*November, 1931*

# ARE JUDGES HUMAN?

## *Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings*

JEROME FRANK †

## I

What is a law school? An institution of learning where "law" is supposed to be taught, where "law" books are studied, where men are presumably trained to become "law"-yers who will practice "law" or to preside as judges in "law" courts where they will decide "law" suits.

Law schools have, then, a grave responsibility. How they define "law" will unavoidably affect the thinking of future lawyers and judges. If, as they have done for years, the schools define law as consisting, exclusively or primarily, of (so-called) legal rules, the law students—the future lawyers and judges—when they are thinking about law, will tend to confine their attention to those rules. For they come to law school to study law and, if law consists of rules (so-called) and nothing else, why bother much about anything but those rules?

Years ago America's greatest lawyer, Mr. Justice Holmes, taught law. He warned his fellow teachers of the dangers of so narrow a definition.

"If you want to know the law and nothing else," he wrote in 1897,[1] "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict. . . . What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction of principles of ethics or admitted axioms or what not. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by law."

Holmes and his friend the bad man, to anyone who listened to them intelligently, put an end to the old fogey belief that law is rules and that rules are law. Holmes told lawyers and law teachers that, if they would go into court and look at what was going on, they would see that the primary

† Ph. B., 1914, J. D., 1912, University of Chicago; member of the New York and Illinois bars; author, LAW AND THE MODERN MIND (1930), and contributor to legal periodicals.

[1] Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457; COLLECTED LEGAL PAPERS (1920) 167, 171, 172-173. See also "THE COMMON LAW" (1881) 317, 214.

business of courts was to render specific decisions (*i. e.,* specific judgments, orders and decrees); that law meant such specific decisions in concrete cases, not so-called legal rules and principles. "A legal duty so-called," he said, "is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by a judgment of the court; and so of a legal right."

Holmes suggested, in effect, the creation of a new jurisprudence based on assumptions which flatly contradicted some of the basic assumptions of the time-honored jurisprudence.

But Holmes' revolutionary suggestion was little heeded until recently; it was ignored for years—or at any rate, its full import was virtually overlooked.

True, now and then, in the first two decades of this century, law teachers made pointed references to elements of the judicial process other than the rules. Notably Dean Pound was among the leaders of those who combated the naïve notion that the work of lawyers and judges ends with legal rules. But he adopted the Holmes' idea in a strange way. While brilliantly elaborating it in some limited directions, he nevertheless repressed it, obstructed its full growth. He diluted it, mingled it with the watery substance of Holmes' predecessors. Pound has done magnificent work of permanent value. But he mangled his work because he compromised the heritage from Holmes, because he refused to recognize its essentially revolutionary character, its sharp break with the past; because he tried to cover up the true nature of that break. Pound was the right wing of the Holmes' movement. It was in the highest degree unfortunate that the first vastly influential teacher to take over Holmes' insight should thus have warped it. It might almost be said that the Holmes' point of view would have been less retarded today in its consequences had Pound opposed it. For his mode of partially adopting it was to confuse and mislead those whom he influenced. And he deservedly influenced many, since, for years, he was the amazingly industrious, ingenious, erudite key-man in American legal education. Indeed, his hold on teachers of law is still so potent that anyone who hopes to bring about any fundamental changes in legal pedagogy and legal thinking in this country must cope with Pound and his disciples, must point out Pound's errors, separate his wisdom from his mistakes—*rescue Pound's lasting contributions from Pound and his uncritical adulators.*

Pound's attitude was confusing and baffling primarily because he adhered to the traditional conception of law and by his learning and prestige strengthened it. The strange sight was presented of a follower of Holmes giving aid and comfort to the enemy. For in one of Pound's earliest and most vigorous writings he said that, "Without entangling ourselves in the discussion as to the definition of law, we may say that *laws are general*

*rules* recognized in the administration of justice." [2] Some twelve years later he wrote that *"the fundamental idea of law is that of a rule or principle underlying a series of decisions"* and described "the three steps in the decisions of causes" as *"finding* of *rules, interpretation* of *rules,* and *application* to particular controversies of the *rules* when found and interpreted." And still later he stated, "Typically, judicial treatment of a controversy is a measuring of it by rule in order to reach a universal solution for a class of causes of which the cause in hand is but an illustration." [3] Such treatment of lawsuits be called "justice according to law."

To be sure, for all that Pound fenced off "law" and restricted it to rules and the like, he always maintained that there were other elements of a non-rule character in the judicial administration of justice. He said that not only is there "justice according to law"; there is also "justice without law." Such justice without law, he declared, is encountered "where rules of law are impossible or inexpedient" or where "the will of the judge" is "free from the constraint of acknowledged *rules* of action or *principles* of decision." And "justice without law" exists in all times and climes. For, he wrote, just as there is a "legal" element (or "technical" element) in judicial administration, so there is a "non-legal" or "anti-legal" element (which Pound sometimes refers to as the "discretionary" or "administrative" element). "Everywhere we find" these "two antagonistic ideas at work in the administration of justice." Indeed, Pound's most brilliant efforts have been devoted to elaborating the point that, in dealing with certain restricted subject-matters,[4] judicial justice must and does include not only "law" but also the "anti-legal"; *i. e.,* "discretion," "administration" and "individualization of controversies."

But unquestionably he darkened his own counsel. If ever a man hid his light under a bushel it was Pound. He was like a man walking backwards up a steep hill. For if "discretion" and "individualization" were not law, if law was "typically" the use of rules, then one needed to apologize for the consideration by *law* students and *law*-yers of what is "anti-legal" or "non-legal."

To label something "anti-legal" was surely not the way to make it congenial to the men of law. It was to damn it in the eyes of the hard-headed lawyer, the hard-headed law student. To them Pound was a poor salesman.

---

[2] Throughout this paper the italics in quotations are inserted by the present writer, except where otherwise noted.

[3] In Appendix to the present Article will be found a more extended summary of Pound's writings on this subject.

*The criticism of Pound in this paper is, of course, not to be taken as any lack of recognition of other aspects of Pound's invaluable work as a legal thinker.*

[4] How Pound unwisely and disastrously denied the application of "discretion" and "individualization" to huge and important segments of the work of the courts will be discussed below

"That other stuff" of which Pound spoke was not law. Pound not only admitted as much, he proclaimed it. Didn't he say it was not "law"? "That other stuff" was "sociological jurisprudence." The lawyer on the make was not interested. Let the "reformers" have it, they said to themselves, those interested in "up-lift," the sociologists, the preachers. To be sure, Pound was a brilliant man, somebody to listen to and applaud at bar associations. And a splendid teacher—when he stuck to "law" (*i. e.*, legal rules). But Pound's studies in what he designated the anti-legal had no place in the daily task of the hard working lawyer.

So Pound became his own most insidious foe. He could write in vain that "morals" played a part as well as "law" in the scheme of things judicial, that the "anti-legal" consideration of certain unique elements of some kind of lawsuits could not be effectively suppressed and should be given candid consideration. All such was not law. "For he himself has said it": *discretion was not the better part of law; it was no part of law at all.*

By and large, then, Pound nullified his own best work. His older-fashioned colleagues were not disturbed by his novelties. They were there to teach law. Let Pound teach not-law if he wanted: the profession would be molded by law teachers, not by expounders of the non-legal.

And in this manner Pound shunted off into futility Holmes' high-powered wisdom. Pound's ablest, most scholarly, most subtle disciple is Dickinson. He has carried on in several departments the views of his master. And he has taken the good with the bad. Pound's definition of law he has made his own. Industriously he has exploited the notion that whatever isn't rules isn't law. In an erudite book [5] and an erudite article [6] he has rung the changes on that theme. Always, he maintains, in the administration of justice there must be observed the distinction between "law" (which consists of "rules") and all else. And like Pound he labels not-law "discretion"—although sometimes he calls it "policy". The term "law", he writes,[7] must not "be so broadened as to include processes of a necessarily discretionary character; a distinction *must* be maintained between rules and the discretion which makes and applies rules . . ."

Note the "must". What does "must" mean? It means, so says the dictionary, "to be essential, to be necessitated, to be compelled." If you "must", you "have to". In other words, according to Dickinson, the distinction between "law" (rules) and not-law (or "discretion") is not voluntary. It is essential, it is necessitated, it is compelled. One "has to" make

---

[5] DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927).

[6] Dickinson, *The Law Behind Law* (1929) 29 COL. L. REV. 114, 284.
*Nothing in the present article is to be understood as a denial of the genuine merit of much of Dickinson's writings.*

[7] *Ibid.* 319.

that distinction. It is, it appears, part of the very nature of things that law consists exclusively of so-called legal rules, world without end.

Holmes saw no such indelible distinction. Recently his teachings have had more direct effect on others than it did on Pound and Dickinson. And some of Holmes' more recent disciples have accordingly raised the following objections to the Pound-Dickinson schema: (1) In the actual thinking of actual lawyers and actual judges there is usually no such compartmenting into rules and not-rules. (2) Such a division may sometimes be useful, but is often harmful to clear thinking about the judicial process. (3) Even if (contrary to fact) rules and not-rules were always separated or were always, for convenience, treated as distinct, it would be a grave error to lend undue dignity to the rules (and unwarrantably to diminish the importance and significance of the other factors in the judicial process) by appropriating "law" solely to the rules and shutting all else out of that important province.

As the writer has said elsewhere: [8]

> "Dickinson attempts to support his position with a sort of *reductio ad absurdum* argument directed against those who stress the ultimate and paramount importance of specific decisions. If, he says in effect, you do not agree that law consists of rules, then you are denying the existence of such rules. And such a denial lands you in juristic nihilism or pyrrhonism. In other words, Dickinson contends that, unless you agree that law is nothing more or less than rules, you must admit 'that law in any true sense becomes an impossibility.' . . . The basic flaw in this contention—and here we shall borrow from Dickinson's own language—is traceable to an identification of law with but one of the materials which may and often do enter into the making of law; *i. e.*, the making of decisions, which identification seems to be the result of an exaggerated legalism which cannot conceive of the ingredients of law as other than law itself, and which thus insists on regarding rules as fully law instead of looking on them as merely one of the phenomena which sometimes powerfully influence the making of law and sometimes aid in predicting what law will be made. In short, Dickinson claims that law consists of one of the numerous factors which affect courts when making law; *i. e.*, in reaching decisions."
>
> "No one can know in advance what a judge will believe to be the 'facts' of a case. It follows that a lawyer's opinion as to the law relating to a given set of facts is a guess as to (1) what a judge thereafter will guess were the facts and (2) what that judge will consider to be the proper decision on the basis of that judge's guess as to the facts. Even that is too artificial a statement. *The judge, in arriving at his hunch, does not nicely separate his belief as to the 'facts' from his conclusion as to the 'law';* his general hunch is more integral and composite, and affects his report—both to himself and to the public—concerning the facts."

[8] FRANK, LAW AND THE MODERN MIND (1930) 116, 141, 269.

"Pound . . . for all his sound wisdom as to the great worth of the use by judges of equity and discretion, holds to the old tradition of so labelling discretion that it appears as something foreign to law, thus confirming the conventional impression that discretion is alien and opposed to law.

"Now it may be desirable for some purposes and at some times to use terminology which will make it appear that there is a sharp cleavage between something which we call law and something which we call discretion; to appear to break up what goes on in the courts into two separate elements. But words have an emotive value and to say that a part of what a judge does is not law or 'non-legal' or 'anti-legal' is to create the impression that that part of the judge's conduct is tinged with impropriety.

"The truth is, of course, that *what Pound calls law and what he calls non-legal cannot be separated. They are so thoroughly intermingled that it is impossible to divide them;* nothing but false attitudes can be engendered by labelling either of these components as if it were not a necessary, ever-acting, and therefore desirable part of the processes of law. It is as if one were to treat thirst or hunger, or sexual desire, as not proper. Such treatment of human appetites has a long history—a history which should serve as a warning to those who continue to deal in like spirit with legal processes.

"Moreover, when, more or less detachedly, one observes what goes on in court one is led rather to say that, *if there must be a better or a worse, a more or less important aspect of legal processes, then what Pound calls the non-legal is the dominant, the more important, the more truly legal, for it is found at the very core of the whole business;* as against . . . Pound it would be wiser to go to the other extreme and to say that the law is at its best when the judges are wisely and consciously exercising their discretion, their power to individualize cases." [9]

Dickinson has recently [10] discussed these objections. At first glance he seems to have recanted: he now concedes that, in the actual thinking of lawyers and judges, "rules" and "discretion" are not separable entities. They are, he now says, "but moments in a single decisional process." Also, he has dropped the "must": the lines of distinction between rules and discretion are no longer considered as hard and fast; no longer depicted as God-given. The differentiation is not now viewed as compulsory or necessary; it is now seen merely as "convenient." The legal rules "can be intellectually marked off for discussion." [11] "Can be," you see; not "must be" as in 1929.

But softly. Turn the page and the old fallacy reappears. "It is submitted," he writes, "that the sound way to anticipate a future decision is to attempt to put oneself in the place of the judge or judges who will

[9] The writer's working definition of "law" will be noted below and contrasted with the Pound-Dickinson definition.

[10] In 1931. See Dickinson, *Legal Rules* (1931) 79 U. OF PA. L. REV. 833, 843.

[11] *Ibid.* 843.

actually make the decision." [12] The present writer was elated when he read that sentence; having written a book [13] devoted in no small part to emphasizing that very notion, he said to himself, "A new ally. Now we shall, of course, be told by Dickinson that decision-making is a highly complicated psychological process, that there is little evidence as to how large a part the 'rules' play in that process, and that only a rash man will venture to predict most specific decisions, for only a rash man will assume that he 'can put himself in the place of the judge or judges who will actually make the decision.' Psychology is years away from telling us how to put ourselves in the mental shoes of the other fellow."

But, alas, no such luck. Dickinson returns to his old schema. Forgotten what he said on a previous page about the "single decisional process" and the fact that he there argued for a division between "rules" and "discretion" on the score of "convenience". Once again Pound's spell asserts itself. The inherently independent rules are once more acclaimed. The judge, when about to decide a case, writes Dickinson, "will find himself confronted with one or more legal rules applicable, or conceivably applicable, to the case before him." And, adds Dickinson, "Only by thus visualizing the judge as he stands in the presence of rules which help him to decide, can an outsider undertake to make accurate forecast of what decision will be reached." And elsewhere in the same article he says, "Hence in predicting how a case will be decided, it is not merely pertinent to know the social, economic, political, psychological, physiological and other pressures operating unconsciously on the person of the deciding magistrate, but also *to know the rule of decision,* if any, which exists for a case of the kind in question; for, *if this be known, a fairly safe prediction may often be hazarded as to the judge's decisional behavior* without knowledge at all of the more esoteric factors above enumerated." [14]

Does it work, that method? Is that the way judges think? By "visualizing the judge as he stands in the presence of rules", does one find it easy "to make accurate forecast" of most decisions? If you know the rule of decision and nothing more, can you make "a fairly safe prediction" as to the judge's decisional behavior? One fears not. One fears also that the law student who believes that fable will be misled to his detriment. He will entertain false ideas of how decisions come into being. He will make for himself an over-simplified picture of the judicial process.[15]

He will ignore the immense importance, the inescapable operation, of the personal element in court justice. As practitioner he will be needlessly baffled by coping with it. He will think it absent, or all but absent. When

[12] *Ibid.* 844.
[13] FRANK, LAW AND THE MODERN MIND (1930).
[14] *Supra* note 10, at 839.
[15] See Appendix to the present article.

it appears he will resent it, treat it as improper, as abnormal, as avoidable. Or he will accept it with chagrin, with distaste; cynically, as something poisonous, debasing, bordering on the corrupt. If he becomes a judge, he will try to think as Dickinson portrays the judge thinking; he will pretend to think in that artificial way, pretend to others—and worst of all pretend to himself. He will be ashamed of the way his mind works humanly despite his efforts. He will waste precious hours attempting to think unhumanly, Dickinsonianly.

And if someone happens to say in his presence that of course judges are incurably human and that their background and personality affect all their thinking and therefore their decisions, the Dickinsonian will pronounce, with Pound and Dickinson, the fatal words, "You are seeking a reversion to Cadi or oriental justice!" [16]

## II

The phrases "Cadi justice" or "oriental justice" are verbal brickbats. Those who fling them do so as if they were launching the ultimate in devastating missiles.

To shift the metaphor, those words seem to those who use them to be the most powerful of curses. They utter those words in awe-stricken tones. The curse is assumed to be so mystically effective that the cursee is expected either to disappear or to remain permanently speechless.

The writer confesses that the manner of uttering this curse used to terrify him and that it is only recently that he dared to consider the matter rather than the manner.

He has come to wonder whether Pound and Dickinson who talk so glibly of the Cadi have ever seriously studied the administration of justice by Cadis. The writer admits he knows little about the subject, but what little he knows goes to show that rules and the like play much the same part in the theory of Mohammedan justice as in our own; that no more than in France, Germany, England or the United States, is the judge in Mohammedan countries supposed to decide cases according to his passing whim or the temporary state of his digestion.[17] A brief statement of the theory of the Cadi's function is as follows:

> "CADI (qādī), a judge in a Muhammadan court, in which decisions are rendered on the basis of the canon law of Islam (sharī'a).

[16] Dickinson, *op. cit. supra* note 10, at 845 and n. 32; Pound, *The Decadence of Equity* (1905) 5 COL. L. REV. 20, 21; POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 155; POUND, THE SPIRIT OF THE COMMON LAW (1921) 56; Pound, *The Theory of Judicial Decisions* (1923) 36 HARV. L. REV. 641, 661; Pound, *Justice According to Law* (1913) 13 COL. L. REV. 696, 697.

[17] See Pound's reference (Pound, *The Decadence of Equity* (1905) 5 COL. L. REV. 20, 21) to "the oriental Cadi administering justice at the city gate by the light of nature tempered by the state of his digestion."

> It is a general duty, according to canon law, upon a Muslim community to judge legal disputes on this basis, and it is an individual duty upon the ruler of the community to appoint a cadi to act for the community. According to Shafī-ite law, such a cadi must be a male, free, adult, Muslim, intelligent, of unassailed character, able to see, hear and write, learned in the Qur'ān, the traditions, the Agreement, the differences of the legal schools, acquainted with Arabic grammar and the exegesis of the Qur-ān. He must not sit in a mosque, except under necessity, but in some open, accessible place. He must maintain a strictly impartial attitude of body and mind, accept no presents from the people of his district, and render judgment only when he is in a normal condition mentally and physically. He may not engage in any business. On some of these points the codes differ, and the whole is to be regarded as the ideal qualification, built up theoretically by the canonists." [18]

When Dickinson speaks of Cadi justice he does not then really mean Cadi justice. What he means is this: He deplores the existence of the personal element in the administration of justice by our courts. He concedes that it exists—but in small measure. He grants that it has a proper place—but only in certain kinds of cases, for he maintains, with Pound, that, generally speaking, in the field of commercial and property law, it is not operative except to a trifling extent and to that extent is an unmitigated evil.[19] Anyone who suggests that it is an inherent element in court justice in the decisions of all kinds of cases—commercial and property cases as well as others—is therefore an evil doer.

The point is that Dickinson does not want to inquire whether the personal element looms large in judicial justice. He dislikes, he fears, what he calls Cadi or oriental justice. He does not want to investigate to determine whether most court justice is of that kind. He wants to avoid such investigation by mere categorical denial.

The Holmesians disagree with Dickinson. They say:

> "The personal element is unavoidable in judicial decisions. Being unavoidable, it should be recognized as such and not treated as negligible and unimportant. It is childish, unwise and dangerous here as in all important human affairs to ignore unavoidables and to pretend that they do not exist. Since the personal element exists, the sensible course is to cope with it and, so far as possible, perfect it. Indeed, like many unavoidables, bravely and intelligibly faced, it can be made to yield some advantages."

How does Dickinson construe that thesis? Thus: those who entertain that view want, he says, to change our system. They foolishly seek to

---

[18] 4 ENCYCLOPEDIA BRITANNICA (14th ed. 1929) 512.
[19] Of this, more below.

augment the personal element in justice. They want to increase the arbitrary, capricious powers of the individual judge. Our legal system is devised, he says, so as to get judicial "decisions made in a way which will somewhat restrict the purely personal and incalculable reactions of individual judges by causing them to *give controlling influence* to considerations which have to a certain extent been standardized for all judges." [20] These dangerous Holmesians want to abandon those safeguards against waywardness in judges. They want judges to cease giving "controlling influence to considerations which have to a certain extent been standardized for all judges."

You see the difficulty. To some of Holmes' followers the traditional system appears not to work as it purports to work. The conventional description of the judicial system (to which Dickinson subscribes) is, to them, misdescription. They question whether it is true that the "standardized considerations" to which Dickinson refers have a "controlling influence" on our judges. They do not say that such considerations have no effect. Nor do they say that such considerations *ought* not to be controlling, or that they *don't want* such considerations to control. They say simply that those considerations do not, to any large extent, control.

Surely there is a difference between saying, "The earth moves" and saying, "I wish the earth would move" or "I'm delighted that the earth moves." To reflect that "John Smith is mortal and will die some day" is not the equivalent of urging "John Smith should be killed", or of stating, "I'm glad to say that one of these days John Smith's life will come to an end." [21] A statement of an observed fact (whether it be a pleasant or unpleasant fact) is not a statement of preferences.

Dickinson has, unconsciously, mistaken his wishes for the facts. Wherefore, he assumes that others do likewise. When he says that legal rules have a "controlling influence" on judges, he is not reporting a fact but is expressing his views of the desirable. His "is" means "I wish." Accordingly, when a Holmesian says "is" Dickinson assumes that "I wish" can be substituted. So that when a Holmesian writes that there is an unavoidable personal element in court-house justice, Dickinson cries, "He is expressing his wishes. He wants to restore Cadi justice." Dickinson fails to notice that when his critics say "is" they mean "is." He confuses the existent with the desirable.[22]

---

[20] *Supra* note 10, at 845.

[21] It is important to note that a reference to John Smith's mortality may induce him to regard his health and perhaps increase his longevity.

[22] It is curious to see Professor Morris R. Cohen doing the same in some of his recent reactions to the writings of the legal "sceptics". (See (1931) 31 COL. L. REV. 352; THE NATION, September 9, 1931, at 260.) Thus, by way of criticism of descriptive statements similar to those contained in the present article, Professor Cohen says, "Uncontrolled discretion of judges *would make modern life unbearable.*" That is, of course, no criticism at all of an alleged description of existing facts. The only proper criticism of an alleged

Dickinson has arrived at mental peace by climbing what James called the "faith ladder," the rungs of which are: What I want *might* conceivably be true. It *may* be true. It *ought* to be true. It *must* be true. It *is* true. Dickinson objects to having the faith ladder kicked out from under him.[23]

His attitude is reminiscent of Lansing's remark that Woodrow Wilson resented the restraints contained in the Constitution on the power of the Chief Executive and transferred his animosity at those restraints from the provisions of that instrument to the person who called his attention to them. Or of Frederick the Great's interesting physician, la Mettrie, who urged the development of science based upon observation. "Methinks," he wrote, "I hear a peripatetic, who says to me, 'You must not credit the experiments of Torricelli, for if we believe them, we banish the horror of a vacuum, and then what a shocking philosophy shall we have'."

The true question, then, is not whether we should "revert" to what Dickinson calls Cadi justice, but whether (a) we have ever abandoned it and (b) we can ever pass beyond it.

The writer believes the evidence is overwhelming that our present judicial system is a disguised system of so-called Cadi justice. That evidence has in part been summarized elsewhere [24] and will not be narrated here beyond the following brief mention:

(1) *The jury system is the "Cadi" system at its maximum. We use twelve uninstructed, haphazardly selected "Cadis" instead of one.* Confronted, as we are daily, with what juries do, it is little short of nonsense to say, as Dickinson does, that men in our country are not "satisfied to entrust themselves to the purely discretionary authority of an oriental Cadi" or that we have worked out a method of "getting decisions made in a way which will somewhat restrict the purely personal and incalculable reactions" of the individuals who decide cases "by causing them to give controlling influence to considerations which to a certain extent have been standardized."

The writer happens to disbelieve thoroughly in that hydra-headed "Cadi", the jury. That kind of capricious, unregulated, discretionary

---

description is a denial of its factual accuracy. It is plain that Professor Cohen does not want to meet that issue of fact, but prefers to deal with *a description of present circumstances* as if it were a *program for the future.* In doing so he joins Dickinson in confounding an "is" with a "should be" or a "would be". See *infra,* note 46.

It is interesting to note that, when Vesalius began to dissect and describe the human body and Galileo began to inspect and describe the stars, their descriptions were assailed as "unbearable". Holmes, as the writer elsewhere, is the lawyers' Vesalius, the lawyers' Galileo. See *infra,* note 72 for Cohen's criticism of Holmes.

[23] "The history of human thought," writes Hogben (THE NATURE OF LIVING MATTER (1931) 250), "again and again proves that people will always fall back on the language of magic, when the language of science provides them with no vocabulary in which to discuss things that interest them."

[24] *Cf.* FRANK, *op. cit. supra* note 13, at 105-116, 148-153; Yntema, *The Hornbook Method and the Conflict of Laws* (1927) 37 Yale L. J. 468, 480; Hutcheson, *The Judgment Intuitive: The Function of the Hunch in Judicial Decisions* (1928) 14 CORN. L. Q. 274; GREEN, JUDGE AND JURY (1930); Powell, *The Judiciality of Minimum-Wage Legislation* (1923) 37 HARV. L. REV. 545; Arnold, *Criminal Attempts* (1930) 40 Yale L. J. 53.

authority he deems indefensible;[25] but he will not substitute his wishes for his eyesight and deny the existence of what he considers deplorable.

(2) To decide a dispute involves determining what the dispute is about—*i. e.*, "finding the facts." Even if (a) all cases were tried by a judge without a jury and (b) all the so-called legal rules were permanently and rigidly fixed and (c) all judges always first carefully and conscientiously "found the facts" and, only after "finding the facts," applied the rules—still the determination of "the facts" of almost any case involving conflicting testimony would necessitate the making of many inferences from testimony. And those inferences obviously vary with the amount and nature of the attention which the particular judge devotes to the testimony. The judge is a fallible and variable witness of the witnesses.[26] Judge Keen and Judge Sloth will not hear and see the "facts" the same way. One doubts whether Dickinson can point out how our or any other judicial system has devised any standardized "controlling influences" to restrict "the purely personal and incalculable reactions of individual judges" when listening to and watching witnesses. *The judge as witness-audience, as "fact-finder," is a "Cadi".*

Even when the testimony is entirely committed to writing before it is submitted to the judge, his response is often "Cadi-like". *United States v. Shipp*,[27] put before the Supreme Court a pure question of fact. An original information in contempt was filed with the Supreme Court charging that the defendant, a sheriff, while holding a prisoner in custody under the jurisdiction of the Supreme Court, had aided and abetted a mob which lynched the prisoner. The Supreme Court appointed a commissioner to take and report the testimony without comments. This he did. On the basis of this testimony thus put before them in writing, the decisions of the members of the court split five to three. They all agreed on the simple question of law. The majority of five said: *"Only one conclusion can be drawn from these facts, all of which are clearly established by the evidence*—Shipp not only made the work of the mob easy, but in effect aided and abetted it." The other three justices concurred in the dissent which read:

> "A careful consideration of the case leaves me with *the conviction* that there is *not one particle of evidence* that any conspiracy had ever been entered into or existed on the part of the sheriff, as charged against him. It is not alone that the evidence preponderates in his favor, but it seems to me there is *no material evidence* against him, certainly none *that rises higher than the merest possible suspicion, founded upon evidence of facts which are in themselves wholly inconclusive,* and just as consistent with innocence as with guilt."

[25] Except in criminal cases. *Cf.* FRANK, *op. cit. supra* note 13, at 176-177, note.

[26] *Cf.* FRANK, *ibid.* 109-110.

[27] 214 U. S. 386, 29 Sup. Ct. 637 (1908).

(3) The great majority of cases conclude with a decision of a lower court from which no appeal is taken. In most of such cases the judge writes no opinion, makes no "finding of facts," and announces nothing as to the "rules of law" he has "applied." His judgment is laconic. Whether he has disregarded certain "rules", been guilty of a "perversion of law" or distorted "the facts" so as "to evade the necessity of applying a rule to a case to which it would be otherwise applicable"—who can tell? [28]

There is no verified basis for the assumption that these laconic judicial judgments differ from the judgments of ordinary mortals (in business or in other professions) when called on hourly to decide questions of all kinds. Knowing that judges are human, it is fair to say that the burden of proof is on those who assert that the average lower court judge, in laconically deciding a case, first carefully isolates his "findings of fact" and then carefully ponders the available rules.

Because upper court decisions are based upon printed records (which the judges presumably read at their leisure, free from the distracting sounds and sights of the trial court room) and because such decisions are accompanied by opinions which purport succinctly to state "the facts" and purport to apply thereto, in most cases, stereotyped "rules of law," it is possible to argue plausibly that the personal element is negligible in the work of appellate courts. The writer believes that such a notion is mistaken; he asks leave to incorporate by reference what he has said elsewhere on that subject [29] Suffice it to say here that internal evidence in the opinions and the revelations of outspoken judges go to show that Cadi justice creeps in to the work of upper courts: (a) through the determination of the "facts"; (b) because the courts often decide first and then arrange their "facts" and "rules" so as to justify the decision previously arrived at; (c) through the vagueness and multiplicity of the rules. One who patiently observes will learn the unguessability of even upper court decisions and perceive that they are often functions of the chance composition of the bench.[30]

If a man is sufficiently gullible and if substantially all he knows about the judicial process is learned from a study of the *opinions of upper courts,* you can stifle his nascent scepticism about the supreme importance of legal rules. But in most lower court cases the judgments are entered minus opinions. It is therefore less easy to persuade the trial lawyer that decisions; (*i. e.,* judgments, orders and decrees) are not likely to vary with the judges. The average laconic judgment of the trial court is patently a composite undifferentiated response to the events of the trial, for, ordinarily, the trial judge does not bother to report his reactions to the evidence in

[28] *Cf.* Dickinson, *op. cit. supra* note 10, at 855.
[29] *Cf.* FRANK, *op. cit. supra* note 13, pt. one, chapters XII, XIII, XIV.
[30] Powell, *op. cit. supra* note 24.

terms of "rules" and "facts". As a witness of the witnesses he is all too clearly a transmitter of "purely personal and incalculable reactions." The "Cadi" in the trial judge is far more difficult to conceal than the "Cadi" in the more aloof and more vocal appellate judge. So that scepticism as to the power of the rules to suppress the "Cadi" is more likely to be rife among those who have tried cases in lower courts and there learned at first hand—rather than through mere reading of upper court opinions—the way in which cases are decided. It is no accident that the left wing of the recent sceptical movement consists of those who have had that first-hand experience.[31]

It is, accordingly, with astonishment that one reads Dickinson's suggestion [32] that the "sceptical movement" is made up of "teachers in American law schools" who "are concerned exclusively with the decisions of appellate courts," and that the doubts about the effectiveness of legal rules derives from preoccupation with "creative precedents" evolved by upper courts when faced with novel cases.[33]

---

[31] Green, Hutcheson and Frank have far less belief in the possibility of diminishing the personal element in the judge than Oliphant or Llewellyn. See, for instance, Llewellyn's criticism of Frank, Llewellyn, *Law and the Modern Mind: A Symposium* (1931) 31 COL. L. REV. 82, and Frank's criticism of Llewellyn, Book Review (1930) 40 YALE L. J. 1120, 1123-1124. Green was an active trial lawyer for ten years before he taught law; Hutcheson was until recently a trial judge; Frank has practised for nineteen years, some ten of which involved considerable active trial experience.

[32] The suggestion was apparently originated by Professor Bohlen in his thoughtful review in (1931) 79 U. OF PA. L. REV. 822. See Dickinson, *op. cit. supra* note 10, at 834 (and note 4) and 846.

[33] Here, too, one may register surprise at Dickinson's notion that current legal scepticism is an off-shoot of Einstein's disturbance of accepted theories in physics. Holmes is the inspiration of most contemporary "progressive jurists" and Holmes' provocative writings antedate Einstein by many years. Note in this connection Frankfurter's reference to the close intimacy of Holmes as a young man with the founders of Pragmatism, Peirce and James, and recall that, as James said, Pragmatism is a new name for some old ways of thinking—ways of thinking that go back to some of the Greek philosophers. See Frankfurter, *The Early Writings of O. W. Holmes Jr.* (1931) 44 HARV. L. REV. 717, 724.

The writings of such as Pearson, Vaihinger, and Poincaré were known in this country long before Einstein's work was known outside of the world of the mathematicians and physicists. The same is true of the writings of Dewey, who has had an immense influence on Walter Wheeler Cook and the many legal thinkers whom Cook has affected. Also, Cook had, as a young man, studied with Mach, whose point of view antedated and influenced Einstein. Bingham's contributions, published in 1912 and 1914 saw the light before the legal profession knew Einstein was born.

Dickinson (848) explains the "sceptical school's" rejection of authoritative "legal rules" as due to the rejection of mere authority in scientific thinking. He then goes on to read the "sceptics" (apparently including the writer, whom he cites) a lecture the point of which is that "conclusions reached in connection with scientific thinking have been unreflectingly transferred and applied to scientific thinking." The writer wishes to object to the injustice of Dickinson's composite photograph. For the writer's book, cited by Dickinson, contains a chapter devoted to expressing his disbelief in the notion "that the way out of the legal Dark Ages is through acquainting law students with the logic of the natural sciences." (See LAW AND THE MODERN MIND, at 93). This chapter Dickinson ignores. And those portions of that book which he cites he misinterprets: It is not there argued that rules of law can become like rules of physics. On the contrary, that book argues at some length that the dream of complete certainty has been abandoned even in physics, that the sophisticated scientist employs such a notion only as a working "fiction", and that it is therefore singularly unwise to assume that lawyers can attain anything like certainty in their chosen field where quantitative exactness is inherently impossible.

The writer admits freely, then, that he believes our judicial system is permeated through and through with Cadi justice. He sees no way to avoid it. He happens to be a comfort-loving soul who—especially in connection with cases involving legal documents he has prepared—would often like a world in which "authoritative rules" would frequently be automatically applied.[34] But he has found that world as unreal as angels or dragons. He deems it wise to learn the facts of life, not to shun them. He advocates no "reversion to Cadi justice." To him that program is as meaningless as a "reversion to mortality" or a "return to breathing." He does say, "In every legal system 'Cadi' justice is active. Ours is a system where it is active but concealed. The concealment prevents our understanding our system. Let us become aware of its true nature. In that way we can use it more efficiently and, if possible, improve it."

## III

1. Pound, as above noted, despite his narrow traditional definition of law, has always insisted untraditionally that the judicial process involves what he calls the "anti-legal" or "discretion."

But even there he has remained within the bounds of the traditional. It has long been a tenet of the conventional *stare decisis* doctrine that while courts may, when justice sufficiently requires, deviate from settled precedents, they must seldom, if ever, abandon a "rule of property" or a "rule of commercial law." [35] Pound seized that old tenet. He strengthened and refurbished it. According to Pound, in legal dealings with property or commercial transactions "discretion" is wholly out of place. There rules alone are considered by the courts and are there mechanically applied.[36] On that thesis he has been repeatedly insistent.

Which presumably means that if the bulk of your practice as lawyer involves property and commercial transactions, you need concern yourself solely with rules. Discretion and those aspects of the "anti-legal" of which Pound often speaks with eloquence, are, according to Pound's own statements, of no significance to you.

The consequence is obvious. The influential men in the profession today are the lawyers who win success in the large cities. Virtually all their time is devoted to the legal aspects of commercial enterprises. Pound, in effect, tells them that in their work orthodoxy is unalterably regnant. There, he says, law means fixed rules pure and simple.

---

[34] Although he confesses that such a legal world would be one full of injustice and impossible to square with the demands of modern society. See FRANK, *op. cit. supra* note 13, at 6-7, 10, 251-252, 190, 284, 293 n. 30.

[35] See cases cited in BLACK, LAW OF JUDICIAL PRECEDENTS (1912) 237-262, 209-210, and 15 C. J. 947 (1918).

[36] See Appendix to the present paper.

So that Pound obscured his own program for enlarging the lawyer's conscious interests not only by adhering to the narrow definition of law as rules. He went further and tried to make peculiarly irrelevant to the leaders of the profession—and to those students who plan to become leaders—all that was "non-legal" by telling them that the non-legal meant nothing in their chosen field where, he said, rules alone hold sway and the intrusion of the "non-legal" would be an impertinence. *With respect to the work of the successful metropolitan lawyer, Pound was more orthodox than the orthodox.*

The writer has already ventured briefly to criticize Pound's new orthodoxy about property and commercial transactions.[37] In the light of the foregoing discussion, the following may be added:

Suppose a case arises relating to a bill of exchange, a promissory note, or a fee simple. Then, says Pound, the rules are applied mechanically. "The circumstances of the particular case cannot be suffered to determine the quality of estates in land nor the negotiability of promissory notes. One fee simple is like another. Every promissory note is like every other." Elsewhere he writes that "there is nothing unique about a bill of exchange." [38] From which it follows, Pound asserts, that the result is assured, for the mechanical operation of the rules excludes uncertainty.

But in cases involving fee-simples, promissory notes and bills of exchange, it is always possible to introduce some *question of fact* relating to fraud, negligence, mistake, alteration or estoppel. In most contested cases, one side or the other usually injects such a question. Suppose such a case is tried before a jury and, on the question of fact, "goes to the jury." Is it not absurd to say that the rules will then be mechanically applied? Anyone who has ever watched a jury trial knows the rules becomes a mere subsidiary detail, part of a meaningless but dignified liturgy recited by the judge in the physical presence of the jury and to which the jury pay scant heed. To say that fixed rules govern property and commercial cases when the jury sits and decides is to deny the plain truth. The pulchritude of the plaintiff or his religion or his economic status or the manners of the respective attorneys, or the like, may well be the determining factor inducing the decision.[39]

---

[37] FRANK, *op. cit. supra* note 13, at 209-214.

[38] *Cf.* Pound, *The Theory of Judicial Decision* (1922) 36 HARV. L. REV. 825, 945, 951; POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 139-143; POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 154-155. See quotations from Pound in Appendix to this article.

For a like argument see Dickinson, *op. cit. supra* note 10, at 847, 1059, 1080; also DICKINSON, *op. cit. supra* note 5, at 145, 148. Here, as elsewhere, Dickinson follows Pound.

[39] See FRANK, *op. cit. supra* note 13, at 170, *et seq.*, to the effect that juries decide cases with but little reference to the rules contained in the instructions. It is significant that in his most recent writings on the function of rules Dickinson fails to discuss the effect of rules in jury trials.

And if a judge sits and decides without a jury but similar questions of fact are raised? Will the crystallized unalterable rules about identical fee-simples (or promissory notes) mechanically produce the decision? Surely not.[40] Of course, if the judge writes an opinion, the stereotyped rules will appear in the opinion. But the judge will decide one way or the other on the "facts" and those "facts" vary with the particular case and with the judge's impressions of those "facts"—although the instrument in suit is a promissory note precisely like every other promissory note.

The truth is that the talk about mechanical operation of rules in property, or commercial, or other cases is not at all a description of what really happens in courts in contested cases. ("Contested" is here used to mean cases where conflicting testimony is introduced with respect to questions of fact.) It is dogma based upon inadequate observation. For it fails to take into account the important circumstance that any future lawsuit about a piece of property or a commercial contract can be contested, and that, if it is contested, questions of fact can be raised involving the introduction of conflicting testimony.

What Dewey[41] says of popular dogmas is relevant here: "Facts and events presenting novelty and variety are slighted, or are sheared down till they fit into the Procrustean bed of habitual belief. Inquiry and doubt are silenced by citation . . . of a multitude of miscellaneous and unsifted cases . . . What will not fit into the established canons is outlawed . . . Beliefs that perhaps originally were the products of fairly extensive and careful observations are stereotyped into fixed traditions and semi-sacred dogmas accepted simply upon authority, and are mixed with fantastic conceptions that happen to have won the acceptance of authorities."

The mechanical-operation-of-rules-of-property-and-commercial-transactions legend will not stand up under examination. If you doubt that statement go to court and look and listen; you will then observe where the fallacies of the Pound-Dickinson thesis occur. Some of those fallacies have been heretofore noted or referred to. Here are some more:

*That legend completely ignores the dishonest judge.* He mouths the rules as well as—or better than—the best. (That the traditional method of writing rule-studded opinions is a boon to the dishonest judge is easily demonstrable.[42] But whatever he says, he decides the way he is paid to

---

In his book (at 317) Dickinson joins those who laud the jury as a determiner of "policy". If that notion were carried to its logical conclusion, the result would be that the judge would find the facts—for which he is far better trained than the jury—and the jury would then decide the case on the basis of the facts as found by the judge, thus reversing the traditional conception of the division of labor between judge and jury.

[40] We are here discussing a "contested" law-suit, *i. e.*, a suit where there is conflicting testimony on vital issues of fact. Note that any future law-suit may be a "contested" suit.

[41] DEWEY, HOW WE THINK (1910) 149.

[42] See FRANK, *op. cit. supra* note 13, at 137-138; Book Review (1930) 40 YALE L. J. 1123. Per *contra*, Pound, Justice According to Law (1913) 13 COL. L. REV. 710, and LLEWELLYN, THE BRAMBLE BUSH (Tentative printing 1930) 62.

decide or the way the boss tells him to decide. As a recent report on a crooked judge euphemistically phrased it, he is "influenced by considerations outside the record." The monotonous similarity of promissory notes do not interest the dishonest magistrate. Fee simples do not all look alike to him. There are, for him, distinguishing characteristics of certain bills of exchange. Those characteristics are not apparent on the face of the bill: What he wants to know is who owns the fee simple, promissory note or bill of exchange so that he can decide in accordance with the way the case is "fixed."

Crooked judges exist. "Fixed" decisions are realities. Those phenomena affect the owners of property and those engaged in commercial transactions. A "fixed" decision which is not reversed determines legal rights as much as a decision honestly arrived at. Such a decision becomes the law for the parties to that case.

Yet little or nothing is said in the classroom or text-books about dishonest judges. They are considered irrelevant in discussions of the rigidity of legal rules pertaining to property and business transactions. If one inquires why that is so, he is told that dishonest judges and purchased decisions are "abnormal." That is true, if you are stating ideals or devising a program for remaking the actual in the pattern of the desirable. It is false if you are describing our judicial system as it has been, now is, or is likely to be for some time to come.

The writer happens to detest corruption, graft and "pull." He is among those who hope that all crooks can and will be driven from the bench. But unrealized hopes do not abolish present evil realities.

What would be said of an engineering school where the students learned little or nothing about friction or wind pressure? Such obstacles to engineering are deplorable from an ideal point of view. But are they called "pathological" and therefore overlooked? What would be thought of an engineering text-book which shoved into the foot-notes all unpleasant facts on the ground that they were "abnormal"? What political scientist today would give a course in city government without devoting much time to the study of corruption? How can we afford to have men trained to practice law who are induced to shut their eyes to the effect on decisions of graft and "pull"?

It is proper for an engineering student to study frictionless engines; but he will do injury to mankind if he does not also learn a good deal about the effect of friction. Of course, law students should study property law as if the judiciary were always thoroughly honest; but is it not imperative that, at the same time, the students should be required to know that such a notion of the judiciary is a "fiction" and not a fact? [43]

[43] See FRANK, *op. cit. supra* note 13, at 312-322, 37-38, 21, 327, for a discussion of the nature and value of "fictions".

The crooked judge can write opinions. In them he can pretend to reason syllogistically, using "fact"-premises and commercial law "rule"-premises. He often does. One of our best known teachers of law (devoted to the rule-definition of law) cites, as the chief support for a "basic principle" in a certain field, a learned opinion by an erudite judge, now happily dead, who (the writer is told by those in a position to know) was a clever rascal. The reasoning in that opinion is flawless. But what if the decision in that case was purchased? Suppose that the judge, after hearing the conflicting testimony, dishonestly (yet unchallengeably) reported what he really thought were the facts of the case. The rules enunciated in his opinion are none the less proper. The opinion is none the less excellent material for a case book devoted to rule worship. But, if our surmise is correct, the decision was not a product of the rules mechanically applied to the facts. The opinion was decoration, or protective coloration.

There they are, the bribed judges. That we detest them doesn't get rid of them. That we would like to have a system in which only honest men wore the ermine, doesn't mean that we have it. But the Dickinson-Pound legend takes no account of them.

And the honest judge. He, too, is often, quite honestly, "influenced by considerations outside the record." [44] *Suppose he is "bribed," but unconsciously by his own prejudices? The "pull" exercised on the crooked judge is often no more powerful than the "pull" which a strong bias exercises on a "straight" judge.* And what of the honest stupid judge who misunderstands the rules which any well-trained law student believes to be clear, settled and easily comprehensible? Is stupidity in judges also to be labelled "abnormal" and therefore irrelevant to the study of law?

Consider the honest intelligent judge who is tired and inattentive when an important witness is testifying. The writer well remembers that, as a junior counsel, it was his function, during a certain long trial, each afternoon to drop books on the table and scrape chairs on the court room floor in order to keep awake the judge who always lunched too well and was accordingly inattentive after the noon adjournment. A well-known judge, now retired from the bench, tells the writer that he found it necessary at intervals to withdraw to his chambers there to pour cold water over his wrists because his wits began wandering.

The "facts", as we have seen, may be crucial when, as is often the case, a question of "fact" is injected into litigation involving a fee-simple. And those facts are, *inter alia,* a function of the attention of the judge. Certain kinds of witnesses may arouse his attention more than others. Or may arouse his antipathies or win his sympathy. *The "facts", it must never*

[44] *Cf.* McEwen, *What is Never in the Record But Always in the Case* (1913) 8 ILL. L. REV. 594.

*be overlooked, are not objective.*[45] *They are what the judge thinks they are. And what he thinks they are depends on what he hears and sees as the witnesses testify—which may not be—often is not—what another judge would hear and see. Assume ("fictionally") the most complete rigidity of the rules relating to commercial transactions; assume ("fictionally") that decisions are products of fixed rules applied to the facts. Still, since those "facts" are only what the judge thinks they are, the decision will vary with the judge's apprehension of the facts.*

So that, although one promissory note may be precisely like another, although the rules governing negotiability may be as rigid as a steel ingot, the decisions as to the rights of the holder of any given note and the duties of the maker of that note are not certain. To say that the law relating to commercial paper or deeds is clear, definite and certain is intolerably misleading as applied to what we have called "contested" cases—unless you add at once (as Pound and Dickinson do not add) that by "law" you do not mean what judgment will be entered in any "contested" lawsuit which may relate to any specific piece of commercial [46] paper or specific deed, but that you mean merely that, when an opinion is written,[47] it will contain rules which will be virtually identical with the rules contained in an opinion delivered in connection with the decision of some other case involving another piece of commercial paper or another deed.

*The rules, that is, do not produce uniformity of decisions (judgments, orders or decrees) in what we have called "contested" cases,*[48] *but only uniformity of that portion of opinions containing the rules.* Judge Alpha may try a "contested" case relating to a promissory note and decide for the holder. If Judge Beta tried the same case he might decide for the maker. The opinion of Judges Alpha and Beta would contain identical rules. That,

[45] The reference here is to the unique facts of the particular case, such as whether Jones paid his note or was induced by Smith's fraud to deliver it. There are other kinds of facts; *i. e.*, "background" facts, such as scientific or economic facts, which judges use in arriving at decisions. (The famous Brandeis-Frankfurter briefs are illustrative.) Such "background" facts are more objective. See, however, even as to such facts, Radin's keen comment, Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863, 881, n. 35.

[46] The question of the effect of precise rules will be further discussed in a later instalment of this paper.

That many rules of commercial law and property are very precise, far more precise than those of negligence or fiduciary law, is undeniable. But that does not mean that the decisions in contested cases relating to commercial law or property are correspondingly more predictable.

For some curious reason Professor Morris R. Cohen has failed to observe that distinction, with the result that his recent criticisms of the legal "sceptics" are not responsive and are therefore irrelevant. See Cohen, *Justice Holmes and the Nature of the Law* (1931) 31 COL. L. REV. 352; Cohen, *Change and Fixity in the Law,* THE NATION, September 9, 1931, at 259. For related errors on Cohen's part see *supra* note 22 and *infra* note 72.

[47] If the case is tried by a jury, then you mean that when the judge addresses the jury, his instructions—which the jury seldom understands and/or heeds—will contain rules virtually identical with the rules contained in equally unintelligible instructions which will be addressed by other judges in other cases involving other pieces of commercial paper or other deeds.

[48] *Cf.* Yntema, *op. cit. supra* note 24; FRANK, *op. cit. supra* note 13, at 148-153.

and little more, is what truth there is in the Pound-Dickinson dogma about the non-uniqueness of promissory notes.[49]

Identity of the language of artificial, rule-worded, published opinions does not mean identity of the undisclosed "real" reasons for decisions. On that score the history of zoning is illuminating. California was the first state to sustain a zoning ordinance. The ordinance in question prohibited the carrying on of certain kinds of businesses except within prescribed boundaries. The historians tell us that the secret of this first victory for zoning is to be found in the name of the case—*In re Hang Kie*—in the fact that the case was decided in California,[50] and in the further fact that the businesses named in the ordinance were the "businesses of a public laundry or washhouse where articles are washed and cleansed for hire"—businesses at that time almost completely usurped by Chinese. Laundry meant Chinamen. Zoning laundries meant isolating Chinamen. Racial prejudice was the true basis of the decision. According to the historians, had the court accurately reported the reasons for the decision, the opinion would have read: "Chinese are obnoxious yellow aliens who should stay where they belong and not come into 'white' neighborhoods." But the conventions proscribed such faithful reporting of the reasons for decisions. Instead, the opinion states, in due form, rules which are syllogistically linked to facts so as seemingly to compel the decision.

Yet the simulated, published reasons (stated in rule-vocabulary) for that decision against the Chinese were used in other states by other judges who for quite different "real" reasons sustained zoning ordinances which were enacted to accomplish purposes involving no prejudice against orientals.[51] Identity of expressed rules does not, therefore, mean identity of "real" reasons.

The converse is true: Two decisions based upon identical "real" reasons may be accompanied by opinions containing very different rule-reasons. Something like the following recently occurred.[52] In a suit on a contract, the defendant's attorney argued that there was no consideration. The lower court held for the plaintiff. The upper court reversed but solely on the ground that there was insufficient evidence of a breach of the contract. Later the lawyer for the plaintiff met a member of the upper court and remonstrated that the opinion was unfair as there was ample evidence of a

[49] As applied to "contested" cases. Cases which are not contested will be discussed in a later instalment of this paper.

[50] 69 Cal. 149, 10 Pac. 327 (1886). The decision had a forerunner, In the Matter of Yick Wo, 68 Cal. 299, 9 Pac. 139 (1885); *cf.* Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730 (1884). The discussion in the text is based upon *History of Zoning*, by Whitnall, THE ANNALS, No. 155, Pt. II, 1 and *Outline of the Law of Zoning in the United States.* THE ANNALS, No. 155, Pt. II, 15. The writer is indebted to Charles Ascher, of the New York bar, for referring him to these articles.

[51] The California decision is indeed an instance of *"oriental justice"*.

[52] For obvious reasons the facts have been changed somewhat.

breach. The judge replied substantially as follows:[53] "We felt that your client was not entitled to recover because there was no contract. But if we had so stated, we would have had to distinguish several of our earlier opinions. Perhaps you're right about the breach. Maybe we were a bit careless in saying a breach wasn't proved. But what's the difference whether the reason we gave is literally in accordance with the record? We conscientiously considered the case, decided what was right and gave out the easiest reasons for deciding that way. That's what we usually do. As long as the decision is correct, what does it matter what we say is the ground of our decision?"

Now another set of judges, constituting another court, might have arrived at the same decision and for the same "real" reasons, but reporting totally different rule-reasons for their decision. Difference in the rule vocabulary does not signify difference in the "real" reasons.

## IV

Let us return to definitions:

(1) Dickinson admits that there are many influences which induce judicial decisions. Of these many influences he selects but one—the so-called rules. All other influences—and the decisions themselves—are excluded from the province of law. If, he says, you know the rules, you know the law. If you don't know the rules you don't know the law.[54]

(2) Goitein represents the extreme opposite view. He defines law "for the jurist" as "the sum of the influences that determine decisions in courts of justice."[55] Not only the rules, but anything and everything that induces a judge to decide a case—all those influences are law. But the decisions themselves are not law.

As between Dickinson's and Goitein's definitions, the latter, tested by the standard of "convenience," seems markedly preferable. It brings one closer to the actualities of the practice of law. If you are a practicing lawyer or a judge, Goitein's definition will far better draw your attention to what you are about. As lawyer you will be better able to win cases or guess future decisions if you have in mind as many as possible of the influences (including the rules) which affect the judge in reaching his decision (his judgment, order or decree) than if you concentrate on the rules. If you are a judge, you will be less effective if you restrict your attention solely to the rules and far more effective if you try to be aware of as many

[53] Proof of discrepancies between the "real" reasons and the published, artificially rule-phrased, reasons is difficult to obtain. It is usually to be found only in private conversations with judges or memoirs. What little of such proof is available may perhaps warrantably be taken as adequate evidence of the artificiality of most of the published reasons for decisions.

[54] Dickinson, *op. cit. supra* note 10, at 835, 837, 838, 839, 849.

[55] 13 ENCYCLOPEDIA BRITANNICA (14th ed. 1929) 198.

as possible of the influences (including the rules) which are pushing and pulling you to decide one way rather than the other.

A law school which accepted Goitein's definition as the basis of teaching would produce graduates much better equipped to practice as lawyers or decide cases as judges than a school which adhered to the old plan of teaching that law is rules.

(3) The writer has suggested another possible rough working definition of "court law." [56] It derives from the following considerations: lawsuits are brought to procure specific decisions (judgments, orders or decrees) in specific cases. It is the lawyer's job to win specific decisions in specific cases, or (in advising clients, preparing instruments, drafting statutes) to guess future specific decisions in specific cases involving specific situations or specific instruments. Clients retain lawyers to procure specific court decisions in specific cases. The "rights" of clients are determined by specific court decisions in specific lawsuits. In like manner, it is the business of judges to decide specific cases.

Wherefore, the writer has proposed the following rough definition of law:

> "We may now venture a rough definition of law from the point of view of the average man: for any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law but only a guess as to what a court will decide.
>
> "Law, then, as to any given situation is either (a) actual law, *i. e.*, a specific past decision, as to that situation, or (b) probable [57] law, *i. e.*, a guess as to a specific future decision.
>
> "Whenever a judge decides a case he is making law: the law of that case, not the law of future cases not yet before him. What the judge does and what he says may somewhat influence what other judges will do or say in other cases. But what the other judges decide in those other cases, as a result of whatever influences, will be the law in those other cases. The law of any case is what the judge decides.
>
> "The business of the judges is to decide particular cases. They, or some third person viewing their handiwork, may choose to generalize from these decisions, may claim to find common elements in the decisions in the cases of Fox vs. Grapes and Hee vs. Haw and describe the common elements as 'rules.' But those descriptions of

[56] FRANK, *op. cit. supra* note 13, at 46-47.
[57] The writer regrets the use of the word "probable". He should have said "potential".

alleged common elements are, at best, some aid to lawyers in guessing or bringing about future judicial conduct or some help to judges in settling other disputes. The rules will not directly decide any other cases in any given way, nor authoritatively compel the judges to decide those other cases in any given way; nor make it possible for lawyers to bring it about that the judges will decide any other cases in any given way, nor infallibly to predict how the judges will decide any other cases. Rules, whether stated by judges or others, whether in statutes, opinions or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go in making the law of the cases tried before them.

"The judging of concrete cases—that is 'law'; rules, while they enter into that business, are by no means the whole of it or the most important part of it.

"There is no rule by which you can force a judge to follow an old rule or by which you can predict when he will verbalize his conclusion in the form of a new rule, or by which he can determine when to consider a case as an exception to an old rule, or by which he can make up his mind whether to select one or another old rule to explain or guide his judgment. His decision is primary, the rules he may happen to refer to are incidental.

"The law, therefore, consists of *decisions,* not of rules. If so, then *whenever a judge decides a case he is making law.* The most conservative or timid judge, deny it though he may, is constantly engaged in law-making; if he were to see himself objectively he would doubtless feel like Moliere's M. Jourdain who was astonished to learn that all his life he had been talking prose." [58]

This definition differs from Goitein's. It defines law not as all the influences which determine decisions but as the result of those influences—the decisions (judgments, orders or decrees) themselves. When a case between Jones and Smith is decided, you know for the first time the "legal rights" of Jones and Smith, for the court has definitely decided those rights. It is such results the parties litigant are after; it is to procure such results the lawyers are hired; it is in order to yield such results that judges are put on the bench. A decision is the consequence of all those influences (including the influence of the so-called rules) to which Goitein refers, but it is not those influences in and of themselves.[59] There is the same difference as that between the cook's ingredients and a finished apple pie.

[58] FRANK, *op. cit. supra* note 13, at 46, 126, 127, 128, 283. The writer there pointed out (47n.) that he was talking of "court-law". At 46 he dealt with "court-law" from the point of view of the lawyer and his client; at 100 *et seq.,* from the point of view of the judge; at 170 *et seq.* from the point of view of the jury.

[59] When Goitein speaks of law as "the *sum* of the influences that determine decisions", he implies that if you do not know all the influences, you will not be able to add them up and arrive at a "sum", and that you will therefore not know the "law" as to any particular situation. Now it is frequently true that we do not know all the influences that determine decisions; it is doubtful whether we shall ever know all such influences. On the other hand,

There is, then, something to be said for this third definition as against Goitein's, for it comes closer to describing the function of lawyers and judges and the aims of clients.

And, as against Dickinson's, this definition of law as consisting of decisions (*i. e.,* judgments, orders or decrees) in specific cases, would tend to make law school instruction more adequate. If one starts with that definition, he will see at once that no one knows the law about any case or with respect to any given situation, transaction or event, until there has been a specific decision (judgment, order or decree) with regard thereto. He will see that the work of the lawyer centers in guessing or bringing about specific decisions, and that the more the lawyer knows about the particular judge who will decide the case and all the influences that affect him in reaching his decision, the more likely the lawyer will be to bring about the decision he wants or to guess what the decision will be. He will not define law as consisting "of whatever will lead to a better prophecy of how cases will be decided" or as "anything, knowledge of which is useful to an attorney in deciding how to act in his client's interest" [60] or "as the sum of the influences that determine decisions." But he will inevitably conclude that any lawyer who is worth his salt should learn, so far as that is possible, whatever will lead to a better prophecy of how cases will be decided, and will try to learn anything and everything knowledge of which will be useful to him in determining how to act in his client's interest.

If you are a teacher in a law school and define law as decisions (*i. e.,* judgments, orders or decrees), you will not lead your students to believe that their principal equipment for their future practice must consist of knowledge of the so-called rules of law. You will tell them that, so far as it is possible, they should endeavor to learn everything that will be helpful in bringing about specific decisions that they desire, or that, when they are advising as to business transactions or drafting instruments, they should take into account all the factors which may influence a court if and when litigation arises with respect to those transactions or instruments.

Specifically to answer Dickinson's challenge—the writer believes that it *is* the function of a lawyer, if possible, to anticipate on the basis of past knowledge, that a police magistrate will exercise his discretion in accordance with the wishes of a particular politician, who is friendly to opposing counsel, or that, in jurisdictions where justices of the peace rely for their fees on

---

we do know what specific decisions are, even when some or many of the influences are unknowable.

Also, in connection with his definition, Goitein refers to "legitimate" considerations, indicating that perhaps he would exclude certain "influences" which he would consider "illegitimate". If that is Goitein's meaning, the writer wholly disagrees. This point will be further discussed in a subsequent instalment of this paper.

[60] This is the definition Dickinson incorrectly ascribes to what he calls the "sceptical movement in recent jurisprudence". Dickinson, *op. cit. supra* note 10, at 837-838.

amounts collected from defendants, there is a likelihood that such officials will give judgments for plaintiffs. Or that Judge *A* has a known animosity to lawyer *X* which is likely to induce Judge *A* to decide against the client of lawyer *X*. Or that Judge Stupid is poorly educated, and knows and can understand few rules of law. Or that Judge Erudite is highly sensitive to syllogistic reasoning using rules of law as premises. Such knowledge, according to the writer's definition, is not law. No more is knowledge of the so-called rules of law. But such knowledge as well as knowledge of the so-called rules of law is helpful in guessing or bringing about specific decisions and therefore, if and to the extent available, should be acquired by any sane, sensible lawyer.

There are bright judges and dull judges; strong judges and weak judges; level-headed and flighty judges; cold-blooded judges and emotional judges; "thick-minded" and "thin-minded"; honest and dishonest. All of them are affected to some degree by the so-called legal rules. No one can generalize about how much effect such legal generalizations have. The effect varies with the judges. And even with respect to any given judge, it is almost impossible to tell, in any specific case involving conflicting testimony, how much he will be influenced by the rules.

The traditional theory (in its old form or in the Pound-Dickinson formulation) would be tenable only as a "fiction." That is, it would at most be proper to make use of the experimental device of saying: "Let us, *for the time being,* talk *as if* the so-called rules were the controlling influences affecting decisions, although *we know perfectly well that what we are saying is not true.* For the purpose of bringing out one aspect of the judicial process, we will temporarily exaggerate that aspect. Let's pretend that all other factors affecting decisions are subordinate and relatively unimportant. But in doing so, we will know that at best we are telling a useful lie." In other words, in thus describing the judicial process, we would be knowingly falsifying, treating a single factor as if it were the only factor. But we would do so only to the extent that and only as long as such conscious over-emphasis increased our knowledge or control of the judicial process. If and whenever our fiction, our lie, turned out to be of little or no use, we would abandon it.

But Dickinson and his predecessors have not stated their thesis as an experimental fiction or as a possibly "useful lie." They have not even advanced it as an hypothesis; *i. e.,* they have not said, "Perhaps the so-called legal rules are the dominant influences bringing about decisions. We will tentatively so describe the judicial process." No. They have announced their thesis as a dogma, or as a verified and thoroughly tested statement of what actually happens.

There is reason to doubt whether that thesis can function even as a valuable fiction, whether it is a lie sufficiently useful to justify its employment.[61] Surely, as an hypothesis—a statement, tentatively made, of what will perhaps turn out to correspond with observed phenomena—it seems to be doomed, for its lack of correspondence to the observed facts is becoming too obvious.[62] As a dogma, or a piece of verified knowledge, it is pitifully absurd. It appears clearly to be a myth—a statement of alleged fact, contrary to the truth, which deceives the person making the statement, an elaborated piece of self-deception or self-delusion.

Of course, the so-called legal rules have *some* effect.[63] No person in his senses would argue that "it is impossible that the mind in reacting can be influenced by general propositions",[64] or that the minds of judges are sometimes influenced somewhat by the particular type of "general propositions" called legal rules. But to recognize these truths is far from the equivalent of accepting the dogma that legal rules are the controlling factors affecting decisions. As the writer has said elsewhere:

> "It is sometimes asserted that to deny that law consists of rules is to deny the existence of legal rules. That is specious reasoning. *To deny that a cow consists of grass is not to deny the reality of grass or that the cow eats it.* So that where rules are not the only factor in the making of law, *i. e.,* decisions, that is not to say there are no rules. Water is not hydrogen; an ear of corn is not a plow; a song recital does not consist of vocal cords; a journey is not a railroad train. Yet hydrogen is an ingredient of water, a plow aids in the development of corn, vocal cords are necessary to a song recital, a railroad train may

---

[61] The "economic man" is a good illustration of a really useful lie. Or a hydrogen picture of the sun treated as if it were the "true" sun. See FRANK, *op. cit. supra* note 13 (second printing) at 22n., 327, n. 9, 356, 361n., 312-319.

[62] In order to sustain it as an hypothesis, it has to be qualified by too many exceptions so that the exceptions loom larger than the generalization to which they are exceptions.

[63] *Cf.* FRANK, *op. cit. supra* note 13, at 130:

"What then is the part played by legal rules and principles? We have seen that one of their chief uses is to enable the judges to give formal justifications—rationalizations—of the conclusions at which they otherwise arrive. From that point of view these formulas are devices for concealing rather than disclosing what the law is. At their worst they hamper the clear thinking of the judges, compelling them to shove their thoughts into traditional forms, thus impeding spontaneity and the quick running of ideas; they often tempt the lazy judge away from the proper task of creative thinking to the easier work of finding platitudes that will serve in the place of robust cerebration.

"At their best, when properly employed, they have undeniable value. The conscientious judge, having tentatively arrived at a conclusion, can check up to see whether such a conclusion, without unfair distortion of the facts, can be linked with the generalized points of view theretofore acceptable. If none such are discoverable, he is forced to consider more acutely whether his tentative conclusion is wise, both with respect to the case before him and with respect to possible implications for future cases. . . . Viewed from any angle, the rules and principles do not constitute law. They may be aids to the judge in tentatively testing or formulating conclusions; they may be positive factors in bending his mind towards wise or unwise solutions of the problem before him. They may be the formal clothes in which he dresses up his thoughts."

See also Book Review (1930) 40 YALE L. J. 1123-1124 and the writer's forthcoming article in the ILLINOIS LAW REVIEW.

[64] Dickinson, *op. cit. supra* note 10, at 849, n. 36.

be a means of taking a journey, and hydrogen, plows, vocal cords and railroad trains are real. No less are legal rules." [65]

It should also be remembered that not all concomitants of an act are necessarily to be counted among its causes. A cook may whistle while frying an egg; a poet may tug at his hair while composing a poem; a scientist may be crossing a bridge at the moment when he hits upon a brilliant new formula. But the relation of the cook's whistle to the frying of the egg, or the poet's hair-tugging to his poem, or the bridge-crossing to the scientist's discovery may not be a causal relation. By the same token, the rules set forth in a judge's opinion may often be no more the cause of his decision than the cigar he was smoking when he made up his mind.

How much influence the general propositions called "legal rules" actually have on judges we seldom if ever know.[66] The judges usually do not know themselves.[67]

An easy way to dispose of those with whom you disagree is to give a distorted account of their work and thus justify calling it by a bad name. This is the method employed by Professor Morris R. Cohen in his criticisms of the legal sceptics.[68] According to him, those deluded persons are extreme "nominalists" who declare that there are no such things as precise legal rules, that indeed there are no such things as legal rules at all.[69] Professor Cohen has no trouble demolishing that absurdly silly thesis. The only trouble with his criticism is that no one has ever been foolish enough to maintain that absurd thesis. What the sceptics say is very different: "We have spent", they say, "many years observing what happens in court. As a consequence, we doubt whether the legal rules are anything like as efficacious as they are supposed to be. We also question their value as adequate descriptions of what judges do or how they think." [70]

That is not nominalism. If a man asserts that the prohibition statute is seldom enforced, he is not denying its enactment. To assert that the moon is not made of green cheese is not to maintain that there is no such thing as cheese or that the moon is indescribable. When Vesalius questioned the accuracy of Galen's anatomical descriptions, he did not claim that the human body was non-existent or that all anatomy was impossible.

The sceptics insist that legal rules exist and must be studied. But they say that knowledge of the rules is but a small part of what lawyers and

[65] FRANK, *op. cit. supra* note 13, at 132; see also 270 with particular reference to Dickinson.

[66] FRANK, *op. cit. supra* note 13, at 114-116.

[67] See Hutcheson, *op. cit. supra* note 24.

[68] The same method could be used to prove that Professor Cohen is a psychoanalyst, that President Hoover is a Marxian socialist, or that the Pope is a Modernist.

[69] Cohen, *op. cit. supra* note 46.

[70] For a further development of this theme see the writer's forthcoming article in the ILLINOIS LAW REVIEW.

judges use in their work and that a definition of law as rules does an injury to clear thinking about law. If, now, law were viewed as decisions (judgments, orders and decrees) and the judicial process as the process of deciding cases, then what Pound and Dickinson call "non-legal" or "anti-legal" would be brought directly into focus. Such a conception of law would force on the conscious attention of the hard-headed student and the hard-headed lawyer *all the* factors that enter into decision-making. They would see that intensive knowledge of the various non-rule elements is a necessary part of the daily work of the practitioner and the judge.

No more could "that stuff" be laughed at as sociology, preacher's nonsense, high-brow twaddle or the like. It would be recognized for what it is, *i. e.*, articulate and conscious knowledge of that which every capable lawyer knows but knows today only in inarticulate or semi-conscious form.

## V

Definitions are only good if they are helpful. It may well be that instead of trying to adopt some universally accepted definition of that ambiguous word "law", it would be better to use one of the following devices:

> (a) Whenever the word law is used, let the user put in parenthesis precisely what he then means by the word. Thus, Dickinson, each time he wrote the word law, would write it thus: "Law (here defined temporarily as if it consisted solely of legal rules), *etc.*"
>
> Or (b) let all writers avoid, so far as possible, the use of the word law. Let the person who was about to use it substitute what he then means by it. Thus, Dickinson would not write about "law" but about "rules", and would say that rules are among the elements which influence judges in deciding cases. Goitein would not write about "law" but about all the influences which determine decisions, adding that legal rules are among those influences. The present writer would not write about "law" but about specific decisions (*i. e.*, judgments, orders and decrees) and the process of making specific decisions, pointing out that specific decisions, in cases in which the testimony is conflicting, are the product of many influences, some knowable and many unknowable, and that among the influences are legal rules.

The writer has adopted that device elsewhere.[71] Here he wants to make another experiment. Suppose that happenings in the legal world were described, without using the word "law", in terms of "legal rights and duties"—using those words to indicate what men may and must lawfully do and not do.[72]

---

[71] In a forthcoming article in the ILLINOIS LAW REVIEW.

[72] It is intended here to include in the word "rights and duties" the entire Hohfeldian assortment, *i. e.*, rights, duties, privileges, powers, immunities, no-rights, disabilities, and liabilities.

Consider the plight of Mr. Fair. He is about to sign and deliver to Mr. Shrewd a document prepared by Mr. Fair's lawyer. It may be a deed or a note or a contract of sale; for convenience, assume that it is a contract. Mr. Fair asks his lawyer what will be his legal rights and duties, if he signs and delivers that contract. The lawyer's answer, if properly worded, will be "hedged" and vague, for those rights and duties are unknown to the lawyer—or anyone else—until they are settled by some specific lawsuit relating to that very contract.

No one can prophesy when or where such a suit will arise or, if it does, whether Mr. Fair and Mr. Shrewd will hotly contest it. If they do, then questions of fact can be raised by one or both of the parties—questions, that is, as to acts performed by Fair and Shrewd years before the lawsuit began (as, for example, whether Fair was induced by fraud to sign the contract or whether Fair or Shrewd performed the contract). Those past acts of Fair and Shrewd do not walk into court. Witnesses tell the judge or jury conflicting stories about those acts. Some or all of the witnesses may tell biased, mistaken or lying stories.

The judge or jury (as a fallible and sometimes prejudiced or inattentive witness of what those witnesses say and do in the court room) then has to guess what Fair and Shrewd did years ago. For court purposes, the real conduct of Fair and Shrewd does not count; the judge's or the jury's guess as to that conduct is controlling. On the basis of the reaction of the judge or jury to that guess, a court decision (order or judgment) is entered.

Suppose the court order requires Fair to pay Shrewd $5,000 and that the order is enforced or enforceable. Then, for the first time, the respective legal rights and duties of Fair and Shrewd are known.

And the legal rights and duties of any man are equally unknowable. Before and until a specific enforceable judgment has been entered, *every bit of advice a lawyer gives about any man's legal rights and duties, and all the rights and duties under every document a lawyer prepares, are subject to that unavoidable uncertainty which results from the fact that no specific rights or duties can be known until a specific enforceable judgment has been entered in a future lawsuit pertaining to those specific rights or duties—a judgment which, so far as anyone can tell, may turn on conflicting testimony, a judgment which is therefore unguessable.*

And so of all legal rights and duties. Whether it will sometime be decided that Mr. Baffled is to go to jail, or to lose or keep his house, or collect the money on a mortgage he holds, or have the custody of his children, or remain the president of his company—all such matters may be determined by unpredictable future court decisions (*i. e.,* judgments, orders or decrees) in cases relating specifically to Mr. Baffled. Whether such suits will arise

and how they will be decided is unguessable. For no one can prophesy if or when or where any such suits will be brought or, if they are brought, how conflicting the testimony will be, or what it will be, or whether such suits will be tried by a jury or a judge, or what judge, or how the jury or the judge will react to the testimony, or whether the judge will be honest or intelligent or lazy. Accordingly, until those cases arise and are decided, the legal rights and duties of Mr. Baffled are uncertain.

Where now do the so-called rules of law come in? In most "contested" jury trials (the word "contested" indicates trials where the testimony is conflicting) the effect of those rules on the court decisions approaches zero, or at any rate is unknowable; few sensible lawyers, however well versed in the rules, will predict to their clients the decisions (*i. e.*, judgments or orders of the court) in such jury cases. A good lawyer can often accurately predict the decision in a future lawsuit as to his client's rights under a given contract or deed—*if* he assumes that none of the important facts about that contract or deed will be disputed by testimony in the lawsuit, or that, *if* they are, the case will be tried by an honest, intelligent judge without a jury, and that that judge will believe the client's witnesses. The lawyer's guess (as to the future judgment or order of the court and its enforceability) is full of such ifs—and so are most legal rights.

The legal rules unquestionably have some effect on an honest judge while he is making up his mind how to decide a "contested" case. Many of the legal rules are so unsettled that their effect on the judge's thinking is vague; but, more important, the rules, however exact, are only one among the many kinds of influence which affect him while trying to reach his decision. The judge's knowledge of the rules combines with his reactions to the conflicting testimony, with his sense of fairness, with his background of economic and social views, and with that complicated compound loosely named his "personality," to form an incalculable mixture out of which comes the court order we call his decision. Thus it is specific, enforceable decisions (judgments, orders and decrees) which determine all legal rights and duties. Enforceable decisions, not legal rules.

But there is prevalent a gravely mistaken notion that legal rules control and cause decisions. This is partly due to the fact that the judges, when they are entering their judgments, sometimes publish little essays, called "opinions" in which they quote the rules and write as if their judgments had been produced by the rules, as if the rules had been the only influences affecting them. These opinions do not refer to the other kinds of stimuli which influenced them; but that does not mean that the other undisclosed factors were not as or more important in inducing their decisions.

The uncertainty of most legal rights and duties is then due to their dependence on the decisions in future specific lawsuits which, in turn, are

affected by at least these three elements of uncertainty: (1) Many of the legal rules are unsettled or vague. (2) Some legal rules are clear and precise. But the guess of the judge or jury as to the facts in a contested lawsuit is unguessable, even when the legal rules are exact. *And no one can prophesy which lawsuits will be "contested" or what conflicting testimony will be introduced in any lawsuit.* (3) The reaction of the judge to his guess, or the jury to its guess about the facts of a "contested" suit, is unpredictable.

There is moderate uniformity in the way the judges quote the rules. But there is a lack of any known relation between the exactness of the rules (even when they are exact) and the predictability of any concrete future decision (*i. e.,* a court judgment or order) in a "contested" case. While there may possibly be some certainties or uniformities in the predictions of decisions in "contested" cases, they have not yet been discovered or formulated.

If anyone doubts the truth of this picture, let him spend several years in law offices and court rooms, noting the effect on court decisions in actual lawsuits (relating to property or contract or anything else) of perjury, mistaken testimony, coached witnesses; of lazy, stupid, energetic, brilliant or crooked lawyers; of honest, intelligent, biased, ignorant, lazy or dishonest judges; of appeals to the bigotry or thick-headedness of juries.[73] If he has kept his eyes open during such exposure to the actualities of legal practice, the observer will no longer believe that it is possible to prophesy that any future lawsuit will not be "contested" and that court judgments or orders in most "contested" lawsuits—relating to property or commercial contracts or anything—are to any considerable degree predictable; or to believe that there is a known correlation between the guessability of the outcome of such suits and the exactness of such of the rules as are exact; or to assume that a line can be drawn between the certain and the uncertain in the prediction of court judgments and orders which will be entered in specific lawsuits still to be tried.

And he will then know what every law-school teacher should tell his students, to wit: many legal rules exist. Many of them are vague. Some are exact. Sometimes the rules have some effect on legal rights. They have that effect only to the extent that they influence the outcome of specific

[73] Such a course of first-hand observation is particularly to be recommended to two philosophers who have turned their unusually brilliant minds to legal subjects, Professor Morris R. Cohen and Professor Mortimer J. Adler. It is patently because of their lack of experience in the actual legal world (because their knowledge of the judicial process is confined to what is discoverable in books) that they have adversely criticized Holmes for saying that, "The life of the law has not been logic; it has been experience." See Cohen's comment, Cohen *Law and the Scientific Method,* 6 AM. L. SCH. REV. 231, at 236; and Adler's strictures, Adler, *Law and the Modern Mind: A Symposium, II Legal Certainty* (1931) 31 COL. L. REV. 91, 107. When these philosophers become practicing lawyers they will understand what Holmes meant. *Cf. supra* notes 22 and 46.

lawsuits. How much effect they will have in bringing about future enforceable judgments, orders and decrees is unknowable. If a lawyer knows the rules, he knows something which may be of some use in guessing what enforceable judgments, orders or decrees will be entered in future lawsuits; to that extent he knows his client's legal rights and duties. But as the knowledge of rules is of very limited value in the game of guessing future decisions, most legal rights and duties are extremely uncertain, however certain and exact the legal rules.[74] (To be continued.)

## APPENDIX

### NOTES ON DEAN POUND'S CONCEPTION OF LAW

#### *1. In General*

"Everywhere we find two antagonistic ideas at work in the administration of justice—the technical and the discretionary. These might almost be called the legal and the anti-legal; with entire accuracy we may term them the legal and the pre-legal. For if we bear in mind that the object of law is the administration of justice, we see that that object may be accomplished, and often is, without law. Whether or not we agree with Markby that the judicial enunciation of a new rule and its application to a case *ex post facto* is of that character, in archaic communities, past and present, justice without law is the normal type. Before the law, we have justice without law; and after the law and during the evolution of law we still have it under the name of discretion, or natural justice, or equity and good conscience, as an anti-legal element. Without entangling ourselves in the discussion as to the definition of law, we may say that laws are general rules recognized or enforced in the administration of justice." [75]

"Two antagonistic ideas, the technical and the discretionary, may be seen at work throughout the administration of justice. These might well be called *the legal and the non-legal* element in judicial administration. With entire accuracy they may be called the legal and the pre-legal element, since *the latter represents the type of administration of justice which obtains prior to the administration of justice according to law, and still obtains where there is no law governing a cause and where rules of law are impossible or inexpedient.* For we must bear in mind that law is not logically essential to the administration of justice. Justice may be administered according to the will of the individual who administers it for the time being, or it may be administered according to law. Probably it is true that even in the earliest and rudest justice the will of the judge is not exercised entirely as such, wholly free from the constraint of acknowledged rules of action or principles of decision. On the other hand it is equally true that in no legal system,

---

[74] In the foregoing, the experiment has been made of using legal "rights" and "duties" as the center of interest.

Another experiment which the writer intends to make in the near future is that of making *enforcement of decisions the center of interest.* One would then start with such subjects as are discussed by GLENN in his invaluable books on CREDITORS' REMEDIES (1915) and THE LAW OF FRAUDULENT CONVEYANCES (1931). Creditors' bills, executions and execution sales would be the beginning points.

The experiment made in the above text might be described as *"the decisional approach".* The proposed experiment might be described as the *"enforcement approach".* Both of them might be subsumed under such a caption as the *"what-will-happen-if approach".*

[75] Pound, *The Decadence of Equity* (1905) 5 COL. L. REV. 20. This article is cited in POUND, OUTLINES OF LECTURES ON JURISPRUDENCE (4th ed. 1927) 76, with no indication of disavowal or recantation or modification.

however minute and detailed its body of rules, is justice administered wholly by rule, without any recourse to the will of the judge and his personal sense of what should be done to achieve justice in the cause before him. Both elements are to be found in all administration of justice. But sometimes, as in oriental justice, the one element greatly preponderates; at other times, as in Europe and America of the nineteenth century, the other element all but holds the whole field. For the moment it is enough to insist that administration of justice without law is perfectly conceivable; that it has taken place and that it still takes place to some extent in the most developed systems. The most conspicuous example is oriental justice. Administration of justice by the king in person is of this type. Martial law, so-called, is another example. Remnants of this direct application of the will to the solution of controversies are to be found in legislative and executive justice in modern states, and it has a recognized place in judicial justice under the name of discretion along the border line between law and morals. *Before the law, then, we have justice without law, and after the law and during the evolution of law, we still have it as a non-legal element under the name of discretion, or natural justice, or equity and good conscience, or permissible relaxation of rules with reference to the requirements of individual cases under certain circumstances, or equitable application of law, of 'free search for the right.'*

"Connected with the problem of rule and discretion, of justice according to law and justice without law, is the problem by whom justice is to be administered." [76]

"The two rival agencies in government are law and administration. Administration achieves public security by preventive measures. It selects a hierarchy of officials to each of whom definite work is assigned, and it is governed by ends rather than rules. It is personal. Hence it is often arbitrary, and is subject to the abuses incident to personal as contrasted with impersonal or law-regulated action. But well exercised it is extremely efficient; always more efficient than the rival agency can be. Law, on the other hand, operates by redress or punishment rather than by prevention. It formulates general rules of action and visits infractions of these rules with penalties. It does not supervise action. It leaves individuals free to act, but imposes pains on those who do not act in accordance with the rules prescribed. It is impersonal, and safeguards against ignorance, caprice, or corruption of magistrates. But it is not quick enough, or automatic enough, to meet the requirements of a complex social organization." [77]

"Justice may be administered according to the discretion of the person who administers it for the time being, or according to law. Law means uniformity of judicial action,—*generality, equality,* and *certainty* in the administration of justice." [78]

"Since *the fundamental idea of law is that of a rule or principle underlying a series of judicial decisions,* it is obvious that the power of finding the law, which a tribunal must be allowed to exercise, is to be governed by some sort of system, or we shall have a personal rather than a legal administration of justice."

"Given *the three steps in the decision of causes, as courts now proceed,* namely, *finding* of *rules, interpretation* of *rules,* and *application* to particular con-

---

[76] Pound, *Justice According to Law* (1913) 13 COL. L. REV. 696, 713. This article is cited in POUND, READINGS ON THE HISTORY AD SYSTEM OF THE COMMON LAW (3d ed. 1927) 5, with no indication of disavowal or recantation or modification.

[77] (1907) 4 PROC. AM. POL. SCI. ASS'N 232, 233, quoted in DICKINSON, *op. cit. supra* note 5, at 15, n. 24. This article is cited in the 1927 edition of POUND, OUTLINES OF LECTURES ON JURISPRUDENCE at 86, with no indication of disavowal or recantation or modification.

[78] POUND AND PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW (3d ed. 1927) 5. The second edition was published in 1913.

troversies of the *rules* when found and interpreted, let us consider the relation of the courts to legislation with reference to each." [79]

The foregoing excerpts give Pound's notion of law as consisting of rules. In 1919 and thereafter he changed his terminology somewhat. He no longer uses the word "rules" to denote all legal generalizations or formulas. Instead, he uses "legal precepts" as the all-inclusive term. And he divides precepts into two broad groups thus:

(1) *Legal Standards of Conduct* (such as "due care" or "good faith" or "fair conduct on the part of a fiduciary"). Such standards involve a "margin of discretion" and "recognize that within the bounds fixed each case is to a certain extent unique." They are "legally defined measures of conduct to be applied by or under the direction of tribunals."

(2) *Other legal precepts all of which "admit of mechanical or rigidly logical application."* These consist of

(a) "detailed rules,"
(b) "legal principles,"
(c) "legal conceptions." [80]

Also, in *Interpretations of Legal History* (being lectures delivered in 1922 and published in 1923), he writes (at 153),

"Jurisprudence is said to be the science of law. But it must be more than an organizing and systematizing of a body of legal precepts. There are three things to consider, which may not be looked at wholly apart from each other and yet must not be confused by ambiguous use of the term 'law'. Putting them in the chronological order of their development, these are, the administration of justice, the legal order and law."

In *Law and Morals* (1923, published 1924), he writes (at 36): "If the term 'law' is to have any useful meaning it must include all the immediate authen-

---

[79] Pound, *Courts and Legislation,* SCIENCE OF LEGAL METHOD (1917) 202, 214, 210. This article is cited by Pound in his 1925 article on *Jurisprudence* in BARNES, HISTORY AND PROSPECTS OF THE SOCIAL SCIENCES (1925) 468, with no indication of disavowal or recantation or modification.

[80] This classification appears first in Pound, *The Administrative Application of Legal Standards* (1919) 44 A. B. A. REP. 445. It is developed in AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 115 *et seq.:*

"It is usual to describe law as an aggregate of rules. But unless the word rule is used in so wide a sense as to be misleading, such a definition, framed with reference to codes or by jurists whose eyes were fixed upon the law of property, gives an inadequate picture of the manifold components of a modern legal system. Rules, that is, definite, detailed provisions for definite, detailed states of fact, are the main reliance of the beginnings of law. In the maturity of law they are employed chiefly in situations where there is exceptional need of certainty in order to uphold the economic order. With the advent of legal writing and juristic theory in the transition from the strict law to equity and natural law, a second element develops and becomes a controlling factor in the administration of justice. In place of detailed rules precisely determining what shall take place upon a precisely detailed state of facts, reliance is had upon general premises for judicial and juristic reasoning. These legal principles, as we call them, are made use of to supply new rules, to interpret old ones, to meet new situations, to measure the scope and application of rules and standards and to reconcile them when they conflict or overlap. Later, when juristic study seeks to put the materials of the law in order, a third element develops, which may be called legal conceptions. These are more or less exactly defined types, to which we refer cases or by which we classify them, so that when a state of facts is classified we may attribute thereto the legal consequences attaching to the type. All of these admit of mechanical or rigidly logical application."

See also Pound, *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 641, 645-653. There we are told that "there are three elements that make up the whole of what we call law", *viz.:* (1) Precepts—which presumably include rules, principles, conceptions and standards,—and (2) traditional ideas and technique of interpreting, developing and applying legal precepts, and (3) philosophical, political and ethical ideas as to the end of law.

tic or received materials of judicial decision." This is somewhat vague, but the succeeding paragraph is some hint that "the intrinsic justice of the case" is intended as among the "materials of judicial decision" to be included in the term 'law'." Again (at 71) he says, "It will not do to say that our new regime of administrative justice is not part of the law."

But in that very book (*Law and Morals*) there are persistent echoes of his earlier statements. Thus (at 79) he writes, *"The very conception of law involves ideas of uniformity, regularity, predictability. Administration of justice according to law* is administration by legal precepts and *chiefly by rule.* . . . The requirements of particular cases must yield to *the requirements of generality and certainty in legal precepts and of uniformity and equality in their application."*

That passage (and his other writings) disclose that even his notion of flexible "standards" (*i. e.,* precepts which admit of less "mechanical or rigidly logical application"), which he began to develop in 1919, contains an inherent element of "uniformity, regularity, predictability", of "generality", "certainty" and "equality". "Discretion" and the power to "individualize controversies" are still presumably to be considered as antithetical to what is "legal". So in *An Introduction to the Philosophy of Law* (written 1921, published 1922, 3d printing 1925), 108, he says, *"Typically judicial treatment of a controversy is a measuring of it by a rule in order to reach a universal solution for a class of causes, of which the case in hand is but an example"*

Moreover (as heretofore noted), after the publication of these later writings, Pound in 1927 cited with approval, and with no indication of recantation or disavowal, his earlier writings, excerpts from which are given above. Apparently, then, he still adheres to his idea that the administration of justice is to be divided into "law" (rules) and "discretion" (the non-legal).

*2. With Reference to "Property" and "Commercial Transactions"*

"In other words, the social interests in security of acquisitions and security of transactions—the economic side of human activity in civilized society—call for rule or conception authoritatively prescribed in advance and mechanically applied. These interests also call peculiarly for judicial justice. Titles to land and the effects of promissory notes or commercial contracts cannot be suffered to depend in any degree on the unique circumstances of the controversies in which they come in question. It is one of the grave faults of our present theory of judicial decision that, covering up all individualization, it sometimes allows individualized application to creep into those situations where it is anything but a wise social engineering. On the other hand, where we have to do with the social interest in the individual human life and with individual claims to free self-assertion subsumed thereunder, free judicial finding of the grounds of decision for the case in hand is the most effective way of bringing about a practicable compromise and has always gone on in fact no matter how rigidly in theory the tribunals have been tied down by the texts of codes or statutes. Likewise it is in these cases involving individual self-assertion, especially in affirmative courses of conduct and the conduct of enterprises, where there is never exact repetition of any former situation and each case is more or less unique, that administrative justice is tolerable and that judicial justice must always involve a large administrative element." [81]

"In matters of property and commercial law, where the economic forms of the social interest in the general security—security of acquisition, and security of transactions—are controlling, mechanical application of fixed, detailed rules or of rigid deductions from fixed conceptions is a wise social engineering. Our economically organized society postulates certainty and predictability as to the incidents and consequences of industrial undertakings and commercial transactions

[81] Pound, *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 940, 957.

extending over long periods. Individualization of application and standards that regard the individual circumstances of each case are out of place here. In Bergsonian phrase we are here in the proper field of intelligence, characterized by its power of 'grasping the general element in a situation and relating it to past situations'. For the general element in its relation to past situations is the significant thing in securing interests of substance, that is, in the law of property and in commercial law. The circumstances of the particular case cannot be suffered to determine the quality of estates in land nor the negotiability of promissory notes. One fee simple is like another. Every promissory note is like every other. Mechanical application of rules as a mere repetition precludes the tendency to individualization which would threaten the security of acquisitions and the security of transactions." [82]

"Philosophically the apportionment of the field between rule and discretion which is suggested by the use of rules and of standards respectively in modern law has its basis in the respective fields of intelligence and intuition. Bergson tells us that the former is more adapted to the inorganic, the latter more to life. Likewise rules, where we proceed upon intuitions, are more adapted to human conduct and to the conduct of enterprises. According to him, intelligence is characterized by 'its power of grasping the general element in a situation and relating it to past situations', and this power involves loss of 'that perfect mastery of a special situation in which instinct rules'. In the law of property and in the law of commercial transactions it is precisely this general element and its relation to past situations that is decisive. The rule, mechanically applied, works by repetition and precludes individuality in results, which would threaten the security of acquisitions and the security of transactions. On the other hand, in the hand-made, as distinguished from the machine-made product, the specialized skill of the workman gives us something infinitely more subtle than can be expressed in rules. In law some situations call for the product of hands, not of machines, for they involve not repetition, where the general elements are significant, but unique events, in which the special circumstances are significant. Every promissory note is like every other. Every fee simple is like every other. Every distribution of assets repeats the conditions that have recurred since the Statute of Distributions. But no two cases of negligence have been alike or ever will be alike." [83]

---

[82] POUND, INTERPRETATION OF LEGAL HISTORY (1923) 154. See also *ibid.* 155: "There is nothing unique in a bill of exchange."

[83] POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 141-142.