Book Review


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As a gesture of honor to Judge Ulysses S. Schwartz of the Illinois Appellate Court upon the occasion of his 75th birthday, his opinions have been edited and compiled by Louis A. Kohn and Edward R. Levy of the Chicago Bar, and published by the judge’s brothers. This compilation is, however, no inconsequential presentation piece issued by a “vanity press”; it is a volume which merits a place of respect on the shelves of any library.

The most immediate and obvious characteristic of Judge Schwartz’s opinions is their facility of expression and felicity of allusion. Their literary grace makes them genuinely pleasing to read. They tend to be written in what Professor Llewellyn has termed the “Grand Style” of opinion writing, as contrasted with the “Formal Style”; in Llewellyn’s terminology, this suggests no grandiose-ness but means that the opinion places its legal problem and the pertinent rules in proper perspective in the factual situation and discusses the social and legal considerations relevant to the decision and to the development of a useful rule. Other attributes—of deeper significance than literary lustre—that characterize and pervade Judge Schwartz’s opinions are his concern with the effect of the opinion upon the society, his focus upon the social utility of the law, and his constant concern with improving the manner of rendering justice. This concern is illustrated by his many trenchant suggestions for revising rules or statutes which he deems outmoded or unwise; it is particularly well epitomized by his opinion in Gray v. Gray, which has been praised and quoted at length in Delay in the Courts, by Messrs. Zeisel, Kalven, and Buchholz, who state that Judge Schwartz puts his point “eloquently” and “with special force” in an opinion which is a “notable judicial essay on the problem of court congestion and the concentration of the trial bar.”

Judge Schwartz’s opinions indicate clearly his belief that the judge should play an active and enlightened role in the growth and development of the law, within the interstitial area in which it is proper for a judge to “make law.” He recognizes that the judge does not have full freedom of action, when he states: “This is not a matter involving method or practice or those interstices of the law where courts have latitude. A court is not the forum to consider the effect of the proposed new type of litigation upon the marital status and mold its opinion to form a public policy so determined. Public opinion cannot be consulted by a court nor can social investigators be engaged to inquire into such matters. We must adhere to the more traditional method of construction.” He has a decent respect for precedent, a good craftsman’s understanding of it, and a willingness to deal openly with it; but he is not hobbled or paralyzed by it.

In Eick v. Perk Dog Food Co., a case of first impression in Illinois, he upheld the right of privacy in an erudite opinion examining the right of privacy in its legal, social, and historical aspects. The Eick opinion states, page 37, “But even if we grant defendants’ point of view that the right of privacy has no foundation in ancient common law, it does not follow that we should deny plaintiff’s right to recovery. To deny relief because of lack of precedent is to freeze the common law as of a particular date. . . . With changing times rigidity can often mean injustice.”

With similar flexibility and perspicacity, Judge Schwartz held that the doctrine which denies indemnity between tortfeasors is inapplicable where the liability of one tortfeasor is primary and active and the other secondary and passive. “The principle of no contributions and no indemnity between all joint tortfeasors is more a rule of ethics than a principle of law. The law simply closed its door to the inter se disputes of those whom it considered to be bad men. This originated at a time when torts were in the main such wrongs as slander, libel, and assault and battery. Today, torts are mainly the incidents of industry and transportation. To continue to apply the rule to such cases as that before us would make the law no jealous mistress, but a squirmish damsel, refusing to have anything to do with a couple of respectable suitors because her grandfather once told her they were joint tortfeasors.” That his participation in the development of the law is conscious and sophisticated is indicated by such statements as: “This is how the doctrine emerges from the cases which have considered it. That this is the common method for the development of our law and represents its unique
and constructive character is demonstrated in *Introduction to Legal Reasoning*, Levi (U. of Chi. Press, 1949).\(^7\)

Despite his earnest desire to stimulate the improvement of the law and the administration of justice, Judge Schwartz’s opinions exhibit the strong rein of judicial restraint. This is peculiarly manifest in his various opinions on appeals involving various administrative activities, ranging from discipline within the police force, to discretionary zoning variations, to the issuance of liquor licenses. He tends strongly to defer to the administrative judgment in the absence of egregious abuse.

On the question of the latitude which a court has in statutory interpretation he commented: \(^7\) “We consider it our duty to give the statute a fair and reasonable meaning and not, by a process of indirect attenuation, to repeal or partially repeal it. The legislature, unlike the court, could hear testimony pro et con and could, as a matter of policy, determine whether the statute should be repealed, qualified, or remain as it is. We have no such freedom in determining the law.”

This volume of opinions is divided into eight sections. The first section is entitled “Admonition to Counsel”; this title carries an unfortunate implication of officiousness, to which neither the opinions themselves nor Judge Schwartz’s reputation for gracious treatment of counsel would lend the slightest support. With few exceptions, the material in the various sections could often be interchanged. One section which is genuinely discrete is that devoted to “Society and the Policeman.”

It does not include any headline cases involving extorted confessions, brutality, false arrests, or the like, but it does contain a number of opinions which carefully and conscientiously consider the relationship between the executive staff of the police department, the civil service commission, and the courts. Judge Schwartz points out the need for judicial restraint in this area, with special reference to the imponderables which go into the making of an executive decision and which are difficult of proof in formal litigation. “Courts must move with great care and caution before they set aside the acts of the executive department of the government under any circumstances, but especially in matters such as this.”\(^9\) He comments further that, \(^9\) “It is easy in such cases for courts to fall into the error of assuming their function to be charismatic and to take on the character of super commission or super chief of police. ** * * * **

“Not a single case has come before us in recent years in which it has been charged, much less proved, that politics or bias motivated the administration of the civil service. ** * * * ** The Civil Service Act therefore must not be permitted to become a mantle for the corrupt and inefficient. If the court is to substitute its judgment for the judgment of the Civil Service Commission and of the Commissioner of Police as to disciplinary action that should be taken, it would in effect be substituting judicial discipline with our responsibility for executive discipline with responsibility.”

Judge Schwartz’s opinions, like his conversation, mirror his eager curiosity, his prodigious memory, and his wide-ranging literary and philosophic interests. They are also enlivened by flashes of sprightliness and wit. He notes, for example, that glib medical witnesses have “shattered the aerial limits of verdicts in personal injury cases and made hundreds of thousands grow where only thousands grew before.”\(^10\) He recognizes the therapeutic effect of petitions for rehearing which “are sometimes used to serve a secondary purpose—to enable counsel to assure the digestive pains which follow defeat in a hard fought case where stakes are high.”\(^11\) He soliloquizes on the problems of the slowness of justice and comments that “Hamlet summarized the seven burdens of man and put the law’s delay fifth on his list. If the meter of his verse had permitted, he would perhaps have put it first.”\(^12\) He quips that “A psychological assault of upper-case artillery and a barrage of emphases serve only to distract and befoul.”\(^13\) He describes demurrers, prior to the Practice Act, as having come “to have an odious synonymity with deliberate delay.”\(^14\) In recognizing that opinions should be strongly buttressed and should not be mere exercises in language, he states, “Our conclusion should rest on sturdier basis than the fine art of drawing a desired meaning from ambiguous phrases.”\(^15\)

It is seldom that any judge’s work is assembled, examined, and valued as a whole, much less a judge of an intermediate state appellate tribunal. Usually, the work of judges (other than a few of the justices of the United States Supreme Court and such men as Learned Hand) is considered in disparate units, piece by piece, opinion by opinion. In this collection, we are not provided with all of Judge Schwartz’s opinions, nor are his opinions complete or in chronological order. The opinions are rigorously excerpted; although the editors have provided excellent brief factual summaries at the beginning of each opinion, the reader often feels that he is reading short essays on varied subjects rather than judicial opinions. In passing, it is surprising to note from this volume how frequently he has dealt with matters of first impression in Illinois. The editors have enhanced the volume with careful annotations. One cannot, however, readily determine from the collection in this form whether there has been change, modification, or growth over the years in Judge Schwartz’s philosophy or in his mastery of the opinion form. The reader cannot easily determine from this collection whether Judge Schwartz is more effective in one field or in one subject matter than in another, though it seems to me that his opinions in corporate and commercial affairs are especially trenchant and discerning. It is to be regretted that this volume does not also contain some of the speeches and occasional papers which he has prepared and delivered from time to time. For example, the short address
which he made at the dedication of the courtroom of the University of Chicago Law School in 1960 richly merited preservation; it was a graceful little gem of a speech, wise in its observations, rich in its scholarship, and warmly respectful and sympathetic to the law.

It has been enlightening to read these opinions in conjunction with Professor Llewellyn's recent volume, The Common Law Tradition: Deciding Appeals, which examines in detail the craft and the techniques of appellate judging. Llewellyn largely takes as his raw material certain random opinions of selected appellate benches, as delivered at particular times; so an observer keen as Professor Llewellyn, this volume of Judge Schwartz's would be a veritable laboratory, in which, in concentrated form, he could observe the judges' craft as it is practiced by one able exponent. This volume, I trust, may be the forerunner of a new series of collections to facilitate the study of such craftsmanship through the close and detailed observation of the work of individual judges. Studies in depth of the opinions of individual judges promise genuine usefulness for observation of judicial craftsmanship and development. From the point of view of watching changes and growth in a judge's style, his technique and his viewpoint, it would be preferable (for the purposes of this kind of study if all of a judge's opinions were collected, put in chronological order, and set forth in full).

Judge Schwartz's judicial performance, as exemplified in this volume, merits high commendation; collections of a judge's opinions which will measure up to his high standards will be very rare. His opinions are forthright, clear, and gracefully stated. They proceed with logic and cogency in stating their premises and in making explicit their relation to precedent, without twisting it or avoiding issues. They demonstrate practical and knowledgeable grasp of their fact situations, and they exhibit wisdom and understanding in their conclusions. They perform well their function of making clear to the litigants and to the Bar the issues which concerned the court, the matters which the court found helpful in dealing with these issues, and the reasons which led the court to the conclusions reached. This volume of Judge Schwartz's opinions is a pleasing and valuable addition to legal literature.

FOOTNOTES


CONFERENCES, LECTURES, AND SPECIAL EVENTS, 1963-1964

Summer Quarter, 1963

Aug. 7—Joint Dinner Meeting of Members of the Conference of Chief Justices, the National Conference of Commissioners on Uniform State Laws, and the Faculty of the Law School.


Autumn Quarter, 1963

Oct. 2—Address to entering students by the Honorable Henry J. Friendly, Judge of the United States Court of Appeals for the Second Circuit, and Member of the Law School Visiting Committee.

Nov. 9—Conference on Legal History.

Winter Quarter, 1964

Eighth Ernst Freund Lecture, by the Right Honorable Kenneth Diplock, Lord Justice of Appeal.

In addition to the items listed above, three more conferences and at least one additional public lecture are currently being arranged.