University of Pennsylvania
Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 104 MAY, 1956 No. 7

CIVIL LAW INFLUENCES ON THE COMMON LAW—SOME REFLECTIONS ON "COMPARATIVE" AND "CONTRASTIVE" LAW*

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As I'm talking after a dinner preceded by a kind of liquidity which economists have not considered, I'm reminded of a sentence in Sterne's *Tristram Shandy:* "The ancient Goths of Germany had . . . a wise custom of debating twice everything of importance to the state. That is, once drunk and once sober: Drunk, that their councils might not lack vigor; and sober, that they might not want discretion." [1]

Because of the evil potentialities of the H-bomb, perhaps it's folly for anyone to discuss "civil law influences on the common law." One recalls Anatole France's remark: "We should conceive a positive pity for our economists arguing with one another about the cost of the furniture in a burning house." [2] But we must assume that this globe and its inhabitants will continue to exist; and maybe sympathetic studies of "foreign law" will help to ensure that existence.

* A paper (here somewhat expanded) read before the American Foreign Law Association, New York City, Feb. 17, 1955.

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1. Edmond Cahn has called my attention to the fact that Sterne lifted this passage almost bodily from Herodotus.

2. FRANCE, THE OPINIONS OF JEROME COIGNARD 26 (Jackson transl. 1913).

INSTANCES OF INFLUENCE

Constitutional Law

The influences of civil law on common law are legion. Many of them doubtlessly can't be detected. But a few years ago, the incomparable Max Radin did an excellent detective job.[3] He examined the source of what seemed to many a distinctively Anglo-American legal precept, "A man's house is his castle," eloquently explained in Pitt's *Speech on the Excise Bill:* "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storms may enter, the rain may enter—but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement." [4] According to the conventional tale Coke first uttered this house-castle precept,[5] but Radin points out that Coke quoted a Latin passage [6] taken almost verbatim from the *Digest,*[7] based on Gaius' *Commentaries on the Twelve Tables.*[8] He notes that the famous phrase had been used by Englishmen twice before Coke, once in a book published in 1574 in which the author cited as its source the Roman poet Terence.[9] At any rate, we Americans enshrined the Roman-made house-castle doctrine in the fourth amendment to our Constitution.

Conflict of Laws

In the modern era, repeatedly our common-law doctrines of conflict of laws have been enriched—and sometimes confused—by studies of

3. Radin, *The Rivalry of Common Law and Civil Law Ideas in the American Colonies,* in 2 LAW: A CENTURY OF PROGRESS 404 (Reppy ed. 1937).

4. Quoted in Radin, *id.* at 426.

5. See Bowles' Case, 11 Co. 79b, 82b, 77 Eng. Rep. 1252, 1258 (K.B. 1616); Semayne's Case, 5 Co. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1605).

6. Radin, *supra* note 3, at 424. England had three "receptions" of Roman law. See LÉVY-ULLMANN, THE ENGLISH LEGAL TRADITION 169-203 (1935). For a convenient summary, with bibliography, of Roman and civil law influences, direct and indirect, on the common law, see WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 54-69 (1925). Legal historians easily trace Roman law influences on—to mention but a few English lawyers—Glanvil in the 12th century, Bracton in the 13th century, Fortescue in the 15th, Saint Germain and Plowden in the 16th, Fulbecke and Seldon in the 17th, Mansfield in the 18th and Austin and Maine in the 19th. LÉVY-ULLMANN, *op. cit. supra* at xxxiii-xxxiv, 129-39, 174-82, 201.

7. Darlington, in 1948, suggested that "we need a Ministry of Disturbance, a regulated destroyer of routine, an underminer of complacency." Radin might well have served in that post.

8. Radin might have noted that, in 1748, Montesquieu wrote: "Both the Roman and our laws admit of this principle . . . that every man ought to have his own house for an asylum, where he would suffer no violence." 2 MONTESQUIEU, THE SPIRIT OF LAWS bk. xxix, c. 10 (Neumann ed. 1949).

9. Radin, *supra* note 3, at 425. This recalls the fact that, it is said, Terence first employed the equivalent of the phrase *summum jus summum injuria.*

continental doctrines. Story, in his work in that legal province as elsewhere, owed much to civilians.[10] He liked the idea of *jus gentium.* In his famous *Swift v. Tyson* [11] opinion—establishing a doctrine now unhappily dead, thanks to Brandeis—he said in 1842: "The law respecting negotiable instruments may be truly declared in the languages of Cicero . . . to be in great measure, not the law of a single country only, but of the commercial world." [12] He quoted Cicero's famous lines: "There will not be different laws at Rome and Athens, or different laws now and in the future, but one and the same law will be valid for all nations and at all times." [13]

Contracts

We must be grateful to Hitler for some gifts to us he never intended. He sent us many eminent continental legal scholars who have imported invaluable continental ideas. I shan't try here to list them, but I note that Kessler and Ehrenzweig have taught us to reflect on the nature and consequences of so-called "contracts of adhesion," [14] a label invented in France by Salleille. I venture the guess that, before long, the Kessler-Ehrenzweig views about such contracts will substantially affect American decisions.[15]

Statutory Interpretation

It is frequently noted that civilians use, and we do not, the analogical method of interpreting a statute. Yet even that difference is beginning to wear thin, for one sees signs that the old concept of the "equity-of-the-statute" may be enjoying a revival here. Plowden, in sixteenth century England, explicitly voiced that concept and in doing so quoted Aristotle to the effect that: "Whenever . . . the statute reads in general terms but a case arises which is not covered by the general statement, then it is right, where the legislator's rule is inadequate because of its oversimplicity, to correct the omission which the legislator, if he were present, would admit, and, had he known

10. For Story's influence, in turn, on some civilian ideas of conflict of laws, see Valladão, *The Influence of Joseph Story on Latin-American Rules of Conflict of Laws,* 3 AM. J. COMP. L. 27 (1954).

11. 41 U.S. (16 Pet.) 1 (1842).

12. *Id.* at 18.

13. "Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit." *Ibid.*

14. Contracts of adhesion are also called "take-it-or-leave-it" contracts. An illustrative example is insurance contracts.

15. I urged acceptance of their views in a recent dissenting opinion. Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 204-05 (2d Cir. 1955).

it, would have put into his statute." [16] Here Plowden, a Roman Catholic, was almost surely affected by continental canonists.

Modern American lawyers, until recently, treated the equity-of-the-statute concept as moribund if not dead, but, in 1934, Landis enthusiastically espoused it.[17] He purported to find its source in the *Year Books,* but Professor Thorne has cast doubts on this derivation from those *Year Book* citations.[18] Nevertheless, Chief Justice Stone wrote an article in 1936 in accord with Landis' idea.[19] And in 1937 Cardozo, without referring by name to the equity-of-the-statute, spoke of a "legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system." [20] In 1940 Crawford said that, according to the wiser view, a statute ". . . merely lays down a general guide and leaves the court wide leeway within which to deal with individual cases as the justice of the case demands"; the best the legislature can do ". . . is to lay down a general rule or guide or policy, and leave to the courts the duty of dealing with specific cases according to the ethical considerations involved, where the statute is not precise enough to cover the problem before it." [21]

This reminds one of Hake who, in an early seventeenth century English treatise on equity—republished in 1953—suggested that a judge who did not "equitably" interpret a statute had violated his oath and should be removed.[22] Perhaps Hake was right. However, we all know some American lawyers who think such a notion sinful. They resemble those early English judges who thought the word "interpretation" connoted fraud or evasion.[23]

Aristotle's theory of interpretation affected Roman law [24] and thence permeated modern civil law. Article I of the Swiss Civil Code

16. Eyston v. Studd, 2 Plowden 459, 465-69, 75 Eng. Rep. 688, 695-700 (C.B. 1574).

17. Landis, *Statutes and the Sources of Law,* in HARVARD LEGAL ESSAYS 213 (1934).

18. Thorne, *Introduction,* in A DISCOURSE UPON THE STATUTES (Thorne ed. 1942).

19. Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4, 13-14 (1936).

20. Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350-51 (1937); *cf.* South & Cent. Am. Commercial Co. v. Panama R.R., 237 N.Y. 287, 291, 142 N.E. 666, 667 (1923). See also Gooch v. Oregon Short Line R.R., 258 U.S. 22, 24 (1922); Slifka v. Johnson, 161 F.2d 467, 469-70 (2d Cir. 1947) (concurring opinion).

21. CRAWFORD, STATUTORY CONSTRUCTION 243, 244 (1940). As to the courts' determinations of the applicable "ethical considerations," see CAHN, THE MORAL DECISION (1955); LLOYD, PUBLIC POLICY 125-29, 146 (1953); PATTERSON, JURISPRUDENCE 232-35 (1953); Repouille v. United States, 165 F.2d 152 (2d Cir. 1947).

22. HAKE, EPIEKEIA 29, 42 (1953).

23. PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 311 (4th ed. 1948).

24. Kiss, *Equity and Law,* in THE SCIENCE OF LEGAL METHOD 146 (1917).

of 1907 adopted the Aristotelian theory, with some modification.[25] Cardozo, in 1920, said that this Swiss provision "well expressed" the "tone and temper in which the modern judge should set about his task." [26] Justice Jackson, in a dissenting opinion in 1942, referred to article I of the Swiss Code as in effect a "candid recognition of what necessarily is the practice" of courts.[27] My great colleague Learned Hand, in 1933—at a time (so he tells me) when he had not read Aristotle—applied almost literally the Aristotelian precept, not only to statutes but also to the interpretation of judicial precedents.[28]

Terminology

The medieval schoolmen, steeped in Roman law as they knew it, left an important heritage to common-law lawyers. As Nicholas St. John Green said: "A large proportion of the abstract terms in the English language are derived from the scholastic Latin. The clearness of meaning which they possess is due to the subtleties, the distinctions, and the refinements which the schoolmen have crystallized. . . ." [29] But, through Francis Bacon's misunderstanding of the schoolmen's interpretation of Aristotle, we received from them indirectly the confusing concept of "proximate cause" which has befogged our treatment of negligence.[30]

Jhering and Holmes

Other borrowings from civilians deserve consideration—for instance, Holmes' borrowing from Jhering. In Holmes' great book *The Common Law,* published in 1881, he expressed some startling ideas which have affected much American legal thinking and, indirectly at least, many American decisions in recent decades. Holmes, in his book, several times cited Jhering's *Spirit of the Roman Law,* but he never cited those portions of Jhering's work in which I think the

25. So I said in an opinion in 1943. Usatorre v. The Victoria, 172 F.2d 434, 441 (2d Cir. 1949). I had the backing, *inter alia,* of FRIEDMANN, LEGAL THEORY 294 (1944). But Nussbaum claimed I had erred. Nussbaum, *Proving the Law of Foreign Countries,* 3 AM. J. COMP. L. 60, 64 n.19 (1954). However, the one book he cites seems to support me. See WILLIAMS, THE SOURCES OF LAW IN THE SWISS CIVIL CODE 73 (1923).

26. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 140 (1921).

27. State Tax Commission v. Aldrich, 316 U.S. 174, 185, 202 n.23 (1942).

28. See Address by Judge L. Hand, Columbia Broadcasting System, May 14, 1933, published in HAND, THE SPIRIT OF LIBERTY 103 (1952).

29. Green, *Proximate and Remote Cause,* 4 AM. L. REV. 201, 208 (1870), reprinted in GREEN, ESSAYS ON TORT AND CRIME 1, 9 (1933) and in Frank, *A Conflict With Oblivion: Some Observations on the Founders of Legal Pragmatism,* 9 RUTGERS L. REV. 425, 452, 458 (1955).

30. See Green, *supra* note 29.

latter anticipated Holmes. I mean Jhering's discussion of the interpretative methods of the Roman lawyers.

Jhering wrote of the way the ancient Roman jurisprudence bent "the rules of logic" and, as "a matter of policy," by a "silent conspiracy" would "twist and turn" the literal language in order to meet "practical interests," the "needs of practical life," the interests and needs of the time, whenever the "law" became "out of date." He said that, "though professing to be merely explanations," their interpretations, "in fact, were a change and development in accordance with the spirit of the time"; that, "with all their reverence for the letter" of the "law," they "had too sound a sense to sacrifice to it their own convictions and practical interests"; that they sought to "adapt" the letter "to the wants of life"; that these adaptations were "justifiable, even necessary," and that "the impulse to this . . . corruption [of the texts] proceeded not from them but from the people." [31]

Now turn to Holmes' book: he wrote: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. . . . A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received. . . . And as the law is administered by able and experienced men, who"—note here especially the echoes of Jhering—"know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted." [32]

31. My knowledge of German is too inadequate to permit my reading Jhering's book of which there is no complete translation. The portion of the book to which I refer will be found translated by Hammond in an appendix to LIEBER, HERMENEUTICS 262-75 (3d ed. 1880).

32. HOLMES, THE COMMON LAW 1, 5, 36 (1881).

I don't mean at all to imply that Holmes plagiarized.[33] Jhering's influence, however, seems undeniable. We may conclude that his reflections on Roman legal techniques fructified American legal thinking.

Legislative History

In interpreting a statute, the civilians have long resorted to what we call its "legislative history." The English courts have refused to accept that technique, perhaps because of the English legislative practice. Driedger writes that "the work of the draftsman is substantially completed by the time Parliament first sees the legislation. It is for this reason, perhaps, that . . . in England, a rather dim view is taken of the suggestion that legislative history should be admitted in evidence to show the intent of or to explain statutes. Legislative history— that is to say, an account of the circumstances and considerations that gave rise to the measure, and of how it took shape —does not exist as a matter of record. If it exists at all, it exists in a multitude of confidential government files, unrecorded Cabinet discussions, telephone conversations and conferences, and faded recollections of the draftsman's cogitations." [34]

In the United States, where the legislative process is different, the courts now do consider a statute's pre-natal history. Some of our judges have reacted rather violently to this practice. These judges have their counterpart in the American literary critics who invented the so-called "new criticism." These "new critics" were outraged by those who were more interested in a poet's love affairs—or any other aspects of his history—than in his poems. The less balanced among these "new critics" have demanded that one look at the text alone, never any part of the context. Of course they went too far; text should never be separated from context. But the lawyer-contextualists have also gone too far, so far that our court has had to warn that it is not established doctrine that judges will not look at the language of a statute unless its legislative history is ambiguous.[35]

Strangely enough, those possessed by context-phobia—who believe judicial investigation of a statute's history leads to judicial "subjectivity"—fail to see that, on the contrary, the rejection of that history as a clue to legislative purpose may give the judges a wider discretion —may invite their "subjective" interpretations—since the legislative history usually narrows the possible scope of the legislative purpose.

33. See Frank, *supra* note 29, at 436, 440.

34. Driedger, *The Legislative Process in Canada,* 41 A.B.A.J. 169, 171 (1955).

35. Marks v. Higgins, 213 F.2d 884, 887-88 (2d Cir. 1954).

Perhaps here our courts can learn from studying the methods of the civilians.[36]

Equity

The extent of the influence of civil law on our equity has been much disputed. Yet no one doubts that, to the civilians, English equity owed much by way of the Romanized canonists, since the early English chancellors were learned churchmen. (Bentham, I think it was who said that English equity had been imported on ecclesiastical bottoms.) Later, St. Germain's early sixteenth century *Doctor and Student,* influenced by Gerson, a continental canonist, affected English equity thinking. Thus, via Aquinas and others, Aristotle's ideas about equity came down to us.[37]

Some writers say the Aristotelian influence in this respect related exclusively to his views of statutory interpretation, not to the equity powers of the chancery court. I incline to agree with those who criticize that view, who believe that there entered into English chancery decisions Aristotle's ideas that equity should individualize decisions and that "equity bids us to be merciful to the weakness of human nature." "Mercy" was a key word in early English equity, and "individualization" still remains the guiding spirit in many English and American equity decisions.[38]

In England, however, because of its peculiar legal development after a period when the common-law judges granted equitable relief, equity came to be administered by separate courts. Some American and English lawyers regard the difference between the Anglo-American and civilian administration of equity as unfortunate and hope, by means of the fusion or merger of "law" and "equity," to eliminate it. But Pekelis, an emigrant civilian, wrote in 1943: "If someone were compelled to explain the essence of civil law to a common lawyer in one sentence, he could perhaps say that civil law is what common law would have been if it had never known a court of chancery. . . . The picture of conflicting and coexisting jurisdictions is . . . inconceivable to a Latin or even a German lawyer, who believes in . . . the uncompromising and sometimes cruel unity of the legal order." [39] Law-

36. See Silving, *A Plea for a Law of Interpretation,* 98 U. PA. L. REV. 499, 508 (1950).

37. See Vinogradoff, *Reason and Conscience in Sixteenth Century Jurisprudence,* 24 L.Q. REV. 373 (1908). For an excellent, brief discussion, citing the authorities, see LÉVY-ULLMANN, THE ENGLISH LEGAL TRADITION 287, 305-13 (1935).

38. *But see* Coing, *English Equity and the Denunciatio Evangelica of the Canon Law,* 71 L.Q. REV. 223 (1955), for a suggested different derivation.

39. Pekelis, *Legal Techniques and Ideologies,* 41 MICH. L. REV. 665 (1943), reprinted in PEKELIS, LAW AND SOCIAL ACTION 42, 72 (1950). Earlier Pound had declared that, on account of the fusion statutes, there was a "decadence of equity" in late 19th century America. Pound, *The Decadence of Equity,* 5 COLUM. L. REV. 20, 29 (1905).

son, in 1951, said of the English system: "We should not have many of the most characteristic and valuable portions of our law, had we not had an equity systematically developed in separate courts." [40] He noted "an equitable jurisdiction based on a good faith introduced" on the Continent "six or seven hundred years after it was introduced in England." [41] However, Rheinstein reports that in Germany, as late as shortly after World War I, the "good faith" (*"treu und glauben"*) provision of the code was regarded with such distrust that a lawyer who cited it was guilty of "bad taste." [42] In the area of equity, then, it would seem that the Anglo-American, by something of an historical fluke or accident, improved upon the civilian methods.[43]

I heartily endorse the fusion, procedurally, of "law" and "equity." But "substantive equity," I think, should never be forgotten. And the retention of the word "equity" I deem important. It instills in the judge a different mood, one of elasticity and fairness. Nothing is more absurd than the saying: "A rose by any other name is just as sweet." If the rose were called the "bloody-nose flower," it might well be odious.

Oral Testimony

One marked disservice of the civilians to our equity procedure was that the English chancellors apparently took over from the summary procedure of the canon law [44] the practice of receiving written testimony only.[45] Legal historians have long maintained that the presence of the jury explained why the English common-law trial courts, as distinguished from the equity courts, received oral testimony. But Ullmann recently showed us that, on the Continent, the fourteenth century postglossators who, as civilian judges or advocates ". . .

40. LAWSON, THE RATIONAL STRENGTH OF ENGLISH LAW 32 (1951).

41. *Id.* at 33.

42. Rheinstein, *The Struggle Between Equity and Stability in the Law of Post-War Germany*, 3 U. PITT. L. REV. 91, 99 (1936).

43. In several of our leading university law schools, there is now no course on "equity." I teach a course on the subject at Yale Law School, but until June 1956, I have been required to call it "Procedure III." One of my esteemed colleagues, Judge Charles Clark, has been a leader in this sort of eradication of the word "equity" from the law school curriculum, rejecting it almost as if it were an obscene term. Yet I note that, in several of his opinions, he felt it made a difference to call a court of bankruptcy a "court of equity." City of New York v. Rassner, 127 F.2d 703, 706 (2d Cir. 1942); Kroell v. New York Ambassador, Inc., 108 F.2d 294, 295 (2d Cir. 1939); *In re* United States Realty & Improvement Co., 108 F.2d 794, 799-800 (2d Cir. 1940) (dissenting opinion).

44. *But see* Coing, *supra* note 38.

45. In the federal courts in this country, we retained that unfortunate practice, except for a short period from 1789 to 1802, until 1912. It meant that in equity cases, the trial judge, the "finder" of facts, could not observe the demeanor of the witnesses.

had their eyes fixed upon the practical administration of the law," maintained that the ". . . indispensable requisite for the judge to form his opinion on the trustworthiness of witnesses was that they appeared before him personally. . . . The personal impressions made upon the judge by the witnesses, their way of answering questions, their reactions and behavior in Court, were the only means of ascertaining whether their statements were trustworthy or not. . . . It was thought necessary, therefore, that the judge . . . should put on record in the files any specific reactions, *e.g.*, that the witness stammered, hesitated in replying to a specific question, or showed fear during the interrogation. . . ." [46]

Some writers assert that after a long period in which the continental courts in civil cases abandoned the use of oral testimony, the courts, in lands not dominated by French influence, *e.g.*, Germany, today rely primarily on oral testimony.[47] Yet one wonders whether they do so in practice. Cejka, a German exchange student at Yale Law School, writing in 1951 of his experience in Germany as an assistant to a judge, reported that the German judges actually based their decisions on the written testimony as recorded in the lawyers' briefs.[48] If that is true, then current German and American practices differ greatly.

The preceding instances are illustrative examples of both favorable and unfavorable influences of the civil law on the common law. The process doubtlessly will continue, but the services may be enhanced and the ills decreased by sympathetic studies of comparative law.

Litigation and Comparative Law

However, at this point I am referring to litigation, not to what Ehrlich and many other members of the "sociological" school call the "living law," *i.e.*, the out-of-court regularities, the mores, the smooth-running social norms which, embodying socially accepted policies and ideals, serve to keep society going. The "living law" of course has vast importance. It is the creation of an international "living law" to which, in large part, we must look for the development of a world community.

But it is precisely when, in particular instances, those smooth-running mores break down that litigation breaks out. Doubtless those

46. Ullmann, *Medieval Principles of Evidence*, 62 L.Q. Rev. 77, 83-84 (1946); see also Ullmann, The Medieval Idea of Law 124-25 (1946); NLRB v. Dinion Coil Co., 201 F.2d 484, 488 (2d Cir. 1952). *Warning:* See point II of the Appendix for value and dangers of "demeanor evidence."

47. See, *e.g.*, Schlesinger, Comparative Law 213 (1950).

48. As to Latin countries, see Pekelis, *supra* note 39.

social norms and the legal rules, statutory or common-law, interact and influence one another reciprocally. The investigation of those interactions should be the task of lawyers who are also cultural anthropologists, but to date that task is undischarged.[49] We still remain largely ignorant, far more so than most of Ehrlich's ardent disciples will admit, of those reciprocal influences even within any country. For this reason alone, it is therefore by no means easy to engage in "functional comparisons" of legal systems.[50]

You need not be reminded that, in every legal system, the substantive legal rules do not guarantee the results of litigation. But, in addition to the often leaky character of those rules, there are other phases of litigation which cause even greater uncertainty. Surely the effects of different modes of trial in different countries should be of much interest to all students of "comparative law." Yet some such students incline to cold-shoulder that subject, to be irritated by those of us who insist on the significance of the practical results of the trial process in particular cases. Thus, Kunz calls us "nihilistic," and asserts absurdly, probably to avoid the embarrassment to him of considering such matters, that we believe there are "no general rules or principles of law." [51]

Certainly, no one can reasonably deny that the mode of trial in vogue in a given country at any particular time seriously affects the manner in which its substantive legal rules work. A substantive legal rule may seem to remain the same but practically does not, in terms of results, if trial is by ordeal, or by compurgation, or if evidence is "weighed" according to the old strict rules of proof, or admitted according to more liberal rules, or if trial is by jury. Wise students of a foreign legal system, therefore, will not study its substantive rules only; they will study also its procedural rules to see how they affect the substantive ones. Think for instance of rules in respect to burden of proof. Such a procedural rule may completely sterilize a substantive rule. Thus, so Kenny says, at one time under canon law no cardinal could be convicted of incontinence except on the evidence of seven eye-witnesses.[52] Think, too, of the restrictions in some civil

49. See FRANK, COURTS ON TRIAL 291, 342-43 (1949); Frank, *The Lawyer's Role in Modern Society,* 4 J. PUB. L. 8, 15-18 (1955).

50. Rheinstein, *Teaching Comparative Law,* 5 U. CHI. L. REV. 615, 617-18 (1938).

51. Kunz, *The American Science of International Law* in 2 LAW: A CENTURY OF PROGRESS 166, 188 (Reppy ed. 1937); *cf.* Campbell, Book Review, 17 MODERN L. REV. 174, 176-77 (1954).

52. KENNY, CRIMINAL LAWYER 456 (1936). Aquinas said: "A bishop shall not be condemned save on the evidence of seventy-two witnesses. . . ."

law countries on (a) the right of a party to testify in a civil suit and (b) the power of the court to compel him to testify.

Judicial Fact Finding

However, procedure does not consist exclusively of procedural rules. To illustrate what I have in mind, I ask you first to consider the Roman praetor and the judex. The praetor told the judex what legal rules he must apply to the case; but the judex received the evidence. The judex, it is said, rendered his decision by logically applying those rules to the facts as he ascertained them from the evidence. Many rules and principles of Roman law on which much modern civil law still rests are found in the praetor's statements or in the responsa of the jurisconsults, but we know next to nothing of the way the judex "found" the facts in particular cases. Now unless we know that, I submit that we know very little of how Roman law actually worked in litigated cases.

Every legal rule includes an "if," for a legal rule is an "if-then" statement. The rule says: "If the facts are such-and-such, then this rule applies, *i.e.*, this legal consequence follows." For example, "If a man kills another without provocation, he will be punished." Or, "If a trustee, for his own purposes, uses trust funds, he must account for his profits to the beneficiary." The "if" clause must be filled in by the kind of facts designated in the rule. Those facts, to which a court applies the rule, are necessarily past facts, events which occurred before the law suit began. The court cannot observe them, see or hear them. They do not walk into the courtroom. The trial court, acting as an historian, must seek to reconstruct those past events as best it can.[53] When the trial court "finds" the facts, they are obviously not the "objective" past facts as they actually happened. The facts, as one of the ingredients of a court's decision, are nothing but what the court determines them to be.

My approach here, as elsewhere, is "constructive legal scepticism."[54] Without such an approach, understanding and intelligent improvement of any legal system is, I think, impossible. My discussion of fact-finding rests on what I call "fact-scepticism," [55] which rep-

53. That the judicial fact-finder functions as an historian and encounters many of the difficulties of the ordinary (non-judicial) historian, see FRANK, COURTS ON TRIAL 37-40, 155-56 (1949); *In re* Fried, 161 F.2d 453, 462 n.21 (2d Cir. 1947); *cf.* FRANK, FATE AND FREEDOM *passim* (1945).

54. See FRANK, COURTS ON TRIAL *passim* (1949).

55. See *id.* at 73-77; FRANK, LAW AND THE MODERN MIND viii-xiv (1930); Frank, *A Conflict With Oblivion: Some Observations on the Founders of Legal*

resents but one of two basic segments of such constructive scepticism. The other segment is "rule scepticism," the awareness that formal legal rules produce much less legal certainty than orthodox theorists admit.[56] Both segments are essential, but "fact-scepticism" has been largely neglected by legal thinkers in general and by students of "comparative law" in particular.

It should not be ignored that judicial fact determination may well not match the actual facts. Why? Because the court arrived at its "finding" of facts by its reaction to the stories told by the witnesses who are often fallible (1) in their original observations of the fact when it occurred, (2) in their memories of their initial observations, and (3) in their accounts, their testimonies of those memories. So the testimony of the witnesses is permeated with subjectivity. The judge, as "finder" of the facts, is also humanly fallible. His "finding" stems from his fallible, subjective reactions to the testimony. Those reactions derive from all the elements of his personality, which includes not only his cultural background, his economic, social and political attitudes, but also his many hidden, inscrutable idiosyncrasies, his unconscious biases for or against witnesses—for example, a plus or minus reaction to women, unmarried women, red-haired or brunette men, fidgety men, Catholics, Jews, Poles or Irishmen. His "findings" of fact result, then, from his subjective reactions to the subjective reactions of the witnesses to the actual facts they purport to have observed.[57] His fact-finding involves a double, or multiple, subjectivity, and the facts as he determines them, accordingly, may easily be mistaken. They are not "objective" but "subjective" facts.[58]

The facts as "found" in a particular case are not "data" (*i.e.*, given). They are not something "out there" which the court looks for

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Pragmatism, 9 RUTGERS L. REV. 425, 446-48 (1954); Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U.L. REV. 545 (1951). See also Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 32-37, 47-49, 233-39, 251 (1931); Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645, 650-51 (1932).

56. As to "rule scepticism," see FRANK, COURTS ON TRIAL 275-88 (1949); FRANK, LAW AND THE MODERN MIND 148-59 (1930); Llewellyn, *On Reading and Using the New Jurisprudence*, 26 A.B.A.J. 418 (1940); Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

57. See ENGELMANN, HISTORY OF CONTINENTAL CIVIL PROCEDURE 609 (1927), to the effect that, in modern German procedure, ". . . the degree of force to be attached to the several means of proof is controlled solely by the *subjective conviction of the court.*" (Emphasis added.)

58. The situation is even more complicated, since the "facts," as the judge reports them, may sometimes not even represent what he believes them to be. See Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U.L. REV. 545, 583 (1951).

and actually finds. Instead, they are something made by the particular judge or judges sitting in the particular case, and are therefore imperfect, man-made, all-too-human products.[59] What the particular trial judge thus "finds" in a particular case may not at all be what another trial judge would have "found" if sitting in that same case, for trial judges in fact "finding" are not fungible in their reactions to the witnesses.

You'll now begin to see, I trust, why fact "finding" plays hob with "comparative law." If, within any legal system, the "facts," and therefore the decisions which result from applying the legal rules to those "facts," vary with the particular trial court, we cannot compare the operation of the rules within that system with the operation of the rules within another legal system. Let me now explore this problem more intensively.

"Fact-Discretion" and the "Unruly"

In almost any advanced legal system, the fact-finder, when the witnesses flatly disagree with one another, as they usually do, has an immense discretion. That is, he must choose what part of the conflicting testimony is to be taken as reliable, as revealing the actual past facts in controversy. Only a few American courts have labeled as "discretion" that power of choice, but discretion it is. Interestingly enough, when the continental countries abandoned the old strict rules of proof, civilian writers openly said that the trial judge now exercised "discretion" in fact finding.

That "discretion—that fact-selection power—can be little controlled externally. No rules concerning its exercise have ever been or can ever be formulated;[60] it is therefore "unruly."[61] Because of this unruly selective power, Tourtoulon speaks of the "sovereignty" of the trial court.

This means what? It means that the fact ingredient of a decision, the "if" in the "if-then" which every legal rule contains, is a product of a virtually uncontrollable discretion, whenever the testimony is in conflict—as it usually is.[62] It follows that, usually, any legal rule, no

59. *Warning:* The sort of facts here discussed are not the "background" facts, such as social or economic facts—of the kind presented in "Brandeis briefs." Such "background" facts are sometimes more objective than those I discuss in the text. But even this objectivity is often an illusion. FRANK, COURTS ON TRIAL 210-12 (1949); Frank, *The Lawyer's Role in Modern Society*, 4 J. PUB. L. 8, 12 (1955).

60. See NLRB v. Dinion Coil Co., 201 F.2d 484, 488-90 (2d Cir. 1952); *cf.* MAINE, VILLAGE COMMUNITIES 317-18 (3d ed. 1889).

61. See Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U.L. REV. 545, 561-64 (1951).

62. See, *e.g.*, NLRB v. Dinion Coil Co., 201 F.2d 484, 488-90 (2d Cir. 1952).

matter how precisely worded, how inflexible it may seem, confers on the judicial fact-finder a huge discretionary power.

Was the judex, the ancient Roman fact-finder, in a markedly different position? I think not.[63] I ask, then, whether the judex did not possess an immense but concealed discretion. If so, the real working of the Roman legal system cannot be discovered solely in its rules and principles, procedural or substantive. To study them alone is to obtain an illusory notion of Roman "law." [64]

Fact Discretion and Interpretation of Legal Rules

Consider, then, the role in litigation of statutes which embody social norms, policies, ideals. It is commonplace that in law suits a statute gets its interpretation through its application or non-application. If, when a statute is invoked in a law suit, the court refuses to apply it, the court interprets the statute pro tanto by holding it inapplicable. So a court nullifies a statute whenever the court so misfinds the actual objective facts that it fails to apply the statute to the facts to which it was intended to apply; for a statute is not applied as intended, either when applied to non-existent facts or when a court, mistakenly or otherwise, denies its application to the actual objective facts of the case.

The prize illustration is the nullification of the American liquor prohibition act by deliberate misfindings of the actual facts. But daily in our courts, we witness such nullifying interpretations of numerous other statutes by erroneous fact-findings, whether inadvertent or deliberate. The decisions that result from such misfindings of fact will seldom be reversed on appeal, because when the testimony is conflicting, as is ordinarily the case, the fact-discretion exercised in thus finding the facts is usually not open to criticism by an upper court or by anyone else.[65]

Wigmore, Pound and others have lauded the jury system because juries can and do prevent the enforcement of socially undesirable legal rules through misfindings of fact, misfindings concealed by the general

63. Radin says the judex relied on "his own common sense and experience" for his determination of the facts.

Probably the judex did not receive oral testimony. But, absent an appeal, it would seem that his fact-determinations became conclusive.

64. I have put this problem to Jolowicz and to Yntema. I have received no satisfactory reply.

65. See, *e.g.*, Colby v. Klune, 178 F.2d 872, 874-75 (2d Cir. 1949); Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949); Watt v. Thomas, [1947] A.C. 481; Powell v. Streatham Manor [1935] A.C. 243.

Warning: See point I of Appendix to this paper for qualifications of the statement in the text.

verdict. I am sceptical about the virtue of that method, *i.e.*, about the capacities of juries to pick out and kill off undesirable statutes; and for reasons I won't here stop to state, I happen to believe that neither that nor any other argument for the jury system justifies it.[66] But in making their particular argument, Wigmore and Pound have strikingly disclosed that juries, via their largely unreviewable fact-discretion, every day interpret statutes contrary to the legislature's clearest intent.

However, that method of interpretation is not confined to juries. Trial judges sitting without juries also frequently employ it, consciously or, more often, unconsciously. They, and juries, do so too in respect of non-statutory legal rules.

We speak, customarily, of the "application of a legal rule to the facts." However, once we recognize that the facts as "found" often result in part from the hidden biases of the fact "finder" with respect to the witnesses, and that those hidden biases often affect the decision of a particular case fully as much as does the legal rule, we should not single out the legal rule as the only thing the court "applies," for often the rule represents but one of the decision's crucial ingredients. Since those biases also frequently represent crucial ingredients, in order to be descriptively accurate we should speak also of the "application" of the court's unknowable biases.

The Supreme Court, by Justice Frankfurter, has declared that, in a diversity of citizenship case, ". . . the outcome of the litigation in the federal court should be substantially the same, *so far as legal rules determine the outcome of a litigation,* as it would be if tried in a State Court." [67] Please note the crucial qualification in the phrase ". . . so far as legal rules determine the outcome of a litigation. . . ." Significantly, the same Justice in later cases said that, ". . . no finder of fact can see through the eyes of any other finder of fact," [68] and that there may be a "diversity in result" in the trials of different cases for "similar conduct" charged as violative of the same statute.[69] This is but another way of saying that the legal rules do not suffice to determine the outcome of litigation, and that the "unruly" elements leave future decisions uncertain and unpredictable.[70] Studies of stat-

66. See, *e.g.*, FRANK, COURTS ON TRIAL 108-45 (1949); FRANK, LAW AND THE MODERN MIND 170-85, 203-09 (1930).

67. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). (Emphasis added.)

68. Commissioner v. Culbertson, 337 U.S. 733, 753 (1949) (concurring opinion).

69. Winters v. New York, 333 U.S. 507, 535 (1948) (dissenting opinion). See also Huilever v. The Otho, 139 F.2d 748, 750 (2d Cir. 1944).

70. See Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism,* 26 N.Y.U.L. REV. 545, 626 (1951): "Let us take stock. The following striking features emerge from our survey of trials: (1) Witnesses do not uniformly react to the past events about which they testify. (2) In most trials, the witnesses orally tell conflicting stories to the trial court concerning those events.

utory interpretation, or of the operation of non-statutory rules and principles, use a scissors minus one blade when they disregard the element of fact-discretion in court-house fact-finding. Consequently, "comparative law" will be sterile so long as it ignores fact-discretion.

ILLUSORY IDENTITIES RESULT FROM IGNORING THE NATURE OF THE "FACT-FINDING" PROCESS

Schwartz, an able student of "comparative law," is typical of many of his kind in stressing, as the chief value of that subject, the discovery of basic similarities among divers legal systems, similarities which are obscured by seeming or surface differences.[71] He expressed that idea in an excellent review of a brilliant book, Lloyd's *Public Policy*.[72] Lloyd, comparing the application of the public policy concept by French and English courts, repeatedly refers to ". . . similar solutions arrived at by what may seem superficially to be differing or even conflicting premises or methods of approach." [73]

These are valuable insights, but the emphasis on such identities can be overdone and can lead to erroneous conclusions. Are the "solutions" involved in two decisions, one in France and one in the United States, to be deemed substantially the same merely because, in apparently solving in substantially the same way what appears to be the same problem, the two courts stated the same facts—despite important differences in the method of trial, *i.e.*, the methods of "proving" the facts? One must ask: did substantially the same evidence come before the two courts? If not, can it properly be said that, had the French

(3) In any such case, for decision purposes, what we call the 'facts' of a case, derives, at best, from the trial judge's . . . belief as to the reliability of the stories told by some, rather than others, of the disagreeing witnesses. (4) There are few uniformities in the formation of those beliefs of trial judges . . ., and no rules to aid them in forming those beliefs. (5) Those beliefs determine the fate of most litigants because, in the very few cases that are appealed, the upper courts usually accept the trial court's beliefs, since those beliefs involve trial-court 'fact-discretion' with which the upper courts seldom interfere. (6) To make matters more complicated, those beliefs are often but purported beliefs. . . . (7) Moreover, the beliefs, real or purported, are often not reported to anyone. If such a trial-court belief is not reported, and if the trial court's decision is appealed, usually the upper court will fictionally assume that the trial court had a belief, based on some selected part of the conflicting oral testimony, which will justify the trial court's decision.

"If you put together all these items, you must conclude that those who glibly talk of predicting future decisions, in cases as yet untried, have grossly exaggerated litigation-certainty."

See also FRANK, COURTS ON TRIAL *passim* (1949); Frank, *A Conflict With Oblivion: Some Observations on the Founders of Legal Criticism*, 9 RUTGERS L. REV. 425, 446-50 (1954); Frank, *Modern and Ancient Legal Pragmatism—John Dewey & Co. vs. Aristotle*, 25 NOTRE DAME LAW. 207, 460 (1950); Frank, Book Review, 13 LAW & CONTEMP. PROB. 369 (1948).

71. See Schwartz, Book Review, 7 J. LEGAL ED. 460, 461 (1955).

72. LLOYD, PUBLIC POLICY (1953).

73. *Id.* at xiii. See also *id.* at 96, 151.

case been tried in the American court, the same facts would have been "found"? If substantially different facts would have been "found" in the American court, then the two "solutions" are not substantially similar in any real sense. The asserted identity turns on the apparent identity of the facts, but the apparently identical facts are not the actual, objective facts but only the facts as "found" in the two courts. Shall no significance attach to the effect of pre-trial discovery in the American court and to the refusal of the French court to permit such discovery? [74] Does it not make a vital difference that in the one system there is almost exclusive reliance on written evidence, while in the other much oral testimony is received? In a civil trial, in some civil law countries, several judges sit, but only one of them sees and hears the witnesses; he reports to the other judges.[75] In such a case, Kahn-Freund suggests, there are ". . . not two sources of error but three: between the facts testified and the decision of the court, there stand the witness, the reporting judge and the court appraising the reporting judge." Does not this difference from our method of trial affect the result? And think of the differences in that most important factor, the means of enforcing judgments.[76]

Lloyd, Schwartz and Co. have dug one layer below the surface differences to uncover seemingly basic similarities, similar "real rules" below the "paper rules." [77] Their digging stopped too soon; one layer deeper they would have come upon more fundamental differences covered up by the layer of similarities.

My point is that too many "comparative law" students disregard the trial process. Lloyd, for a moment, puts his finger on this point in a footnote when he says that the "basic uncertainty of the legal process . . . as to facts . . . is more apt to impress itself on the practitioner than the academic lawyer"[78]—also, I would add, on the trial lawyer as differentiated from the office lawyer and the appellate court lawyer. The many unruly factors in trials, mightily affecting the decisions, are likely to escape the office lawyer and appellate court lawyer as well as the academe. Many of them are still enthralled, more or less, by some form of the myth of legal certainty. Even when, like Lloyd, they are keenly aware of the legal uncertainty occasioned by

74. See, *e.g.*, SCHLESINGER, COMPARATIVE LAW 208-09 (1950).

75. See, *e.g.*, Hammelmann, *Rules of Evidence Under the New Italian Civil Codes*, 29 J. COMP. LEG. & INT'L L. (3d ser.) 39, 46 (1947); Sereni, *Basic Features of Civil Procedure in Italy*, 1 AM. J. COMP. L. 373, 380-84 (1952).

76. See, *e.g.*, Pekelis, *Legal Techniques and Political Ideologies*, 41 MICH. L. REV. 665, 667-77 (1943).

77. In this respect, they resemble Llewellyn. See his writings cited in note 56 *supra*.

78. LLOYD, *op. cit. supra* note 72, at 118 n.4.

the uncertainties inhering in the formal legal rules and principles, they largely overlook the far greater uncertainties inhering in trial-court fact determinations. Only thus can one understand why so singularly keen a scholar as Rheinstein writes: "The problems which courts have to decide are essentially the same on both sides of the Atlantic, and I venture to say, eighty percent or even more of the solutions are the same." [79] These thinkers have attained "rule scepticism"—but have not yet advanced to "fact scepticism."

I must at once acknowledge that some "comparative law" scholars are not thus guilty; for example, Schlesinger, who points out the practical effects of procedural differences.[80] Dean Griswold of Harvard Law School discloses awareness of the problem but says that, in the "comparative law" courses at Harvard, little time is devoted to the "procedure and practice" of any foreign country because it is ". . . very difficult, without extensive, practical experience in the [foreign] jurisdiction, to have an accurate idea of the law in action" there.[81]

McDougal's invaluable discussions of "comparative law" come close, sometimes, to my approach; they underscore the many variables in decision-making, and include among those variables the idiosyncratic reactions of the particular judge who decides a particular case.[82] Yet McDougal seems to offset this insight by dwelling on the "flow of decisions," [83] as if that "flow" could be understood without a thorough knowledge of the hidden variables, especially in "finding" the facts, involved in each particular decision.

By that respect, he somewhat resembles Felix Cohen who centers on the "path of precedents" and maintains that this "path" can be predicted with considerable accuracy.[84] In seeking to predict the course of future decisions, Cohen relies on the uniformity of the "social forces" operative at any given time and place as the prime prediction-instrument. McDougal, for his purposes, relies far less on

79. Rheinstein, *Common and Civil Law—A Comparison,* 12 PA. B.A.Q. 7, 19 (1940).

80. See SCHLESINGER, COMPARATIVE LAW (1950). He includes in this book, at 197-201, the valuable article by Amos, *A Day in Court at Home and Abroad,* 2 CAMB. L.J. 340 (1926), and an excellent brief discussion of the effects of differences in procedure, *id.* at 220-22.

81. Re, *Comparative Law Courses in the Law School Curriculum,* 1 AM. J. COMP. L. 233, 239 (1952).

82. See McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order,* 61 YALE L.J. 915, 922 (1952).

83. *Id.* at 920-21.

84. See citations of Cohen's writings in Frank, *"Short of Sickness and Death": A Study of Moral Responsibilities in Legal Criticism,* 26 N.Y.U.L. REV. 545 *passim* (1951).

such "forces." [85] Nevertheless, McDougal's effort to detect the "flow of decisions" and Cohen's to predict the "path of precedents" encounter the same obstacle, *i.e.*, the undiscoverable, unruly, aspects of "fact-finding" in particular cases.

McDougal, after reading these comments, tells me that his position depends on the facts as seen by a "disinterested observer." He has written: "Thus we can hope to predict the *probable* responses of courts . . . to *probable* kinds of objective situations"; and he has defined "objective facts" in a law suit as the facts as they would look to "an objective, non-participant observer who utilizes all available sources. . . ." [86] But, this side of deity, there exists no such observer of the actual facts of cases.

The ordeals, invoking magic or deity, sought a "disinterested observer." [87] McDougal has not pointed to any adequate modern substitute. True, he discusses not only court decisions but also those made by other men. My immediate criticism relates solely to his discussion of the former, but I surmise that there are never any disinterested human observers of the "objective" facts on which any kind of man-made decisions turn.

I can't here further enlarge on what I regard as McDougal's failure to observe how far the hidden variables he describes interfere with a meaningful discovery of the "flow of decisions," [88] or discuss at length the related flaws in the various theses of those who, like Cohen, believe that prediction of most future decisions is possible.[89] I do think it worthwhile to quote in part as pertinent what I have said elsewhere about one weakness in Felix Cohen's thesis: "Cohen implies that the 'social forces,' at any particular time, have a substantially uniform influence on court decisions. Others talk of substantial uniformity in the 'living law' (which rests on customs and mores), or in the community's sense of justice (or injustice), or in the prevalent social moral attitudes or ideals. Disregarding the fact that, in our society, there are, as to many subjects, many warring customs, moral attitudes and ideals, let it be assumed, arguendo, that such uni-

85. McDougal, after reading these comments, said in a conversation with me that his aim was not prediction. *But see* Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203, 240 (1943). For McDougal's present emphasis on the purpose of insight and change, rather than of prediction, he refers me to McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order,* 61 YALE L.J. 915 (1952).

86. Lasswell & McDougal, *supra* note 85, at 239-40.

87. See FRANK, COURTS ON TRIAL 37-79 (1949).

88. *Id.* at 201-06.

89. See Frank, *A Conflict With Oblivion: Some Observations on the Founders of Legal Criticism,* 9 RUTGERS L. REV. 425, 446-49 (1954).

formities are both dominant and knowable. The argument about the effect of such uniformities usually takes this form: Countless transactions, it is said, are governed by the 'living law'; these transactions never develop into law suits, never come before the courts; consequently such transactions are not plagued by the uncertainties and unpredictabilities encountered in litigation. Litigation (so that argument goes) represents the unusual, the 'pathological' or 'sick' situations, when the smooth-running, socially accepted, norms disrupt, and the unsettled disputes go to the courts, which serve as 'hospitals.' But, as this argument itself makes plain, the 'living law' does not affect litigation, except to the extent that a demonstrable correlation exists between (a) the out-of-court regularities and (b) what happens in the courts when the 'sickness' of litigation breaks out. Let us assume, however, that a correlation does exist, to a considerable degree, between the out-of-court regularities and the in-court regularities we call the legal rules. But then the vital question becomes this: Do (1) these in-court regularities, the legal rules, usually bring about anything like (2) regularities in court decisions? The answer is no—because of the vagaries of trial-court fact-finding.

"Assuming now that the out-of-court uniformities are embodied in the legal rules and reflect community morals or ideals, let us approach the problem in terms of morals or ideals. It then appears that, in fact-finding in particular law suits, those uniformities are balked by private, un-uniform, moral attitudes. I call them 'moral' for this reason: If the unconscious, subthreshold, individual prejudices of particular trial judges or jurors towards particular witnesses (or lawyers or litigants) were consciously entertained and publicized, they would spell out as moral—or immoral or unmoral—attitudes. They would then be open to criticism, and would perhaps be made to accord with acceptable community attitudes. But they are concealed, publicly unscrutinized, uncommunicated. These secret, unconscious, private, idiosyncratic, 'moral' norms or standards cut across—they fight with and nullify—the influence, on fact-findings, of the moral attitudes and ideals of the community which (we have assumed) are both knowable and uniform.

"Here is a kind of rampant subjectivity ignored by legal thinkers . . . who minimize the difficulties of legal criticism and of prediction of decisions. These thinkers overlook the distinction between (1) the more or less 'objective' (uniform) character of the norms embodied in the legal rules (whether 'paper' or 'real' rules) and (2) the 'subjective' character of the trial judges' or juries' responses to conflicting oral testimony. Why? Because those thinkers are thinking of

cases in upper courts where the 'facts' are ordinarily those 'found' by the trial courts." [90]

Other Unruly Elements of the Decisional Process

For brevity's sake, in speaking of fact-finding, I have omitted mention of one of its most important features: the merging of "facts" and rules in a judge's, or jury's, *gestalt* or composite reaction. That element represents a sort of fourth dimension of the decisional process.[91] I have also omitted any reference to several other unruly aspects of fact-finding such as perjury, the prejudices of witnesses, missing witnesses, missing documents, the skill or ineptitude of the lawyer representing one or the other of the parties, and the ability or inability of litigants to meet the expense of obtaining evidence—including the hiring of expert accountants, engineers or detectives—often essential to success in law suits.[92] Nonetheless, they are important elements of "fact-scepticism." [93]

THE JUSTICE FACTOR

Several writers have urged that, in a conflict of laws case, a court should always give paramount consideration to doing justice in the particular case when asked to apply a foreign legal rule.[94] I heartily agree.[95] Nor would I confine such an attitude to conflict of laws cases.[96]

The difficulties encountered in doing justice present difficulties for "comparative law." This appears from the following: a court

90. See Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism,* 26 N.Y.U.L. REV. 545, 581-82 (1951).

91. See, *e.g.,* FRANK, COURTS ON TRIAL c. 12 (1949); FRANK, LAW AND THE MODERN MIND 116 (1930); Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism,* 26 N.Y.U.L. REV. 545, 595-600 (1951); Frank, *What Courts Do in Fact,* 26 ILL. L. REV. 645, 655-56 (1932).

92. See FRANK, COURTS ON TRIAL 94-99 (1949); Frank, *White-Collar Justice,* Sat. Eve. Post, July 17, 1943, p. 22; Frank, Book Review, 56 YALE L.J. 589 (1947).

93. I am pleased to note that several distinguished legal thinkers do recognize the importance of "fact-scepticism." CAHN, THE MORAL DECISION (1955); PATTERSON, JURISPRUDENCE 187-88, 298, 544-45, 567, 590 (1953); Stone, Book Review, 63 HARV. L. REV. 1466 (1950).

94. See Cavers, *A Critique of the Choice-of-Law Problem,* 47 HARV. L. REV. 173-78, 186-87 (1933); Kronstein, *Crisis of "Conflict of Laws,"* 37 GEO. L.J. 483, 484 (1949); Morris, *The Proper Law of a Tort,* 64 HARV. L. REV. 881 (1951); *cf.,* Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952, 956 n.19 (2d Cir. 1951); GREEN, JUDGE AND JURY 76-77, 97, 151 (1930); Bodenheimer, *The Public Policy Exception,* 12 THE JURIST 51, 63-66 (1954).

As to the tendency of many courts to take many a conflict rule as ". . . in itself a jural end," see CARDOZO, PARADOXES OF LEGAL SCIENCE 67-68 (1928).

95. See Siegleman v. Cunard White Star, Ltd., 221 F.2d 188, 206 (2d Cir. 1955) (dissenting opinion).

96. See FRANK, COURTS ON TRIAL 35, 90-91, 371, 383, 388-91 (1949).

cannot do justice in a particular case to the extent that it, for any reason, fails to ascertain the actual facts. Serious inadequacies in the trial process necessarily yield injustice when they prevent the ascertainment of the actual facts; for the application of a correct rule, a just rule, to the "wrong" facts, to facts that never happened and therefore to spurious facts, is as unjust as the application of a "wrong" rule to the actual facts. Misfinding of the facts may ruin a litigant. Some of the inadequacies of the trial process which yield such injustices are ineradicable because they involve indelible human frailties; [97] others can be and should be eliminated.[98]

It should shock us that, thanks to our trial methods, Judge Learned Hand, our wisest judge, could remark: " . . . I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." [99] The ineradicable defects of trials—those which stem from the unruly elements in "finding" the facts and which account for unavoidable uncertainties and injustices—also constitute a stumbling block to "comparative law," for reasons I have previously suggested.

The Justice Factor and the Upper Court Myth

An upper court can do little to eliminate those inadequacies as they affect any particular decision on appeal. For reasons already canvassed, the "facts" are usually those which the trial court "found," so that they are data, *i.e.*, already finally "cooked," for the upper court. Consequently, the upper court cannot correct uncertainties and injustices resulting from defects inherent in the accepted trial methods. The naive belief to the contrary stems from what I call the "upper-court myth," a myth that upper courts are always or usually the most important part of the judicial process.[100] We cannot, then, look to upper courts to get rid of those obstacles to "comparative law" which result from the unruly qualities of trial-court fact-finding.

The Justice Factor and Natural Law

"Natural Law," at its best, represents a quest for justice, yielding standards of justice and morality for critically evaluating the man-made

97. As to the need to recognize that there are irremediable inadequacies, see *id.* at 3, 35, 47, 50-51, 61, 79, 88, 99, 185, 222, 424.

98. For a summary of suggested reforms to get rid of those that are remediable, see *id.* at 422-23.

99. Address by Judge Learned Hand, Association of the Bar of the City of New York, November 17, 1921, published as *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).

100. For further discussion of the myth, see FRANK, COURTS ON TRIAL 222-25 (1949); Frank, Book Review, 13 LAW & CONTEMP. PROB. 369 (1948).

legal rules and perhaps for ensuring a moderate amount of certainty in those rules. That is, it aims at justice and moderate certainty in the more or less abstract, generalized, human formulations of what men may or may not lawfully do. But it furnishes no helpful standard for evaluating the fact-determinations in most law suits and no assistance in ensuring uniformity, certainty or predictability in such determinations. To be practically meaningful, judicial justice must be justice not merely in the abstract but in the concrete, in the court's decisions of the numerous, particular, concrete cases. Thence arises the problem of achieving justice, and uniformity, in court-room ascertainment of facts in divers individual law suits. This problem can be solved via natural law only in so far as natural-law principles operate on and control the subjective, un-get-at-able, often unconscious and unstandardized judicial findings of facts when testimony is conflicting as to crucial issues of fact. I see no sign that those principles do so operate and control. Consequently, natural law, too, will not solve these problems of "comparative law" caused by unruly fact-discretion.

The Effect of Using the Ambiguous Word "Law"

I suggest that a major obstacle to the ready perception of the many difficulties which I've been discussing lies in that miserably ambiguous word "law" in the labels "comparative law" and "foreign law." Since "law" means to most lawyers the legal rules and principles, it tends to blind most lawyers to all the circumambient unruly elements.

Consider Ehrenzweig. He is in the forefront of the rule-sceptics in the field of conflict of laws. He sagaciously counsels that, even within our own legal system, we should not accept any rigid, unified theories or doctrines but should leave room for newly emerging social policies.[101] But his stimulating, constructive scepticism includes no whiff of fact-scepticism.

Much the same may be said at times, I think, of so astute a man as Yntema. In 1937, he wisely wrote that " . . . awareness not merely of the superficial dissimilarities of legal principles but more particularly of the divergent denotations or qualifications of corresponding legal terms is essential to the proper application of the pertinent foreign rule of decision." [102] But he made no mention of the impact

101. Ehrenzweig, *American Conflicts Law in Its Historical Perspective,* 103 U. Pa. L. Rev. 133, 154-56 (1954).

102. Yntema, *Roman Law as the Basis of Comparative Law,* in 2 Law: A Century of Progress 346, 367 (Reppy ed. 1937).

He moved closer in 1944 to what I think the correct viewpoint—see Yntema, *Research in Inter-American Law at the University of Michigan,* 43 Mich. L. Rev. 549, 557 (1944)—but did not quite arrive.

of divergent modes of trial, especially of divergent modes of "finding" facts and the unruly aspects of such findings on the actual, specific, judicial decisions in different countries.

This is surprising since he had written in 1928: ". . . [O]f the many things which have been said of the mystery of the judicial process, the most salient is that decision is reached after an emotive experience in which principles and logic play a secondary part. The function of juristic logic and the principles which it employs seem to be like that of language, to describe the event which has already transpired. Those considerations must reveal to us the impotence of general principles to control decisions. Vague because of their generality, they mean nothing save that they suggest in the organized experience of one who thinks them, and because of their vagueness, they only remotely compel the organization of that experience. The important problem in the conflict of laws is not the formulation of the rule but the ascertainment of the cases to which, and the extent to which, it applies. And this, even if we are seeking uniformity in the administration of justice, will lead us again to the circumstances of the concrete case, and to the careful study of foreign practices. The reason why the general principle cannot control is because it does not inform. . . . It should be obvious that when we have observed a recurrent phenomenon in the decisions of the courts, we may appropriately express the classification thus adopted in a rule. But the rule will be only a mnemonic device, a useful but hollow diagram of what has been. It will be intelligible only if we relive again the experience of the classifier. . . . To decide questions of this nature we must intimately probe the purposes and the prejudices implicit in the judge's reaction to the concrete case. . . ." [103] That was surely a bold statement, indeed something of an over-statement. But it implied fact-scepticism and indicated a perception of the *gestalt* in fact "finding." Did Yntema abandon those insights after 1928?

Legal Education and the Civilians

The blinding effect of legal rules and principles may well be the result of our current American mode of legal education—another major disservice of the civilians to common-law lawyers.

Langdell counseled against having American law teachers experienced "in dealing with men" or "in the trial and argument of causes." He said that properly equipped teachers should have "not the experience of the Roman advocate or of the Roman praetor but the

103. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 480-81 (1928).

experience of the Roman jurisconsult." I think that reference to the "Roman jurisconsult" reveals the serious defect of the Langdell attitude which still too much pervades American law schools. The jurisconsult was a man who seldom, if ever, tried a case or went to court. It was his business to give answers to legal questions, answers based upon assumed states of fact. He did not bother about the means of convincing a judex, through testimony, that those were the facts or about the method by which the judex would reach that conclusion. Such matters were beneath the dignity of the jurisconsult; he left them to the trial lawyers and to the judex (or the magistrate).

Max Rheinstein, in a letter to me a few years ago, referring to my attempt partially to explain by way of "modern legal magic" the dominant American law school aversion to observation of trial courts, offered a supplemental explanation: "In Rome, 'legal' activities were divided up among three groups of men: the jurisconsults; the orators; and practical politicians, statesmen, and, during the late empire, bureaucratic officials. The jurisconsults busied themselves exclusively with the rules of law; the practical administration of justice remained outside of their field. Yet, their work has become the foundation of all legal science [104] ever since, not only in the countries of the so-called Civil but also in the Common-Law orbit. The style of Common-Law legal science was determined when Bracton started out to collect, arrange, and expound the rules of the Common-Law of his time in the very style of the Roman classics and the corpus juris. All the law books since his time . . . have adhered to the pattern thus determined. Legal education built upon these books has been equally limited; from Pavia and Bologna to Harvard, Law Schools have regarded it as their task to impart to their students a knowledge of the rules of law and hardly anything else. Of course, for practical work in the administration of justice such a training is far from being complete." [105]

"If," said Bentham in his *Comment on the Commentaries,* "there be a case in which students stand in need of instruction, it is where the generality of books that come into their hands represent things in a different light from true ones. True it is that, after many errors and disappointment, observation and practice may let a beginner into the bottom of these mysteries; but what sort of an excuse is it to give for feeding him with falsehood, that some time or other he may chance to find out?"

104. I deplore this use of the word "science." FRANK, COURTS ON TRIAL c. 14 (1949); Frank, *The Lawyer's Role in Modern Society,* 4 J. PUB. L. 8 (1955).

105. These comments are at odds with Rheinstein's remark, see text at note 79 *supra,* about the similarity of "solutions" of problems "on both sides of the Atlantic."

CREATIVE MISUNDERSTANDINGS

However, misunderstandings have often been creative. What men erroneously believed to have happened in the past has often influenced them far more than what in fact happened. Thus the false belief that the Magna Carta granted the right to trial by jury gave considerable encouragement to those Englishmen and Americans who espoused that mode of trial; and thoroughly erroneous beliefs about ancient Roman history inspired many subsequent undertakings.[106]

In the same way, a misunderstanding of foreign legal practices sometimes has a curious effect. There are many instances of such creative misunderstandings—which may be beneficent or evil. We know that Montesquieu's misunderstanding of the English political system brought about a widespread devotion to the separation-of-powers idea, an idea which had both good and bad repercussions, and with differences in its interpretation in France and the United States.

A belief that the English Act of Settlement of 1700 made all English judges independent has supported efforts to give all American judges life tenure. But Lord Goddard, in an opinion in 1953,[107] revealed that the overwhelming majority of English decisions in criminal cases, and a multitude of such decisions in civil cases, come from judges who have no such tenure.

It has been a common belief in this country that specific performance of contracts is the exception in common-law countries, and an award of damages the rule, but that the reverse is true in modern civil-law countries. Huston, in 1915, wrote a book in which he so maintained,[108] and Goldschmidt said much the same in 1937.[109] Huston pointed to this alleged continental practice and, following Story's lead, suggested that our courts might well grant specific performance in most instances. But Pekelis, the brilliant civilian who emigrated to the United States, informed us in 1943 that in France and Italy, despite the wording of the codes, the courts do not send a defendant to jail who disobeys a court order requiring specific performance but allows him to pay damages in the last push.[110] Kessler tells me that Pekelis' description also describes the practice in Germany.[111]

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106. Dunning, *Truth in History*, 19 AM. HIST. REV. 217 (1914).

107. Terrell v. Secretary of State, [1953] 2 Q.B. 482-96.

108. HUSTON, ENFORCEMENT OF DECREES IN EQUITY 48-49 (1915).

109. GOLDSCHMIDT, ENGLISH LAW FROM THE FOREIGN STANDPOINT 118-19 (1937).

110. PEKELIS, LAW AND SOCIAL ACTION 45-53 (1950); *cf.* Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMP. L. 208, 218-19 (1955).

111. See also *id.* at 228.

Here is a paradox: through continental canon law, the English chancellor learned the technique of jailing contempt orders acting on the person of the disobedient defendant, and our courts now employ that technique frequently. Today on the European continent, a variety of circumstances has yielded a different procedure. We are more modern than the contemporary civilians—by being more old-fashioned.

The Value of Contrastive Law

In the title "comparative law," we use the ambiguous word "law." If we continue to use that word, at least a more preferable adjective would be "contrastive," for often it is the contrasts between legal systems which are most educational. Each country, parochially, ethnocentrically, tends to take its own legal methods for granted, to think them the best conceivable. A look at those of other lands stimulates self-criticism. For example, America's excessively contentious trial procedure includes one device which most American lawyers consider essential. I mean the way our lawyers interview witnesses before trial with the consequence that the lawyers often inadvertently "coach" a client or other friendly witnesses.[112] There seems to be no way of avoiding this undesirable result. But if we inquire, we learn that due to Klein's reforms the lawyers in several continental countries usually may not engage in pre-trial interviewing of witnesses in civil cases.[113] This suggests a possible reform of our practice.

Or consider the fact that generally in the United States a defendant in a criminal case cannot obtain any knowledge before trial of most of the evidence the prosecutor will offer. Such a procedure astonishes civilians. It also surprises English lawyers, since modern England, in an oblique way, has arrived at substantially the same method as the civilian, *i.e.*, pre-trial disclosure to the accused of the evidence against him to be introduced at the trial. By contrasting the American with these foreign practices, we may be shamed into reforming ours.

Our complacent satisfaction with our own ways needs to be disturbed. That complacency stems from the unquestioning espousal of the accustomed. We develop a "militant faith in [our own] bad solutions." [114] Writing of evils in much administration of criminal "justice," Chesterton exclaimed: "The horrible thing about all officials . . . is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is simply that they

112. Frank, Courts on Trial 86 (1949).

113. Lenhoff, *The Law of Evidence*, 1 Am. J. Comp. L. 313, 342, 343 (1949).

114. Feibleman, Freedom and Authority in Our Time 1939 (1953).

have got used to it." [115] Disorientation, by studying foreign ways, may get us un-used to some of our own that sorely need overhauling.

Transplanting—Its Dangers

Yet, although borrowing may sometimes be wise, often a danger lurks in transferring a legal rule or practice to an alien culture. We may find a parable in the fact that rabbits, harmless in their native habitat, when imported into Australia turned out to be a menace to Australian farmers.[116] We should note too the biologist's report that "identical living cells develop differently in different parts of the organism," and that, so some believe, cancer is caused by the unregulated growth and spread of normal cells. Mark Twain, somewhat exaggeratedly to be sure, asserted that the European idea of medieval chivalry as depicted in Sir Walter Scott's novels, when imported into the ante-bellum American South, brought on our Civil War. Scott, said Twain in the 1860's, ". . . had so large a hand in making Southern character . . . that he is in great measure responsible for the war." [117]

The danger of transplanting may be particularly great when a large segment of a foreign legal system is suddenly transplanted. It may give the importing country something like the "bends"—a grave ailment experienced by a man who too rapidly emerges from an area of high atmospheric pressure to one of much lower pressure. Perhaps that's what happened in pre-communist China when, still a seemingly backward country, it adopted a large portion of modern occidental procedures.[118]

On the other hand, our courts could learn much from the traditional Chinese idea that the judge must treat all legal principles as mere general guides to be applied always equitably with primary atten-

115. CHESTERTON, TREMENDOUS TRIFLES 85-86 (1909).

116. Frank, *A Conflict With Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 RUTGERS L. REV. 425, 426 (1954); Frank, *Some Tame Reflections on Some Wild Facts*, in VISION AND ACTION 56 (1953); FRANK, FATE AND FREEDOM 61 (1945).

117. OSTERWEIS, ROMANTICISM AND NATIONALISM IN THE OLD SOUTH 50 (1949); *cf.* Kliger, *Emerson and the Usable Anglo-Saxon Past*, 16 J. HIST. OF IDEAS 476, 489-90 (1955).

118. The adjective "backward" may be most unfair. In 1948, two Chinese graduate students at Yale Law School wrote a paper for me in which they said, "It is a superficial observation that the Chinese legal system has been found suitable only because the Chinese civilization is less advanced. The Romans developed their legal system at a time when their civilization, while unique and flourishing, was not particularly to be envied in comparison with Chinese civilization. In the fourth and third centuries B.C., China had a theory of law—that of the so-called Legists—quite akin to that of the German scholars during the 19th century A.D. But Confucianism led to the abandonment of that theory in China many centuries ago."

tion to the unique factors of the particular cases.[119] We often achieve the same result surreptitiously by means of the fact-discretion of our trial judges and juries. I think it would be wiser if we did so candidly.[120]

Borrowed Principles As Sometimes Too Authoritarian

The Romanists, ignoring the fact-discretion of the judex, concentrated on legal principles. This prompts the suggestion that the word "principles" seems to derive from the same word as "princes" (powerful monarchs), and that legal principles, undemocratically, may become authoritarian. "For, with its stress on uniformity, a legal generalization (or principle) tends to become totalitarian in its attitude towards uniqueness." [121] Maybe this should be coupled with the fact that Justinian's *Institutes* ". . . were written after more than three centuries of open and avowed dictatorship." [122] I do not ask you to take this suggestion too seriously.

Nevertheless, recognizing that they can become authoritarian, we should exercise caution in adopting outright any foreign legal principles. For example, the "moral right of authors," expressive of a desirable viewpoint towards which many American courts have been too snobbish, ought not, I think, be accepted here wholesale.[123]

Kahn-Fraund, commenting on this article, says in a letter to me, that he is very largely in agreement with me on the limited value of comparative law for practical purposes, but that he believes "a comparison of legal institutions in practice in different jurisdictions is of interest in that it shows what questions are considered as legal questions in one area and as non-legal questions in another," for frequently "a legal problem is not intrinsically so, but only owing to the historical and social environment in which the problem has to be solved."

Further Difficulties of Transplanting

The uncritical adoption of a foreign legal device will often transmute it. In the course of transportation, it may suffer a sea change. At home it is surrounded by many usages which are never written down but taken for granted and more or less unconsciously accepted,

119. FRANK, COURTS ON TRIAL 381-82 (1949).

120. *Id.* at 409-10; *cf. id.* at 132-33. Wigmore who, through his spell of teaching in the Orient, knew well the Chinese approach, at times applauded it.

121. Guiseppi v. Walling, 144 F.2d 608, 618-19 (2d Cir. 1944).

122. Radin, *A Glimpse of Roman Law,* 45 CLASSICAL J. 71, 72 (1949).

123. See concurring opinion in Granz v. Harris, 198 F.2d 585, 590 (2d Cir. 1952).

thus checking its unwise use. But those checks can seldom be exported. They are not negotiable internationally.

Holmes, in a judical opinion in 1923, discussing the difficulty American courts experience in reviewing decisions of Puerto Rican courts, said: "When we contemplate such a system from outside, it seems like a wall of stone, every part even with all the others. . . . But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand inferences gained only from life, may give to the different parts wholly new values that logic and grammar never could get from the books." [124] Since then, others such as Whitehead [125] have similarly remarked. In 1954, the anthropologist Murdock chided some of his fellow-anthropologists for looking solely to the "patterned norms" of alien cultures and neglecting the "unpatterned behavior," the "variations and deviations." [126] The "axioms" or unquestioned assumptions of an alien culture, in order to be understood must be experienced in their setting, must be "proved upon our pulses." [127]

The more sagacious students of comparative politics appreciate this fact.[128] They point to the way the English parliamentary system or the American constitutional scheme, glossed by many domestic usages, becomes something very different when other countries, ignorant of those usages, purported to adopt it.

Such transplanting is an instance of what the anthropologists term "diffusion." The anthropologists can teach lawyers that the effects of diffusion are not always salutary.

The Communication Problem and Semantic Scepticism

We have difficulty even within our own culture in understanding past usages, the unwritten assumptions of an earlier period. J. Dover Wilson warns that, in reading *Hamlet,* we are likely to overlook "those tacit understandings between Shakespeare and his audience" which were "part of the atmosphere of the time." [129] So we misinterpret

124. Diaz v. Gonzales, 261 U.S. 102, 106 (1923).

125. WHITEHEAD, SCIENCE AND THE MODERN WORLD (1925).

126. MURDOCK, FOR A SCIENCE OF MAN 14, 22-23 (1954).

127. "We must," wrote Julius Stone in 1951, "study the history, the politics, the economics, the cultural background in literature and the arts, the religious beliefs and practices, the philosophies, if we are to reach sound solutions as to what is and what is not common." Stone, *The End To Be Served by Comparative Law,* 25 TUL. L. REV. 325, 332 (1951). See also Bebr, Book Review, 64 YALE L.J. 954, 955 (1951).

128. *Cf.* McWhinney, Book Review, 52 COLUM. L. REV. 553 (1952).

129. WILSON, WHAT HAPPENED IN HAMLET 26-27 (1935).

Shakespeare's line, "Get thee to a nunnery," if we don't know the colloquial meaning of "nunnery" in the days of the English Reformation.

Even the lapse of a few decades may make past writings almost unintelligible. "A hundred years hence. . .," comments Wilson, "readers of Edwardian plays like *Major Barbara* and *The Voysey Inheritance* will unconsciously miss a great deal through inability to understand the economic facts which Bernard Shaw and Granville-Barker assumed, but never spoke of, because they knew their audience would assume them likewise." [130]

We are wont to believe that we "moderns" are unusually sceptical. But about two centuries ago, an English judge exclaimed in some distress: "We live in an age when men are apt to bring those things into question, of which our ancestors never doubted."

So with semantic scepticism. Francis Bacon, Hobbes, Locke and Berkeley were masters of it. Pascal observed that "all men who say the same things do not possess them in the same way." Justice Johnson, in an opinion in 1816, said: "Language is essentially defective in precision, more so than those who are not in the habit of subjecting it to philological analysis are aware." [131] But in our times, such scepticism has waxed. We have come to doubt whether words alone can adequately communicate. The poet Trumball Stickney expressed this doubt thus: "You lean over my meaning's edge and feel.—A dizziness of the things I have not said." We have learned to reject the "complacent belief" that invariably we understand what others say to us.[132] For, from such complacency, there ensues an illusion of communication, and men often fail to understand one another just because they are too sure they do.

At best, communication is but an approximation. "To each of his friends, even to his closest friends," writes Schlauch, "a man talks out of a private world of his own. . . . It is impossible for any two persons ever to have learned the same work under the same circumstances, occupying . . . the same space in time, and apprehending the . . . term with precisely the same background." [133]

If there be these obstacles to understanding as between two men of the same culture, how much greater will be such hindrances as between those of different cultures? Each language, in its peculiar

130. *Ibid.* I think the idea of the *Zeit-Geist* can be and often has been overworked. In a given time and place, there are dozens of Time Spirits. FRANK, FATE AND FREEDOM c. 7 (1945); Frank, *A Sketch of an Influence,* in MODERN INTERPRETATIONS OF LEGAL PHILOSOPHIES 188, 217-18 (1947).

131. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 374 (1816).

132. The Times Lit. Supp. (London), Oct. 27, 1950, p. 1669, col. 2.

133. SCHLAUCH, THE GIFT OF TONGUES 113 (1948).

structure, embodies a world outlook different from that embodied in another language. Men of divers languages often talk past one another. They encounter a baffling sort of dialectic of dialects. It has been said that "the philosophers meet, not their philosophies." The same is often true of men of different countries who gather to discuss "comparative law."

Other Dangers of Transplanting

Occasionally, a legal device even in its home-land produces unintended, sometimes undesirable, results. The foreign borrowers may be ignorant of those untoward consequences. Unknown to those borrowers, by the time the borrowing happens, the legal device may be in disrepute in its native haunts.

In addition, the borrowers sometimes deem the foreign device socially valuable because it has been touted enthusiastically by some foreign lawyer. But that enthusiastic foreign lawyer may be a mere bookish man who is not cognizant of the social workings of that device. He may ignore important nuances, being intent on over-simplification and thus incapable of seeing complexities. He may be like Chief Justice Chase of whom someone said: "With him self-delusion was almost a talent." He may impute to his countrymen his own idiosyncratic values: "Poor Richard Lovatt," writes D. H. Lawrence in one of his novels, "wearied himself to death with the problem of himself; calling it Australia."

What's more, lawyers as a group may be inadequately sensitive to the social consequences of legal rules. As a specialist group, an "apart group," lawyers tend to have limited perspectives, restricted horizons, unique attentional attitudes, their own carved-out province or sub-universe, with its special presuppositions or "quasi-realities" and with its particularistic "just-so stories" which the lawyers endow with the "accent of reality." [134] Many lawyers suffer from what Veblen called "trained incapacity" and Dewey "occupational psychosis," *i.e.*, their very skills function, outside the professional area, as inadequacies or blind spots. As Kenneth Burke puts it, men ". . . may be unfitted by being fit in an unfit fitness." So foreign lawyers may misinform us concerning the actual social values and disvalues of their country's legal institutions.

With all the foregoing in mind, one may say of many borrowed segments of a foreign legal system what someone said of those who at-

134. FRANK, COURTS ON TRIAL 399-400 (1949); *cf.* FOSS, SYMBOL AND METAPHOR 30 (1949): "Who chooses a profession settles down in it and outlines, once and for all, certain limits to his activity."

tempted to imitate Chekhov: "Nothing, after all, is so unlike an original as a copy."

"Sociology of Law"

In 1748, Montesquieu in Book 29 of his *Spirit of Laws*[135] made some shrewd observations. He said that "laws which appear the same have not always the same effect" and are "sometimes very different." He also noted that "laws which seem contrary proceed sometimes from the same spirit," and he showed that accordingly they might have the same effect. Any law, he insisted, must be viewed as part of its own system.

In this and other ways, he may be said to have anticipated in some considerable measure the "sociology of law" and much of that "realism in comparative law" of which recently Brutau has brilliantly written.[136] However, to recur to what I noted earlier, Montesquieu's modern disciples have overlooked the unruly factors which determine how, in their application in litigation, laws are actually interpreted.

Undetected Puns

Lepaulle, echoing Montesquieu, said that the similarity in the laws of two countries ". . . may be due to the purest coincidence—no more significant than the double meaning of a pun."[137] On the other hand, the very adoption of a foreign legal provision may have been due to the fact that its words had a double (or multiple) meaning, a punning character.

A law or rule or principle, whether imported or domestic, often in its vagueness or ambiguity contains an undetected pun. Undetected puns in legal systems as elsewhere may stimulate growth, either good or bad. For a hidden pun is kin to a buried metaphor or an unrecognized fiction.[138] It has a latent ambiguity, and sometimes there are

135. 2 MONTESQUIEU, SPIRIT OF LAWS 156-62 (Nugent transl. 1949).

136. Brutau, *Realism in Comparative Law*, 3 AM. J. COMP. L. 42 (1954).

137. Lepaulle, *The Function of Comparative Law*, 35 HARV. L. REV. 838, 853 (1922): "An identical provision of the law of two countries may have wholly different moral backgrounds, may have been brought about by the interplay of wholly different forces, and hence the similarity may be due to the purest coincidence—no more significant than the double meaning of a pun."

138. For more extensive discussion of this theme, see Frank, *Some Tame Reflections on Some Wild Facts*, in VISION AND ACTION 56, 61-62, 71-72, 75 (1953); Larson v. Jo-Ann Cab Corp., 209 F.2d 929, 932 & nn.9-16 (2d Cir. 1954); *cf.* Brutau, *Realism in Comparative Law*, 3 AM. J. COMP. L. 42, 51, 53 (1954).

As to "fictions," see FRANK, LAW AND THE MODERN MIND 37-41, 166-67, 312-22 (1930); Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 513, 877 (1930); TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW 293-96, 383-99 (Read transl. 1922); Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 133-34 & n.3 (2d Cir. 1945); United Shipyards v. Hoey, 131 F.2d 525, 526-27 (2d Cir. 1942); Hammond-Knowlton v. United States, 121 F.2d 192, 199 (2d Cir. 1941).

valuable "resources of ambiguity" which the more naive semanticists do not perceive. Thus, often the ability of courts to adapt old legal rules to changed conditions is ". . . due to the fact that the same norm is used but with a changing meaning, the same verbal formulas with an apparent identity which is verbal only." [139]

The moral for students of "private international law" is crisply stated by Salenga, who writes "that the mere adoption of a uniform set of technical propositions does not secure uniformity in the treatment of conflict problems, for verbal symbols have been, and will be, used, by various—oftentimes the same—courts to mean different things, to lead to different ends. Hence, any constructive effort to achieve a common outlook on conflict problems must go beyond the mere employment of common symbols and technical problems." [140]

Proposals for a Unified Legal Language

It should also be obvious that a unified international legal language, a lawyers' Esperanto, will not create uniformity of decisions. Perhaps the movement among civilians for such a word-unification gets its impetus from the fact that in many continental countries no judge on a collegial court is allowed to publish a dissent, so that a false facade of unity is erected around decisions.

Moreover, world-wide word-unification, if it did succeed in achieving its sponsors' aims, might be pernicious by preventing desirable innovations. Orwell, in his terrifying book *1984,* depected such a language called "Newspeak." All "ambiguities and shades of meaning were purged out of" words. The "vocabulary grew smaller, instead of larger, every year. . . . A Newspeak word . . . was simply a staccato sound expressing one clearly understood concept." Horace Kallen, criticizing the movement for the "unification of the sciences" and its correlative "unified" language, warns that it has its roots in a dread of variety, novelty, in a "compensatory passion . . . for a One to Rule over the Many," which issues in the stifling harmonies of a closed system.[141]

"Reception" As Contagion

Carstens, a German graduate law student at Yale in 1949, came up with this interesting idea. He quoted Goethe's lines in *Faust,* which

139. Stone, *Fallacies of the Logical Form,* in MODERN INTERPRETATIONS OF LEGAL PHILOSOPHY 696, 721 (1947). See also FRANK, COURTS ON TRIAL 276-78 (1949); FRANK, LAW AND THE MODERN MIND 22-31, 57-61, 293 (1930); LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

140. SALONGA, PRIVATE INTERNATIONAL LAW 432 (1950).

141. Kallen, *The Meanings of Unity Among the Sciences,* in STRUCTURE, METHOD AND MEANING 225 (1951).

he translated thus: "All rights and laws are still transmitted like an eternal sickness of the race, from generation into generation fitted, and shifted round from place to place." He remarked that, if we look at "law" as a sickness, it is not only hereditary but contagious, and that the "reception" of a foreign law is the consequence of a sort of contagion. "The admiration for the supposedly better law," he wrote, "is so great that the receiving country does not realize its shortcomings in its native land."

This he said in speaking of the adoption on the continent of trial by jury in criminal cases. Indeed, there we have an instance of an infection which caused much anguish, but from which the continentals have now pretty well recovered. England too has almost got rid of that native "jury-disease," while we still are in its throes.

Codification

I turn to another instance of foreign contagion: the example of the civilians has recurrently incited some common-law lawyers to experiment with the codification of our laws. The experiments have seldom proved successful, partly because most of our judges and lawyers, trained as they were, have been unsympathetic, and partly because many American codifiers have fatuously thought that a code could and would produce legal certainty and get rid of all judicial legislation. The wise civilians know that no code can achieve those ends, that an effective code must seek simplicity and flexibility, not detailed, complete regulation.[142]

I was amused when, in 1953, an ardent sponsor of the new American Uniform Commercial Code, in an article answering a critic, used a locution which thirty years earlier would have been denounced as ungrammatical.[143] If our grammar had been codified three decades ago, he could not properly have written as he did. In 1868, an American lawyer sagely observed: "Who can tell in what net of legal principles we should be enmeshed, if the sages of the fourteenth, the seventeenth or the eighteenth century could have decided our probable cases in advance for us?" [144] You'll recall that Cardozo held that the Uniform Negotiable Instruments Law had stunted the growth, via changing customs, of one codified rule of commercial law.[145]

142. FRANK, LAW AND THE MODERN MIND 186-92, 310-11 (1930); FRANK, COURTS ON TRIAL 290-91 (1949).

143. Gilmore, *The Uniform Commercial Code,* 61 YALE L.J. 364, 365 (1952): "No one—certainly not I—pretends that. . . ."

144. Quoted by Hammond in his edition of LIEBER, HERMENEUTICS 32 n.9 (3d ed. 1880); see also FRANK, IF MEN WERE ANGELS 313-14 (1942).

145. Manhattan Co. v. Morgan, 242 N.Y. 38, 150 N.E. 594 (1926).

The civilians have learned how to work as well as how to write a code. I, for one, gravely doubt whether this country can adapt itself to codification except in some particular, restricted areas.

Codes and Stare Decisis

The fact that the civilians deal with codes has led some naive lawyers to believe that we basically differ from the civilians in our use of court decisions as precedents. Sophisticated lawyers know that difference has been much exaggerated.

I remember a prominent German lawyer who visited me in the 1920's when I was still in practice. He asked me to explain how we use our law books. I took him to our office library, showed him the court reports and the West Digest. "Good heavens," he asked scornfully, "You mean that, to answer a legal question, you must read so many court opinions?" He spoke as if we were utter barbarians. Guilefully, I enquired, "And how do you go about it?" "Why," he replied, "we just look at the Code." "Is that all?" "Well, we look too at the commentaries." "And never at any judicial decisions?" "Oh, yes, we do that, too."

But myths die hard. In 1954 a well-known American lawyer wrote that, in France, "judges decide the case before them and that alone, and on its own merits, and not on the authority of any prior or similar cause." [146] He went on to say that the French system is based primarily on logic, the American system on experience. This remark is akin to the recent howler of another learned American lawyer—that no continental legal system recognizes the "presumption of innocence." [147]

The Affirmative Contributions of Contrastive and Comparative Law

Eder has said, "The most valuable contribution that comparative studies can make is perhaps a negative one," that "comparative law teaches us, by the light of costly experience in other countries, what to avoid." [148]

I think that too pessimistic an attitude. It insufficiently recognizes the healthy, affirmative and educative worth of "contrastive law." It turns its back on the possibility and the desirability of not only

146. *The Two Great Systems of Law of the World,* address by Grossman, Harvard Club, New York City, April 30, 1954.

147. Wormser, The Law 137 (1949).

148. Eder, A Comparative Survey of Anglo-American and Latin-American Law 157 (1950).

revealing, but also of increasing, common international perspectives and agreements on this troubled planet, a gospel valiantly preached by McDougal and his aides.[149]

Here, international standardized contracts, cooperatively drafted, may in a humble way accomplish much by building some sort of an international "living law" and thus quietly creating part of the foundation of a world community. Such instruments to be sure, if imposed on those with weak bargaining power, may prove baneful, but may work beneficently when the parties have approximately equal economic strength. Let us not forget, however, that if those contracts get into litigation in the courts of divers countries, the decisions may not be uniform because of the differences in "fact-finding" methods, so that seeming uniformity may prove illusory.

An Unfinished Symphony

Let us beware of the dangerous infectious aspects of "receptions." Beware, above all, of the totalitarian evils of an excessive planetary uniformity which would efface desirable differences in cultural values and monopolistically obstruct local originalities, initiatives, inventive creations. "Harmonization," a "democratic world order," these words symbolize an imperative need. But there remains, and I'm sure McDougal and Northrop [150] agree, an ultimate wisdom in Horace Kallen's oft-repeated warning that true democracy calls for an orchestration of differing attitudes—in which some unresolved cacophonies play a part—not for a stifling regimented unity.[151] A democratic global symphony should always be an unfinished symphony.

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149. McDougal, *The Comparative Study of Law for Value Clarification as an Instrument of Democratic World Order,* 61 YALE L.J. 915 (1952); Bebr, Book Review, 64 YALE L.J. 954, 959 (1955); *cf.* SALONGA, PRIVATE INTERNATIONAL LAW 397, 434 (Supp. 1950); STONE, THE END TO BE SERVED BY COMPARATIVE LAW 325, 334-35 (1951).

150. NORTHROP, THE MEETING OF EAST AND WEST (1946).

151. KALLEN, THE EDUCATION OF FREE MEN 117 (1949); KALLEN, THE LIBERAL SPIRIT 190 (1948); *cf.* Kallen, *The Meanings of "Unity" Among the Sciences,* 6 PHIL. AND PHENOM. RESEARCH 493, 495-96, 523 (1946); ROSS, INTERNATIONAL LAW cc. 1 & 2 (1947).

APPENDIX

I. "FACT-DISCRETION" AND THE UPPER COURTS—SOME QUALIFICATIONS

Statements in the foregoing *re* "fact-discretion" need some qualifications:

1. When the conflicting testimony is oral, seldom can the upper court, on an appeal, revise or correct the trial court's discretion in "finding" facts, if there is substantial oral testimony to support the findings. For the upper court cannot observe the demeanor of the orally testifying witnesses, and therefore cannot disturb the trial court's credibility-evaluations.

When, however, the testimony is not oral, the upper court can reject the trial court's "findings" and make its own.[152] This is often the situation in civil law countries.

2. Even when the testimony is oral, the trial court's finding may be reviewable, to some extent, on appeal:

(a) It is reviewable, if based on oral testimony that is so patently ridiculous as to be incredible.[153]

(b) A trial court's finding may include two different kinds of fact:

(1) The trial court, if it believes a witness' oral statement of a fact, infers from that statement that it is a fact. Such an inference may be called a "testimonial inference." As such an inference involves an evaluation of the witness' credibility, based in part on his demeanor, usually a fact thus inferred will be accepted by an upper court.

(2) From facts ascertained through "testimonial inferences," a trial court will often infer the existence of other facts to which no one testified. A finding of such facts results from what may be called "derivative inferences." As the finding of any such fact does not involve the trial court's evaluation of any witness' demeanor, the upper court may reject a finding of such a fact, and substitute its own finding, via its own "derivative inferences." This it should always do if the trial court's derivative inferences are irrational. It may also do so—unless the fact-finder was a jury or perhaps an administrative agency—if other alternative equally rational derivative inferences are open.[154]

152. See, *e.g.*, Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950).

153. See, *e.g.*, Gindorff v. Prince, 189 F.2d 877 (9th Cir. 1951).

154. See, *e.g.*, American Tobacco Co. v. The Katingo Hadjipatera, 194 F.2d 449, 451 (2d Cir. 1951); *In re* Kellett Aircraft Corp., 186 F.2d 197, 200 (3d Cir. 1950); E. F. Drew & Co. v. Reinhard, 170 F.2d 679, 684 (2d Cir. 1948); Kuhn v. Princess

(c) An upper court may reject any finding of fact as irrelevant with reference to what it holds to be the correctly applicable legal rule.

(d) An upper court, in applying and thus interpreting the correctly applicable legal rule, may "interpret" the facts as "found" by the trial court. In this way, the facts as "found" and the legal rules interact.[155] This sort of interaction, however, should not be confused with a trial court's *gestalt*.[156]

II. Oral Testimony and "Demeanor Evidence"

Most Anglo-American judges and other legal thinkers believe (and I agree) that a trial court's observation of the demeanor of witnesses while orally testifying has much value in aiding the trial court to evaluate the witness' credibility. It must be confessed, however, that sometimes such "demeanor evidence" may be deceptive.[157]

Lie Detectors

Our courts generally are still sceptical about the efficacy of so-called lie-detectors. However, it is possible that such devices will improve sufficiently to overcome this scepticism.

But those devices will not do away with the effects of an honest witness' initial errors in observing the past events concerning which he testifies. Those devices also seem most unlikely to meet the difficulties caused by an honest witness' mistakes of memory or those due to his unconscious prejudices.

Lida of Thurn & Taxis, 119 F.2d 704, 705 (3d Cir. 1941); NLRB v. Universal Camera Corp., 190 F.2d 429 (2d Cir. 1951) (concurring opinion); Wabash Corp. v. Ross Electric Corp., 187 F.2d 577, 601-03 (2d Cir. 1951) (dissenting opinion); Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U.L. Rev. 546, 561-62, 583-84 (1951).

155. See, *e.g.*, Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U.L. Rev. 545, 586-90, 592-95 (1951); *cf.* Levi, An Introduction to Legal Reasoning (1949); Wurzel, *Methods of Juridical Thinking*, in The Science of Legal Method 286, 340-48 (1917); Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 Harv. L. Rev. 753 (1944).

156. See Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U.L. Rev. 545, 595 (1951).

157. See, *e.g.*, Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949).