inappropriate to consumer transactions, what better way to break these fetters than to utilize a system where these rules need not be followed? The commercial bar has already expressed the fear that it may be drawn into the vortex created by legislative and judicial efforts to reform the law for the consumers’ benefit. They would welcome an opportunity to head off further damaging judicial precedents.29

Efforts should also be made to provide a skilled para-professional force, trained in the basic areas of consumer law, which would be available to provide assistance to consumers in their defense in legal proceedings, in making their claims, and in counseling them in advance. Such a cadre of consumer aides would stretch the existing supply of lawyers, and would also help to make the best use of the professional resources available. This group might be developed out of persons already involved in the social services field who have developed techniques for locating and assisting those most in need of help.

The concerned members of bench and bar should make a concerted effort to purge the ranks of the bar of those attorneys who seek to collect by threat, intimidation, or other improper

29. 29 U.S.C. § 2996 (f)(g) (1974) directs that the corporation shall provide a study of prepaid legal service systems, among other systems, for the delivery of legal assistance, and report back to the President and the Congress within two years of the first meeting of the board of directors of the corporation. The corporation presently has grant-making authority which could be used in certain circumstances to assist prepaid programs. See 42 U.S.C. § 2996 (f)(e) (1974).

30. A similar view was recently expressed by the head of the Commercial Law League of America in an address before the annual Credit Congress of the National Association of Credit Management. See Hertzberg, Consumerism and Commercial Credit: You Can't Add Apples and Oranges, 79 COMMERCIAL LAW JOURNAL 338 (1974). See also Leff, Injury, Ignorance and Spite—The Dynamics of Coercive Collection, 80 YALE L. J. 1 (1970).
means. If, for instance, the courts regularly referred to grievance committees and the district attorney's office cases where default judgments were vacated because of a "sewer service," this practice might come to an end.\(^3\)

The "Brandeis brief" is a properly revered part of our legal tradition. In the original Brandeis brief, Brandeis pleaded the pressing social realities which faced women laundry workers while his colleagues in that case made the more traditional legal arguments. David Caplovitz has written an eloquent Brandeis brief for the consumer movement in *Consumers in Trouble*. It now rests with the bench, the bar and the legislatures to fashion the appropriate remedies—and that task is none too soon begun.

31. The Association of the Bar published a report in 1968 which focused on ethical problems raised by the conduct of certain collection lawyers. *See Improper Collection Practices*, 23 Record of N.Y.C.B.A. 441 (1968) (Report of the Committees on Grievances and Legal Assistance). In 1974, the Appellate Division did bring disciplinary action with regard to a collection attorney who had utilized fraudulent affidavits of military service. *See In re Shenghit*, 44 App. Div. 2d 440 (1st Dep't 1974). Still the condition continues. The most recent effort to curb sewer service is evidenced by a rule of the Appellate Divisions for the First and Second Departments, which requires that before a default can be entered in Civil Court the attorney seeking it must supply the clerk of the court with a notice of what the default entails and an envelope addressed to the debtor at the address at which service was made. The return address on such envelope is that of the clerk. If the letter is returned because of an improper address or because the debtor does not reside at the given address, judgment cannot be entered. For an extensive and perceptive discussion of the new rule and of the problems which still remain in the area of sewer service, see Schrag, *Consumer Law—New Court Rule Will Curb "Sewer Service"*, 173 N.Y.L.J. 30, Feb. 13, 1975 at 1, col. 1.

Reviewed by Alice L. O'Donnell**

In some 500 pages, Professor Peter Graham Fish's The Politics of Federal Judicial Administration has chronicled the history of the federal courts, placing particular emphasis on the last half century. The book presents its topic of concern well, and to this extent, the author has performed a great service.

Those of us in the legal profession, particularly we who work in the federal courts area, may put the book down with some disappointment, however. Passed up by the author was a splendid opportunity to voice criticism and analysis based on years of study devoted exclusively to federal judicial administration. Perhaps what Professor Fish had in mind was to stimulate some thinking and forced self-analysis from the federal judiciary itself.

Woven into each chapter are bits of history which make the reader question why certain procedures and decisions were or were not adopted or made, and whether these policy alternatives resulted more from the presence of personalities on the scene than from logic or the demands of the time. For example, many pages are devoted to the Judicial Councils—how they are constituted, how and when they meet, and the manner in which they exercise their powers.1 But the author leaves many related issues unanswered: just how extensive are the Councils' powers; are there inherent judicial powers in them which could be exercised to a greater degree than have been up to now; why are district judges excluded? An even greater omission is the lack of reference to the Circuit Judicial Conferences—how and why were they created; how do they function; what is the history of their statutorily mandated meetings?

On the positive side, Professor Fish does well to remind us that we have inherited a solid, viable and durable document from our founding fathers—the Constitution of the United States. Our federal court system, which evolved both from this document and

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from our Congress, is perhaps the strongest and most workable
of recent world history. To put it another way, it has survived in
spite of history.

When Supreme Court Justices rode circuit, vacancies on the
high court often went unfilled for long periods of time because the
positions were considered undesirable for men who wanted both
an orderly life and a job that brought good pay. At that time the
federal judiciary was small, for the Judiciary Act of 1789 provided
for only one District Court Judge in each state. Today the system
functions with approximately 600 federal judges\(^2\) and federal
boundaries that encompass 94 districts and eleven circuits. The
workload of the courts in these jurisdictions has grown at such an
accelerated rate in recent years that Congress found it necessary
to constitute the Commission on Revision of the Federal Court
Appellate System to study the problem.\(^3\)

A further response to this expansion is the recently estab-
lished Advisory Council on Appellate Justice, an independent
group of concerned and knowledgeable lawyers, law professors
and judges (state and federal) which has been studying all as-
psects of the problems on the federal circuit level for over three
years. It was formed originally by Columbia Law Professor Maur-
ice Rosenberg, who has remained Chairman throughout its his-
tory. To further the good work of this council and to encourage
further exploration for answers, co-sponsorship was furnished by
the Federal Judicial Center and the the National Center for State
Courts. The more than thirty Council members contribute their
time at no cost to either organization. This is a great testimonial
to the unselfish and dedicated service that lawyers and judges
throughout the country provide because of their concern for our
appellate courts.\(^4\) Still another study which included an examina-
tion of the appellate courts was that done at the request of the

\(^2\) This number includes a count of the senior federal judges. Senior judges are those
who by length of service and age are retired but elect to continue their service either on a
full or part-time basis.

\(^3\) The Commission was created in 1972 and released its first report in November,
1973. Entitled The Geographical Boundaries of the Several Judicial Circuits Alterna-
tive Proposals, this document considered changes in the structural realignment of the
Fifth and Ninth Circuits. The second phase of study, dealing with the internal operating
procedures of the circuits, will be concluded by June, 1975. The final report of this group
will be made available at that time.

\(^4\) The Council's work was concluded in January, 1975 when it invited over 250
conferees to gather at Coronado, California to discuss various recommendations emanat-
ing from all sources. Reporters were present to summarize these discussions and it is
anticipated that the official materials will be available soon.
Federal Judicial Center under the direction of Professor Paul Freund of Harvard Law School over two years ago. The report, entitled, Report of the Study Group on the Caseload of the Supreme Court, contains over 70 pages of facts, charts, conclusions and recommendations for study and consideration. By speaking about the federal judiciary’s constant expansion throughout his book, Professor Fish may be pointing out that this continuous growth necessitates adherence to a basic principle—any large body must be governed by some uniform means. No amount of literature on the “independence of the judiciary” can negate the need to accept this concept. What can be mistakenly subscribed to, however, is the notion that the two concepts can not be practically accommodated together in the same system.

The centralization of control in policy making for the federal court system rests in the Judicial Conference of the United States, with the Chief Justice of the United States, the permanent Chairman. To achieve a geographical balance, each circuit is represented by its Chief Judge and a district judge elected from each circuit, as well as the chief judges from the special courts. Thus, there is liberal opportunity for free input through conference participation and reports. Proof that the judiciary takes full advantage of this opportunity is demonstrated twice a year when voluminous reports of the standing and special committees of the conference are distributed. Subjects of these reports range from personnel problems to more substantive issues related to the federal jury system, sentencing, probation reports and rules of evidence. What is adopted after careful consideration of these reports represents the best thinking of the majority. Though the discussions take place in closed sessions, it is no secret that some

5. Among this group’s recommendations were the creation of a National Court of Appeals to decide on the merits conflicts among the circuits, changes in appeals and certiorari procedures and the statutory establishment of a non-judicial body whose members would investigate and report on prison conditions.


conference decisions are often accompanied by very vigorous dis-sents. The point is that the process works. The decisions made through this body are imposed upon all who work within the system, and the federal judiciary operates more effectively as a result. Further, the "independence of the judiciary" is not jeopardized or weakened by this process.

Up to now, no serious criticism has been leveled against this type of centralization and control. Attacks have come, however, from attempts to create uniformity. Although this criticism stems from the judiciary, it is the members of the bar who lose when uniformity is lacking. An excellent example of this is the effort of the bar to get more uniformity in the local rules which are presently devised by each of the district courts. In the vast majority of these courts, rules are promulgated without the involvement of the bar. To the great credit of several forward thinking judges, however, some local rules are the product of committees created by the court and constituted with full representation from both bench and bar. While it is true that unique local situations may call for special local rules, districts can still operate with a degree of uniformity. For example, counsel in one district could be permitted to litigate in another without unnecessary and unreasonable restrictions.

Other questions are prompted by Professor Fish's review of the history of the federal courts as well: why not a federal bar which would permit reputable counsel with good standing to litigate in all districts; why the necessity, in these days of quick and ready communication and travel, for the utilization of local counsel, when out-of-state counsel are retained? An example of how the restrictive admissions requirement works to the detriment of indigents was recently related to me by a professor at one of our large law schools. To make a contribution to his chosen profession he offered his services at a federal prison in an eastern state. Later he elected to teach in a western law school and took his case files with him so that he might continue his assistance to indigents. At least one of his clients was then transferred to a prison in another state. As the professor was not admitted to the bar of that state, and since he was not in fact a resident of the state where papers had to be filed, he was precluded from further assisting his client. Even more frustrating, however, was his inability to find

counsel in the jurisdiction of the prison who was willing to contribute time to indigent cases. With a little more uniformity and somewhat more flexibility, an indigent prisoner in need of legal services could have been fully assisted. This is but one of many examples where the lack of uniformity works to the detriment of the system and the people it serves.

_The Politics of Federal Judicial Administration_—complete as it is—causes the reader to wonder what really makes our federal judicial system work and what makes it survive. Whatever the answer, the logical question follows as to whether changes should be made. No thinking individual can put the book down without reflecting on this problem.

One worries whether the history Professor Fish has recorded has really brought forth the best possible federal court system. It is hard to come up with viable alternatives based on this history. In the final analysis, we have a small number of judges working in a very specialized area of the law and the system has merely adjusted over the years. The strongest criticism that could be inveighed against the evolution of the system centers on the great length of time it took to establish the Administrative Office of the United States Courts. It is hard to understand the thinking of the leaders of all three branches of Government in vesting the business of the federal courts in the Department of Justice. As Professor Fish records in Chapter 3, the Justice Department prepared the budget for the courts, printed and distributed the forms necessary to carry out its business, allotted and distributed the salaries of the judges and supporting personnel and provided for a Division of Examiners periodically to visit and examine the courts. This created a potential conflict of interest, for the Attorney General and his corps of United States Attorneys were constantly litigating before the judges they served in this housekeeping capacity. In 1939 Congress finally saw fit to correct a bad

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9. Students at Washington and Lee Law School have made a fine contribution to the effective administration of criminal justice at the Federal Reformatory for Women at Alderson, West Virginia, by advising inmates on legal problems under the direction of their law professors. Washington and Lee, however, is in Virginia and the institution is in West Virginia. Thus, unless the professors are licensed to practice in West Virginia they are foreclosed from filing papers for their indigent clients in this state. An additional impediment to full legal assistance for these indigents is in the geographical location of the Reformatory which is situated in a rural area where few if any local counsel are available.


11. Perhaps this is one reason why one chief judge, since deceased, was reported to have said to an associate when he learned that an agent of the Division of Examiners had
situation and created the Administrative Office of the United States Courts. This office now handles all housekeeping matters for the federal judges. The examiners are now a part of that agency, and the Attorney General functions strictly within the executive branch; only the marshals, who also serve the courts, remain in the Department of Justice. Perhaps this too will be changed in time.

More than history alone brings about change. We can be grateful for vigilant, concerned people who serve both the bench and bar. To the great credit of the profession, improvements come about through cooperative efforts. This is in a large measure due to strong leadership in organizations such as the Federal Bar Association and the American Bar Association. At no time in our history have federal judges been so involved in both. The 17 volumes of the American Bar Association's *Standards for Criminal Justice* were the product of a seven year endeavor with great contributions from federal judges eager to improve judicial administration in both state and federal courts. Following completion of this work, a number of federal judges responded to the call of the ABA President and joined with state judges, lawyers and law professors to serve on a commission to update standards originally set out by the late Chief Justice Arthur Vanderbilt in his publication, *Minimum Standards of Judicial Administration*. The contribution made by the federal judiciary to the drafting of the *Code of Judicial Conduct*, another ABA endeavor that ultimately received approval of the Judicial Conference of the United States is also significant. With a few modifications imposing canons upon themselves which were even more rigid than those of the ABA, the Conference adopted the *Code of Judicial Conduct for United States Judges* which now applies to all federal judges, magistrates and bankruptcy judges. The Federal Bar Association has had equally commendable participation from the federal judiciary in the programs it has sponsored to bring about better judicial administration in the federal courts. A very recent example of this participation and support is the plan to put on regional programs relating to the new rules of evidence.

arrived to examine his court: "Fine, take him to lunch, to the golf course and then to the railroad station and bid him have a safe journey home." This incident was related to me by Judge Alfred P. Murrah, of the U.S. Court of Appeals for the Tenth Circuit, and former Director of the Federal Judicial Center. Judge Murrah ascribes the experience of some of the first days he served on the circuit court after having been elevated from the United States District Court for the Western District of Oklahoma.
The greatest, or at least the most publicized influence of both associations stems from their recommendations and evaluations on appointments to the federal bench. It is a powerful influence and an effective procedure that is designed to bring to the federal bench able and dedicated jurists. Both the executive and the legislative branches heed the words of these groups, for they are keenly aware that they can be formidable opponents. These associations also examine our system of selection and tenure on the federal bench, and Congress and the federal judges themselves have never discouraged this. Even if no changes are made in this area for years to come, it would be well to continue the dialogue. These national associations, as well as local bar associations are, as they should be, an important part of the “politics of federal judicial administration.” It is something our foreign visitors often question when they visit this country, but as one European judge recently commented to me, “I don’t understand just why you select your judges the way you do, but the system works well so it is hard to argue against it.”

Professor Fish has pointed out, consciously or not, that we can be grateful for the history the federal judiciary has on record. He has made his reader ponder on the wisdom of the system and thus has made us more aware than perhaps we were that, though we have an obligation to constantly monitor our system, we should not be too hasty with change. The “third branch” has always been slow to change. There is good reason for this, for judges are inherently an apprehensive lot and the nature of their work sharpens this feeling. They are unwilling to experiment with lives, and often this is what change means. They want to know precisely what results will come from changes before they are willing to accept them.

All of which is to say that Professor Fish has not only given cause for thought, he has given himself a reason for a sequel to his book which could more fully explore the questions he raises.

12. One of the functions of the Federal Judicial Center’s Division on Inter-Judicial Affairs is to meet with and brief visiting judges from all parts of the world. Our provisions for selection and tenure of federal judges are without a doubt the subject we are most frequently questioned about by these foreign judges. Vastly different from many European countries where judges are specifically schooled for the judiciary before they enter the profession, this phase of our judicial system receives the most scrutiny.