

ARE JUDGES HUMAN?

Part Two: As Through a Glass Darkly

JEROME FRANK

I

1. You are a lawyer. A client comes to consult you. He hands you a lease in which he is named as lessor and John Johnson is named as lessee and which provides that the term of the lease expires on January 2, 1932. It is now November 1, 1931. The client wants to put Johnson out of possession January 2, 1932. Can he do so?

According to the Pound-Dickinson notion,¹ the answer is simple. Your client's rights are to be found in the well settled legal rules relating to leases. If the language of the lease is clear (and, one may be sure Pound and Dickinson would add, if you are satisfied that your client has written, said or done nothing to extend the term of the lease), you can answer your client, without mental reservations, that he can evict the lessee, Johnson, on January 2, 1932.

But if you are "realistic", you will not be so glib—at least to yourself. You will say to yourself—and perhaps to your client—something like this: (1) If I bring suit and Johnson defaults, he will be evicted. (2) If Johnson defends, and raises no questions of fact, he will be evicted, *if* the judge understands the so-called rules relating to leases. (3) If Johnson defends and introduces evidence—which may be forged writings, or the testimony of lying or mistaken witnesses—to the effect that (a) he had an option to renew and has exercised it, or (b) that my client agreed with Johnson to renew, or (c) that the original lease was intended to terminate a year later but that there was fraud, accident, or mistake in its execution—then a "question of fact" will arise. In any of such events, the case may go to a jury. If so, it is impossible to tell whether or not Johnson will be evicted.

Even if the case is decided solely by a judge and the judge is perfectly honest, yet he may erroneously believe the testimony of Johnson's witnesses. Those witnesses may be unmitigated or semi-deliberate or pathological liars or merely mistaken or forgetful. But their testimony may mislead the judge. If so, he may decide that Johnson is not to be evicted.

Now merely from your conferences with your client and an inspection of the lease he hands you, what are you to conclude are his "legal rights", with reference to the eviction of Johnson? Are those "rights" more certain and clear than his "rights" would be if he were consulting you about

¹ As explained in the previous instalment of this paper, (1931) 80 U. OF PA. L. REV. 17.

a negligence suit? Yes, you will say, if you follow Dickinson's lead. For then, in trying to ascertain your client's rights, you will consider merely the "rules" of property (which according to your theory are precise and definite while the "rules" relating to negligence are not) relating to a settled and determined and controllable set of facts consisting solely of the words appearing on a piece of paper called a lease.

But if you look at your client's rights as the effects ² of a future court judgment, order or decree in a suit against Johnson, you will conclude that lease-rights are about as lacking in certainty as negligence-rights or fiduciary-rights. You will know that, whatever the subject matter, "a lawsuit is a lawsuit", to wit, a chancy affair. You will be cautious about glib assurances to your client. *You will know that, if you recommend litigation to a client, you are recommending that he engage in a gamble,—and this as much if it be litigation about a lease, a deed, a will or a check,³ as if it be about the dissolution of a marriage, a claim against a railroad on a bill of lading or the care required of a hotelkeeper.⁴*

The "rules" may, in certain portions of the legal field, be certain and predictable. But what of it? The controlling consideration for you as lawyer is whether the decisions (judgments, orders and decrees) in that portion of the field are certain and predictable. The precise character of the rules relating to certain situations does remove variability in and doubt about one of the many components which produce decisions in those situations. *But since in "contested cases", court decisions (i. e., judgments, orders and decrees) are functions of many unknown and unknowable variables, the fact that only one of the components is a constant does not sufficiently stabilize the ingredients to make possible stabilization of the decisions.* Who are you that you should predict what future lawsuits will be "contested"—i. e., involve conflicting testimony about questions of fact—or what witnesses will be believed by the judge or jury, or what will be the reaction of the judge or jury to what the judge or jury guess to be the facts?

Let it be conceded that in property cases and commercial transaction cases some of the rules ⁵ are more clear-cut than in negligence cases or

² Here enters the entire question of the enforceability of court judgments, orders or decrees. If the party that loses the suit will not comply with what the court decides, then the practical value of the victory is no better than its enforceability—which is by no means always certain.

³ Cf. Dickinson, *Legal Rules: Their Function in the Process of Decision* (1930) 79 U. OF PA. L. REV. 833, 846-7.

⁴ *Ibid.* 847-8-9, 853. Consider here *the effect on decisions (and therefore on legal rights) of the abilities of the lawyers* who appear in the litigation.

⁵ This paper does not discuss the uncertainty in the rules. But it should be noted in passing that, even with respect to property and commercial transactions, the rules are often amazingly unsettled when one examines them close up. *The expert in any field is far less sure of the preciseness of the rules than one who examines them from a distance.* How many questions come to a bank's lawyers where, even assuming all the facts to be undisputed, he finds that the rules concerning commercial paper are wide open, despite (or perhaps because of) the N. I. L.

fiduciary obligation cases. But see what happens if you say that the "law" consists exclusively of the "rules" and that in property or commercial cases all else (the "non-legal") is inoperative: You will next say that "legal rights" in such cases are unaffected by the indefinite "non-legal" factors and are therefore clear and precise. And—in all likelihood—you will slide into the habit of thinking that judgments, orders and decrees will correspond to the precision of that "law" and of those "legal rights". *And you will conclude, with pitiful inaccuracy, that actual decisions (judgments, orders and decrees) in such cases are precisely foretellable. In which case you will be a menace to your clients.*

In sum, there is in actual practice no possibility of delimiting the uncertainty of future decisions, and of saying that in property or commercial contract cases future decisions (in suits not yet commenced) are nicely predictable because the rules of property law and commercial law are exact. All future lawsuits are gambles. Only in some books, some lectures, some law review articles and some class room instruction is it possible nicely to differentiate between the hazards of (a) a case not yet begun relating to a promissory note and (b) a case not yet begun relating to the obligations of trustees. The differentiation is faulty and dangerous in its practical consequences.

2. Litigation; cases; courts; judges; juries; court decisions; judgments; orders; decrees. Those are the concern of the lawyer and of his clients. Litigation—lawsuits which have arisen or which may arise—are the lawyer's peculiar province. It may be true that in any given place at any given instant there is regularity in lay practices—in the folk-ways, the *mores*, the modes of acting. The relative stability of the community attitudes is of transcendent importance to those interested in social control. As an intelligent member of the community, the lawyer is interested in those *mores*. He is interested in the *mores*, too, as they affect decisions.⁶ But any semi-regularity in the folk-ways is not his peculiar province. He is in every sense of the word an officer of the court. What courts do is his business.

For the anthropologist (or economist or political scientist or sociologist), litigation may properly be considered pathological,—for litigation means to him a critical breakdown in the *mores*. But just as infantile paralysis may be "abnormal" to the layman but the proper and "normal" object of the physician's study, so is litigation, actual or potential, the "normal" object of study for the lawyer. *Lawsuits, actual or potential, are as normal to the lawyer as insanity is to an alienist.*

From which it follows that the lawyer must not be misled by a definition of the ambiguous word "law", taken over from anthropology, which identifies law with some of the habits of laymen when they are not litigating

⁶The writer is in process of writing a paper on the relation of anthropology to court-law and the psychology of the litigant, in which there will be developed the points which are here merely adverted to.

or contemplating litigation. Those habits—which you may describe if you like as “rules of behavior in society”—often act as preventives of litigation. They often prevent men from disputing, often prevent them from letting their disputes go to the point where a lawsuit arises. But it is what happens if lawsuits arise that concerns a lawyer. *And not only the trial lawyer. Every lawyer.* For the rights and duties of his clients under any legal document a lawyer drafts or on which he gives advice are nothing more and nothing less than what may in the future be decided by some court in a lawsuit involving those rights.

Until there has been a specific court decision as to those specific rights and duties, they are in the realm of guesses as to what a court will decide if ever such a suit arises. And it is a serious source of error for the lawyer to confuse (a) the smooth running course of folk-ways with (b) litigation which ensues exactly when the folk-ways disrupt. *To say that any “rules of law” are certain because they work uninterruptedly unless a lawsuit occurs, is to speak with dangerous ambiguity, if you are a lawyer.* The subject matter of the lawyer’s study is the outcome of past, present and future lawsuits. His business is that of dealing with what happens as the result of litigation. It relates to disputes which men cannot settle between themselves, disputes the courts are called on to settle.

Consider, now, these remarks of Dickinson:

“There is, however, a large and important class of cases in which it is not too much to say that the outcome is in fact directly dictated by a legal rule without the intervention of judicial discretion in the smallest degree. Suppose for example that a purported will is offered for probate which bears the signature of but one witness in a jurisdiction where two are required by the statute. The rule of law which requires that the witnesses shall be two operates with the deadly inevitability of a guillotine to decide the question of probate. . . . The automatic operation of direct specific rules of law of this character is seldom sufficiently brought home to professional teachers of law and students in law-schools. It does not always appear from a study of litigation, because cases where the rule thus leaves absolutely no doubt are seldom litigated. But this does not mean that the automatic operation of legal rules in situations of this kind is not of the utmost importance from the standpoint of the value of law as an agency of social order. It is one of the great preventives of litigation. It enables counsel to advise their clients with an assurance which does not need to be tested by resort to the courts in every instance. It operates with equal value in another way. Clean-cut and specific rules make it possible for men to accomplish in their business dealings the legal results they intend without the necessity of constant recourse to the courts to resolve doubts. . . . These results are made possible by the practically automatic operation of legal rules which are so simple and specific that legal scholars do not ordinarily find them interesting.”⁷

⁷ Dickinson, *op. cit. supra* note 3, at 846-7.

Dickinson himself recognizes that this is too pretty a picture. A few pages later⁸ he recalls that, "There are cases, however, where doubt may arise as to the application of even such a highly specific rule. For example a will may on its face bear the signature of two witnesses, thus apparently satisfying the rule, but doubt may be raised as to the genuineness of one of the signatures, or as to whether or not it was duly affixed in the presence of the testator as required by law."^{8a}

Which means—what? That the "automatic" operation may become not automatic, that the edge of the guillotine-like rule may prove to be blunt and its descent neither deadly nor inevitable. Why? Because, in any case, a "question of fact" can be injected into the record, thus arresting the application of the highly specific rule. The rule about the two witnesses to a will should read, "*If the judge thinks* that two persons witnessed the will in such and such manner, then, etc." *There is the rub*: "If the judge thinks."

That is a real rub, indeed. For if that important contingent factor always exists as a possibility, then there vanishes the automaticity of the highly specific rules, their direct "dictation" of court judgments, orders and decrees without the possible intervention of any judicial cerebration. And at the same time there vanishes the supposed value of those rules as "great preventives of litigation". Dickinson's statement about the automatic operation of these rules is reminiscent of the salesman's talk in *The Music Master*: "Monkey-on-a-stick. It goes by itself, if you pull it with a string."

For Dickinson is compelled to admit that a direct specific rule will be applied⁹ only if the "case to which it is to be applied is such as to fall squarely within it",¹⁰ i. e., only if the facts are clear and uncontroverted. And that is all that Dickinson's talk comes down to. If the facts are contested, then all bets are off. And who is to say, in advance of a lawsuit, whether the facts will be contested, whether fact-questions will arise? See what Dickinson is forced to fall back on. He maintains that "in the great majority of cases the application of the rule is practically automatic and no such questions arise".

Is that true? Yes, if he means that many litigable issues are never litigated, and that where there is no litigation there is no litigation. Most wills, for instance, are admitted to probate without a contest. *But the non-litigating habit is not peculiar to situations involving definite rules*; most breaches of contract, assaults, slanders or violations of fiduciary obligations

⁸ *Ibid.* 852.

^{8a} Consider here the problem of *unprovable facts*,—*unprovable because of the death or absence of witnesses*.

⁹ There are no better "jokers" or "weasel words", beautifully adapted to self-deception when talking of legal rules, than "applied" and "application".

¹⁰ Dickinson, *op. cit. supra* note 3, at 851-2.

never get even as far as a lawyer's office. There is no evidence to show that the vaguer rules produce more litigation than the more precise rules. So when Dickinson says that "in the great majority of cases turning on definite rules no questions of fact arise", he cannot mean merely that, where the issues in such cases are uncontested, then the issues in such cases are uncontested. If Dickinson's statement has any real meaning it must signify that in the great majority of cases which are litigated or contested, involving "clean-cut and specific" rules, no questions of fact are raised and the rules "dictate" the outcome without the intervention of any influences or choices on the part of the judge. Has Dickinson actually investigated the great majority of such contested cases? What exactly is his evidence for that statement?¹¹ Does he know or does he merely will to believe?¹²

As to specific rules preventing litigation, the very opposite could be asserted far more plausibly. *There are excellent grounds for the contention that "direct specific rules of law" provoke more litigation than they prevent.* The more simple a rule the more simple is the course of the "bad" man. It is well known that whenever a new more or less specific rule about negligence is laid down by an upper court, the evidence introduced in many subsequent personal injury cases miraculously makes those cases fall squarely within the new rule.

¹¹ This is not the only place where Dickinson attempts to brush aside objections to his theories by cavalierly making unverified statements about what actually happens in the court-house. Thus he is forced to concede that a judge can avoid the "application" of a given rule by so finding the facts that the case does not fall within the rule. But see what he does with this objection: "There can be no doubt", he writes (*op. cit.* at 855), "that *occasionally* courts employ this power of finding the facts to evade the necessity of applying a legal rule to a case to which it would otherwise be applicable, and to that extent the effectiveness of any rule in controlling the action of courts and in facilitating the prediction of decisions may be seriously impaired." And that is that, for Dickinson. He tries to chloroform a disagreeable difficulty by using the word "*occasionally*".

What is his warrant for thus making it appear that such practices are exceptional? Here is a field of inquiry in which dogmatic assertions are absurd since no one knows what the truth is. The very tradition which Dickinson supports is adhered to by the judges in their opinions to such an extent as to render it almost impossible to learn the truth. Judges' opinions do not disclose differences between "the facts" as reported by the judges, and what the judges think are "the facts". It is only from occasional extra-judicial utterances of judges that a few glimmerings of the truth are obtainable.

The writer does not believe that such "forcing of the balance" by judges is usually deliberate. That point and the related point of the inherent "subjectivity" of the "facts" of a case are discussed by the writer in a forthcoming article in the ILLINOIS LAW REVIEW.

The position taken by Dickinson is more unequivocally stated by Goodhart (*Determining the Ratio Decidendi of a Case* (1930) 40 YALE L. J. at 181) in the following amazing comment: "If we are bound by the facts as seen by the judge, may not this enable him deliberately or by inadvertence to decide a case which was not before him by basing his decision upon facts stated by him as real and material but actually non-existent? . . . Can a judge, by making a mistake give himself authority to decide what is in effect a hypothetical case? The answer to this interesting question is *that the whole doctrine of precedent is based on the theory that as a general rule judges do not make mistakes either of fact or of law.*" In other words, if the facts interfere with your theory, ignore the facts.

Italics in quotations throughout this paper are the present writer's.

¹² See Appendix I hereto: "A Note on 'Sources' and 'Causes' of 'Law' and the 'Motives' of Judges."

The very conciseness of a rule may be a boon to the bad man and the bad man's "bad" lawyer. *A precise rule may be a guide for coaching witnesses. It may furnish a perjury chart. It may canalize lying testimony.*

The courts have had some glimmering of a not unrelated notion when they have refused to make a "direct specific rule" as to what constitutes fraud and not-fraud, knowing that a crystallized formula of that kind would promote swindling. They have said that "were courts to cramp themselves by defining it (fraud) with a hard-and-fast definition, their jurisdiction would be cunningly circumvented by new schemes beyond the definition. Messieurs, the fraud-feasors, would like nothing half so well as for courts to say they would go this far and no further in its pursuit".¹³

Perhaps one of the best legal stories ever told is this: A judge was trying a case of a "gift on condition". After the testimony was in, the lawyers presented authorities. The judge finally said, "Gentlemen, if Jones, the deceased, said—in the light of these Missouri decisions—'Daughter, if you'll come and live with me, I'll give you this house', then I'll decide for the plaintiff. Now just what was the testimony?" Unfortunately the court reporter had boggled his notes. The judge impatiently asked if the principal witness, the plaintiff's maid, was present, and, learning that she was in the court room, asked her again to take the stand and repeat her testimony. This is what she said: "I remember very well what happened. It was a cold and stormy night. We were all sitting around the fire. Old Mr. Jones said to Mrs. Quinn, '*In the light of these Missouri decisions, daughter, if you'll come and live with me, I'll give you this house.*'"

Of course, in that case it was obvious enough to the court that the witness had a convenient and partisan recollection. But there are hundreds of cases where that kind of memory and that kind of testimony go undetected. Many a man loses his most valuable property, or his liberty, or his wife, or his life, because of perjured or distorted testimony, or the coaching of witnesses.

Doubtless, it will be said that perjury is "abnormal", that it is a crime and that it may safely be assumed that, "in the great majority of cases", the threat of criminal prosecution acts as a deterrent. But that again would be an unverified dogma. It is not possible to prove such an assertion, for there is no collected data on the subject. The writer's own experience and his talks with trial-lawyers and judges incline him strongly to the belief that a surprisingly large proportion of witnesses do not tell the truth, the whole truth, and nothing but the truth. Most of the witnesses who deviate from the truth probably do not tell out-and-out lies which would justify

¹³ *Stonemets v. Head*, 248 Mo. 243, 263, 154 S. W. 108, 114 (1913). See 2 PARSONS, CONTRACTS (8th ed. 1893) 769 to the effect that "if there were a technical definition of fraud . . . the very definition would give to the crafty just what they wanted, for it would tell precisely how to avoid the grasp of the law".

their conviction for perjury. Rather they illustrate Nietzsche's aphorism: "Memory said I did that. Pride says I could not have done that. Eventually pride wins."¹⁴ Once again we must say that law teaching is inadequate which fails to take into account the effect of perjured or distorted testimony, the deliberate or intentional coaching of witnesses, and the machinations of the ever-present crooked lawyer.¹⁵ Such phenomena are unquestionably unpleasant but it is folly to call them "abnormal" and then to ignore them.¹⁶

3. Somewhat more bluntly than is customary, such unpleasant phenomena as the stupidity, prejudices and dishonesty of *some judges* have been referred to in this paper because, in their practical effects on men's legal rights and duties, those phenomena need to be considered but are usually ignored in legal treatises. To avoid any possible misunderstanding, it should be said that, of course the writer does not for a moment intend to imply that most judges are stupid, improperly prejudiced^{16a} or corrupt. *The great majority of judicial magistrates are intelligent, patient, conscientious and honest.*

But undeniably, albeit unfortunately, there are some few who are dull-witted, some few who are impatient, some who are lazy, some few whom the political boss can affect. Wherefore, no lawyer can tell his client, before a lawsuit is begun, involving that client's legal rights, whether those rights will be judicially determined by an excellent, a mediocre, an incompetent or an otherwise undesirable judicial officer. For no one knows in what jurisdiction, or when, such a future lawsuit will be commenced or tried, and therefore no one knows what judge will pass upon the client's rights.

Which alone suffices to make those legal rights unknowable. For, as we have seen, any such suit may be "contested", *i. e.*, involve a fact-issue

¹⁴ There is a legend that women are peculiarly given to distortions of the truth in the interest of the side they favor. The writer's experience indicates that men are no less likely to "fudge" the facts but are more skilful in the art and therefore less frequently detected.

See Bromley, *Perjury Rampant* (June 1931) v. 163, No. 973 HARPERS at 37: "The comparatively few people who possess too much self-respect to commit perjury are seldom seen in the courts. . . . Arrests for perjury are rare, and convictions still rarer. . . ." The article quotes an experienced trial lawyer to the effect that in twenty years of litigation he had participated in only two cases in which there was no perjury to be found or suspected, and states that many lawyers and judges admit "that perjury is committed by one side or the other in the great majority of cases". This picture is probably overdrawn, but there is no denying that inaccurate if not perjured testimony is an important factor affecting decisions.

¹⁵ "In the great majority of cases the lawyer who coaches his witnesses to misrepresent the truth has nothing to fear and everything to gain." Bromley, *op. cit. supra* note 14, at 45.

¹⁶ All witnesses who are coached are not deliberately coached. There is such a thing as *inadvertent or honest coaching*. Every careful lawyer before going into court tries to interview all the witnesses whom he intends to call to the witness stand. In his interview with a prospective witness, it is almost impossible for a lawyer to avoid indicating what story he would like the witness to tell. If the witness is lawyer's own client or someone very friendly to the lawyer's client, the lawyer's unavoidable disclosure of his desires will frequently prompt the witness, out of partisan zeal, to give the answer that the lawyer wants.

^{16a} There is, obviously, no unprejudiced human being. An unprejudiced judiciary is unimaginable. What we need are judges who are sensitively aware of their own prejudices and able to make allowances for them.

concerning which conflicting testimony is introduced. Since what judge will hear the conflicting testimony is now unknown, you can't guess how he will react thereto and what his resulting decision will be. And, as we have seen, the client's legal rights mean nothing more and nothing less than the unpredictable decision of that now unknown judge in that possible future lawsuit.^{16b}

4. The mythical notions that legal rules are the paramount factor in "law", that many legal rules work automatically to protect legal rights, that by the elaboration of a system of legal rules the personal element in courthouse government has been reduced to a minor and relatively insignificant role,—such notions inevitably produce *the false impression that almost any kind of a lawyer can be an efficient and able judge. The consequence is that the incompetent, the mediocre, the lazy, the corrupt judges can, to use street language, "get away with it"*. They can ask no better protection from public examination of their poor judicial output than the comment of Dean Pound that "rules . . . secure us against the well-meant ignorance of the weak judge and are our mainstay against improper motives on the part of those who administer justice. . . . A judge tied down on every side by rules of law and the necessity of publicly setting forth his reasons upon the basis of such rules, cannot do much for a corrupter, if he would";^{16c} or Dickinson's statement to the effect that the "artificial rules" of law do "not permit the judge to take into account matters which might draw his attention from the merits of the cause to his personal interest in the suitors."^{16d}

As the writer has said elsewhere, "The fact is . . . that those judges who are most lawless . . . or most dishonest, are often the very judges who use most meticulously the language of compelling mechanical logic,

^{16b} It is perhaps wise to repeat that *uncertainty would exist even if all judges were of the highest order of intelligence and probity*, because (1) a judicial decision in any future "contested" case depends on the belief of the judge or jury as to the facts and on the reaction of the judge or jury to that belief, and (2) that belief and that reaction cannot be prophesied. It could not be predicted even if it were known—and it obviously cannot be known—just what the conflicting testimony would be in a lawsuit not yet begun.

No objective test has ever been invented, or is likely to be, for ascertaining the credibility of witnesses or for weighing testimony. *As we have seen, the "facts" of a "contested" case are subjective. Those "facts" vary with the peculiar personal reactions of the particular judge or jury that may happen to try the case. They are whatever that judge or jury thinks they are and that, in turn, depends on what that judge or jury hears and sees as the witnesses testify. Any decision—and anybody's legal rights—depend, therefore, upon the unguessable reaction to the testimony in a possible future lawsuit of whatever judge or jury may happen to be sitting.*

The implications of the subjectivity of the facts of a contested case are discussed in the writer's forthcoming paper in the ILLINOIS LAW REVIEW and will be further developed in a book by the writer now in process.

That book will also discuss the important question of the relation of the upper courts to the fact-finding of the lower courts and will make a nicer analysis than is here possible of the phrase "reaction to the testimony".

^{16c} (1913) 13 COL. LAW REV. 696, 710.

^{16d} ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 142.

who elaborately wrap about themselves the pretense of merely discovering and carrying out existing rules" ^{16a}

Traditional rule-worship not only obscures the evil effects of judicial laziness, incompetence, stupidity and corruption. It unjustly diminishes appreciation of the splendid work of honest, alert, conscientious judges.

The quality of judicial output will be improved only with improvement in the quality of our judges. The bar and the laity must be made unqualifiedly to recognize that fact. The personality, character, intelligence and integrity of our judges determine the kind of judicial justice we obtain.

Those devoted to the traditional rule theory sometimes admit that what is loosely called the "personality of the judge" is a slight factor which sometimes slightly deflects the operation of the legal rules. It is not merely a deflecting factor. *The so-called personal element in the judicial process is central; the legal rules are among the deflecting factors.*

The conventional theory may be crudely schematized thus:

$$R \times F = D.$$

That is, *Rule x Facts = Decision.*

On the other hand, the writer's notion may be roughly outlined as

$$S \times P = D.$$

That is, the *Stimuli* affecting the judge x the *Personality of the judge* = *Decisions.*

Such a schema has the virtue of calling to attention all the factors in decision-making and bringing out sharply the transcendent importance of the character of the judiciary. It makes clear the fact that tinkering with judicial machinery, reforms in procedure, refinements of the legal rules, and elaborate "re-statements" of "substantive law" will avail us nothing if our bench is weak and will prove, to a considerable extent, superfluous if our judges are honest, well-trained, alert and self-scrutinizing. Our "law" is and will be as good as and no mite better than our judges. In that direction and no other lies real progress legally.

Rule-worship, too, conceals the prime importance of adequate fact-finding. It causes us to underrate the trial judge, to place too much reliance on and give too much kudos to the upper court judge. A shift in perspective here may well lead to augmenting the dignity of lower court judges, to changes in their method of selection and to liberating them from what may some day seem to be unwise interferences by appellate courts. When that day comes able lawyers will be proud to sit as trial judges, for they will be aware that the trial court is and should be acknowledged as the principal agency of legal administration.^{16f}

^{16a} FRANK, LAW AND THE MODERN MIND (1930) 137-138; cf. Book Review (1930) 40 YALE L. J. 1123.

^{16f} Cf. GREEN, JUDGE AND JURY, 394. The writer is at work on a book in which the above theme will be dealt with more at length.

II

The antithesis between legal "theory" and "practice" is dangerous. Those who employ this antithesis incautiously are likely to say with Dickinson that of course it is admitted by "legal theory" that "law does not always work out in fact".¹⁷ But lawyers "practice law". Law in practice, law which does work out in fact, is the law they must deal with. Except as theory is helpful in practice,¹⁸ it is irrelevant to the lawyer as a knowledge of ping pong or of the climatic conditions of the Antarctic.

More correctly put, a theory of law which does not arise out of the practice of law is a bad theory. It is said of Vesalius that "in dissecting monkeys he became convinced that the many discrepancies between the Galenic teaching and his own observations on the human body were due to the circumstances that Galen derived most of his knowledge from dissecting monkeys, and had not thought it necessary to mention the fact". The realistic lawyer finds the same kind of difficulty when he reads the writings of legal "theorists" who feel themselves too proud to engage in or closely observe the fights called lawsuits. The writings of those theorists usually omit a disclosure of their significant omissions. Theirs, like Galen's, may be called "monkey business".

Which, by a natural association of ideas, leads to a consideration of Dickinson's discussion of Watson's "behaviorism". Watson devoted himself as a young man to the study of the ways of monkeys and rats. Since they were speechless, he could learn nothing about them except by observing their behavior. This restricted technique, which perforce governed the study of monkeys and rats, Watson (Galen-like) later applied unqualifiedly to human beings. He treated men as if they were monkeys or rats, as if their reports in speech of their conscious reactions could throw no light on their acts. Speech was produced by certain muscles.¹⁹ It was therefore to be considered muscular activity or "laryngeal behavior".²⁰ *This veterinary psychology*²¹ was immensely stimulated by the important experiments

¹⁷ Dickinson, *op. cit. supra* note 3, at 837, n. 14.

¹⁸ Or hurtful in practice. For the effect of a false theory in befuddling other lawyers and judges is important.

¹⁹ Dickinson is properly critical of the inadequate Watsonian view of speech. Almost unaccountably he ascribes this view to the writer and indeed goes on to portray the writer as refusing to recognize that language is often indispensable to thought. See Appendix II to the present article, point 3.

²⁰ This gave rise to what has been called the "wind-pipe" theory of thought. Watson later modified this theory, conceding that "other bodily movements such as shrugging the shoulders, could take on the significance of speaking a word or phrase". See Robinson, BEHAVIORIST: L'ENFANT TERRIBLE (Jan. 2, 1929) v. 57, No. 735, NEW REPUBLIC at 181, 183. Robinson terms this latter theory the "every-little movement" theory. Robinson suggests that Watson's contention that thinking depends exclusively on muscular movements and does not involve "images" is due to the fact that Watson's own thought-processes—as distinguished from that of many other persons—are "fairly free of the highly concrete type known as images".

²¹ Whenever the writer reads Watson he is reminded of a story which appears in a footnote in 1 WIGMORE, EVIDENCE (2d ed. 1923) § 688: "It is said that Prince von Bismarck was

of Pavlov with dogs and of Lashley with rats. There developed the valuable concept of the "conditioned reflex", valuable not only in studying animal behavior but illuminating, too, in the contemplation of humans. Some psychologists say that "there is not the slightest sign that the Pavlovian technique developed for the study of modification of a simple reflex in the dog, will do more than supplement the existing methods for studying human habit-formation."²² Whatever their value, these studies, limited in their scope and based upon the ways of speechless animals with a brain equipment far simpler than man's, warrant no such optimism as has emanated of recent years from Watson under the name of Behaviorism.²³ That with the aid of some such idea as the conditioned reflex, the bio-chemist may some day be able to describe any human act in quantitative terms is perhaps a warranted working "fiction" for the bio-chemist. But it is probably not unwarranted to say that that day will never arrive, or at any rate, is so far off that to say "never" would not be dogmatic.²⁴ For, as C. J. Herrick puts it, "rats are not men". Even if and when rat or monkey behavior is reduced to equational form, long thereafter human behavior will escape precise mathematical description because the cerebral cortex of man is complex to an incomparably greater degree than that of the rat or even the monkey.²⁵ Physiology and bio-chemistry will doubtless contribute in-

once ruffled by the number of questions put to him by his medical attendant, an eminent physician of no less individuality and self-possession than the Chancellor. The latter intimated that the physician could do his duty without putting so many intrusive questions. 'Very well, Highness,' said the other, 'but, if you wish to be cured without questions asked, you had better send for a veterinary surgeon'."

²² Robinson, *op. cit.* *supra* note 20, at 184.

²³ In the article on BEHAVIORISM in 3 ENCYCLOPEDIA BRITANNICA (14th ed. 1929) 328, Watson says: "He believes that given the relatively simple list of embryological responses which are fairly uniform in infants, he can build (granting that both internal and external environment can be controlled) any infant along any specified line—into rich man, poor man, beggar man, thief."

²⁴ See NEEDHAM, THE SCEPTICAL BIOLOGIST (1930) 71, 135, 136, 141, 192, 206. He refers to "special biological generalizations" as "*rest-houses on the way to bio-physics*" which must be "clearly understood to possess '*interim*' character and to be only awaiting expression in physico-chemical terms". "Some day", he writes, "some group of bio-chemical investigators may prove that a deficiency of sulphatide phosphorous and a high oxidation-reduction potential in a certain area of the cerebral cortex is invariably associated with the creation of great poetry. Obviously such a suggestion is as wild as can be, but it is nevertheless a legitimate extrapolation from facts already known." As to the proper use of such "fictions", see FRANK, LAW AND THE MODERN MIND (1930) Appendices III and VII and works there cited.

²⁵ See HERRICK, BRAINS OF RATS AND MEN (1926) (4 *et seq.*): "Donaldson estimates that there are about twelve thousand million (12×10^9) nerve cells or neurons in the human brain, and more than half of these, or ninety-two hundred million (9.2×10^8), are in the cerebral cortex. . . . If a million cortical nerve cells were connected one with another in groups of only two neurons each in all possible combinations, the number of different patterns of inter-neuronic connection thus provided would be expressed by $10^{2783000}$. This, of course, is not the actual structure . . . ; but the illustration may serve to impress upon us the inconceivable complexity of the inter-connections of the ninety-two hundred million nerve cells known to exist in the cerebral cortex." See also *ibid.* 347-365.

For an excellent brief criticism of Watson, see JULIAN HUXLEY, ESSAYS OF A BIOLOGIST (1923) 109; see also 82, 84. Russell has high hopes of the future of Pavlovian psychology. But he says (RUSSELL, THE SCIENTIFIC OUTLOOK (1931) 107): "It is true that we cannot

creasingly to knowledge of the ways of humans. But those contributions are far from being helpful to any great extent in understanding the conduct of specific human beings when faced with any but the simplest problems. Psychology, using its own "psychological" "interim concepts" and "fictions" is still the best available technique for such understanding.²⁶ But these concepts and fictions are relatively inexact.²⁷

Accordingly, unless one is uncritical and swallows whole Watsonian behaviorism, he will reject the notion that the judgment of any man when confronting a complicated situation is likely to be predictable.²⁸ Some of the legal scholars who have become dissatisfied with the use of the conventional rule theory as a basis of predicting judicial decisions but reluctant to recognize that probably there are no adequate bases for such predictions, seem, at times, to have been bemused by Watson and to have sought a new foundation for legal certainty in the notion that "by studying how past judges have acted we can predict the behavior of future judges in precisely the same scientific way in which a study of the past behavior of chemical

predict human actions with any completeness, but this is quite sufficiently accounted for by the complication of the mechanism, and by no means demands the hypothesis of complete lawlessness, which is found to be false wherever it can be carefully tested."

²⁶ As to the "autonomy of psychology" and the validity of interim psychological concepts and "fictions" see HART, *PSYCHOPATHOLOGY* (1927); HERRICK, *op. cit. supra* note 25, at 288; HOERNLE, *STUDIES IN CONTEMPORARY METAPHYSICS* (1920) 146, 176; NEEDHAM, *op. cit. supra* note 24, at 71, 141, 192, 206; FRANK, *op. cit. supra* note 24, at 357-358, 312-319; cf. HOGGEN, *THE NATURE OF LIVING MATTER* 303; HUXLEY, *op. cit. supra* note 25, at 102.

Needham (at 141) says: "It will be seen that the discoveries of which we shall speak as yet hardly touch the fringe of mental life, even such apparently simple phenomena as that of attention being, so far, out of reach."

²⁷ HAR, *SOCIAL LAWS* (1930) 40, says: "At the level of the reflex activities we are reasonably certain that the specific causes of behavior are the stimuli of a mechanical and chemical character. At the level of conditioned responses, there is again a reasonable degree of probability that the specific causes of behavior are the conditioning stimuli of various kinds and the code of signals. And Pavlov's and Kohler's studies of the animal psychology show that even dogs and monkeys are capable of responding appropriately to such stimuli. At the level of phobias, emotional and habitual responses, there is a large mass of empirical evidence which also suggests specific stimuli, and also a rough measure of uniformity of responses on the surface. *But the behavior mechanism has become so complex at this stage of development that it is exceedingly difficult to isolate the various springs of action from one another.* Some psychologists lump these springs of action into half a dozen of prepotent drives, others split them into some forty or more of instincts. Finally, with the emergence of self-consciousness and the beginning of rational activities, it is well-nigh impossible to put one's finger on the specific causes of behavior."

HOGGEN, *op. cit. supra* note 26, at 194, writes: "A mechanistic philosopher can legitimately entertain the hope that the study of human society will become an ethically neutral science, and that the methods of biology will fertilize sociological enquiry, as the methods of physics and chemistry have fertilized biological investigation. He is not entitled to pretend that biology can at present provide a key to the interpretation of human history."

Inexact as are the concepts of contemporary psychology, they are the best we have and deserve the most careful attention from lawyers, judges and law-school teachers. They may be particularly helpful to the judge in teaching him to learn and control the worst effects of his own biases and prejudices. Cf. FRANK, *op. cit. supra* note 24, at 114-115, 144-147, 153, 159.

²⁸ Cf. COHEN, *REASON AND NATURE* (1931) 356: "A man says to a woman, 'My dear!' The physical stimulus is here a very definite set of sound waves, and we have reason to believe that the physical effect of these waves is always determinate. But what the lady will in all cases say or do in response depends upon so many factors that only an astonishing complacency about our limited knowledge of human affairs would prompt a confident answer."

reagents enables us to forecast their future reactions".²⁹ The writer wholeheartedly agrees with Dickinson that such a suggestion is absurd.³⁰ But though Dickinson rightly repudiates such new pseudo-science, he errs in convincing himself, by the use of vague phrases and unverified generalizations, that the traditional theory does give support for measurably accurate foretellings of what a judge will do in a particular case.³¹ And he incorrectly assumes that if the legal Watsonians are wrong in what they affirm they must therefore be wrong in what they deny, *viz.*, the possibility of predicting decisions through a knowledge of so-called legal rules. The truth is that prediction of most specific decisions (*i. e.*, judgments, orders and decrees) is, today at any rate, impossible, whether one sticks to the old theories or introduces some new theory.³²

Indeed, there is good reason to believe that advances in bio-chemistry may increase rather than reduce our awareness of the unpredictable effects

²⁹ Dickinson, *op. cit. supra* note 3, at 840.

³⁰ The writer's entire book, *LAW AND THE MODERN MIND*, is devoted to the thesis that predictability of most specific decisions is (and will doubtless remain) impossible. One passage (at 133)—quoted in part by Dickinson—reads as follows:

"An answer to these questions must lead to a vision of law as something more than rules and principles, must lead us again to the opinion that the personality of the judge is the pivotal factor. Where, then, is the hope of complete uniformity, certainty, continuity in law? It is gone except to the extent that the personalities of all judges will be substantially alike, to the extent that the judges will all have substantially identical mental and emotional habits.

"And here we come to a curious conclusion: it is perhaps just possible that we could get stereotyped results from our judges by picking stereotyped men for the judicial office. If we were to elect or appoint to the bench the most narrow-minded and bigoted members of the community, selected for their adherence to certain relatively fixed and simple prejudices, willing to be and remain ignorant of those niceties of difference between individuals the apprehension of which makes for justice, and insensitive to the rate of social change—we then might have stability in law. There is little hope of such stability, however, if our judges are the more enlightened, sensitive, intelligent members of the community, for then there will be small likelihood that all judges will react identically to a given set of circumstances or will be obtuse to the recognition of unique facts in particular legal controversies."

Dickinson, however, apparently seeks to ascribe the "behavioristic" idea to the writer. He quotes (*op. cit. supra* note 3, at 840, n. 19) in a misleading manner a portion of the first paragraph of the matter quoted above in this note. In this fashion Dickinson pictures the writer as believing at the same time two extreme and utterly inconsistent ideas: (1) Decisions are precisely predictable to the maximum degree. (2) Decisions are unpredictable to the maximum degree.

Generally speaking, this grotesque caricature results from a method which is described in Appendix II to the present article.

³¹ See his language (quoted on a previous page) to the effect that "an accurate forecast of what decision will be reached"; and "a fairly safe prediction may often be hazarded as to the judge's decisional behavior" through knowledge of the legal rules. *Op. cit. supra* note 3, at 844, 839.

³² Cf. the following from Leslie Stephen (quoted by I VINAGRADOFF, *HISTORICAL JURISPRUDENCE* (1920) 107 n.): "If we had but a single passion, if we were but a locomotive stomach like a polyp, the problem would be simple. . . . Who can say what is the relative importance of the various parties in the little internal parliament which determines our policy from one moment to another?"

As Dr. David M. Levy has recently indicated, any act of any person may be looked at as "the interaction of an individual and a social environment". And, within the act stresses may be placed at three phases: One, primarily, in the social environment; two, primarily, in the interaction of the patient's personality and the personalities about him; three, primarily, in the mental mechanisms of the patient himself. These stresses he also describes as: (1) the social milieu; (2) personality traits or personality drives; (3) intra-psychic mechanisms. "In every act", says Dr. Levy, "stresses vary. They may predominate in one of three ways, though they are always present."

on decisions of the personality of any individual judge. For "bio-chemical individuality", we are told, can take any one of an infinite variety of forms.³³

More than that, the attitude of any judge at any given time may vary with his diet. In the eighteenth century, la Mettrie referred to a gentleman who "was when fasting, the most upright and merciful judge, but woe to the wretch who came before him when he had made a hearty dinner; he was then disposed to hang everybody, the innocent as well as the guilty".³⁴ A contemporary answered him this wise: "Champaign will never change a peasant into a doctor; nor brown bread a philosopher into a fool. Aliments . . . will only support the material part of a man." Needham comments: "And yet, la Mettrie might answer out of his grave, the vitamine in rice husks, more potent than brown bread, may turn the fool into a philosopher, and thyroxin will be devastatingly effective where 'champaign' would equal water."³⁵

Needham also writes of "the possible physical means by which individuals can affect one another" and says there is every likelihood that "sub-

³³ NEEDHAM, *op. cit. supra* note 24, at 142: "The class of compounds known as the proteins is always associated with life, and, together with the fats and the sugars, invariably makes up the material foundation of living organisms. Our knowledge of the constitution of the protein molecule leads to the view that the number of possible varieties of it may be almost indefinite.

"It is made up of a very large number of smaller units, the amino-acids, and each of these can exist in three modifications, differently constructed in space out of the same number of atoms, and therefore rotating polarised light in different directions. The known amino-acids are about twenty-five in number, and, existing as they do in three modifications, the number of ways in which they can be combined together to form single protein molecules is immensely large, for at least one hundred amino-acid units are required to build up one protein molecule. The molecule of serum albumen may have at least 350,000 million stereoisomers. In this way we can foresee a kind of *biochemical individuality*, which well might be the physico-chemical manifestation of what we are accustomed to call *mental individuality*."

³⁴ Cf. HUXLEY, *op. cit. supra* note 25, at 185: "The only things of which we have immediate cognizance are, of course, happenings in our minds: and the precise nature and quality of these happenings depends on two things—on the constitution and state of our mind and its train on the one hand; on the other hand, upon events or relations between events outside that system. That sounds very grand; but all it means is that you need a cause to produce an effect, a machine to register as well as something to be registered. As a further consequence, since this particular machine (if I may be permitted to use the odious word in a purely metaphorical sense), this mind of ours is never the same for two succeeding instants, but continually varies both in the quantity of its activity and the quality of its state, it follows that variations in mental happenings depend very largely on variation in the machine that registers, not by any means solely upon variations in what is to be registered. Few (at least among Englishmen) would dispute the thesis that food, properly cooked and served, and, of course, adapted to the hour, is attractive four times in the day. But to a large proportion among us, even sausages and marmalade at nine, or roast beef and potatoes on a Sabbath noon, would prove not only not attractive but positively repellant if offered us on a small steamer on a rough day. I will not labour this point. . . . The fact remains that *we are always prone to regard the machine as a constant, and to discount the inner variation in ourselves when we are seasick, or in others when they are old and reminiscent, but not only is this discounting sometimes far more difficult, it is sometimes not even attempted.*"

³⁵ "The great divisions between men and men", says Jean Christophe, 'are into those who are healthy and those who are not?' The radical and all pervasive effect of this factor, and especially of *the condition of the alimentary tract*, upon the emotional life is difficult to exaggerate, though it is ordinarily thought unworthy of mention in moral treatises." PERRY, *GENERAL THEORY OF VALUE* (1926) 565.

stances, produced perhaps in the course of metabolism, may, though odourless and not perceived by any of the special senses, exert an influence of one organism upon another." He queries "whether there may not be hormones acting outside the body as well as the well-known ones within it", and bids us "remember that air is no inconvenient medium for the transmission of discrete molecules . . ."

What immeasurable vistas of judicial uncertainty this opens up! The hormonal substances produced by the metabolic processes of a witness or a lawyer may be transmitted through the air to the judge and have an incalculable and unperceived hormonal effect on the bio-chemical individuality of the judge. And it must be noted, too, that "the constitution of what Lloyd Morgan speaks of as the 'bio-chemical brew' is really susceptible of a very great number of modifications, and the physico-chemical expression of the emotions may originate in varying percentage relationships of the hormones of the body." Couple that fact with knowledge that exceedingly small amounts of chemical substance may affect the glands of internal secretion and that such glands exert "extraordinarily profound effects . . . upon the mind and the body" and you will surely become sceptical as to the possibility of prophesying a particular judge's reaction (in the form of his judgment, order or decree) on any particular day to the conflicting testimony in a particular "contested" case.³⁶

*Shall we seriously picture the lawyer of the future as not only carefully conferring with his witnesses and preparing his trial brief, but asking himself before going into court, "How are my hormonal exudations today? Are they in tune with Judge Jones' present hormonal sensitivity?"*³⁷

III

It is imperative that lawyers, when considering legal rules and judicial opinions, take to heart F. C. S. Schiller's cautions: "*The same meaning*", he writes, "*can be conveyed in many different forms and the same form can be utilized for conveying many different meanings . . .* In actual fact logical assertion grows up in the jungle of wishes, desires, emotions, questions, commands, imaginations, hopes and fears, which constitute the psychic life of every living person. In real life logical assertion is intimately bound up with this context; it is either the answer to or the raising of a question, and so an integral part of a larger process. Hence it can be extricated only

³⁶ Cf. HUXLEY, *op. cit. supra* note 25, at 138, 147, as to the "endocrine balance", "endocrine make-up" and the "interlocking system of endocrine glands" as "the chemical directorate of the body".

³⁷ Cf. PERRY, *op. cit. supra* note 35, at 564: "The instrument or mechanism of personality is the body, and pervasive bodily changes will be reflected in the personal life and in all its component interests. Interest is as dependent on the physico-chemical state of the body as is sensation or cerebration. There are many such changes of bodily state whose effects upon the motor-effective life are proverbial and indisputable, obscure as may be then *modus operandi*."

by a forcible abstraction . . . Moreover, the attempt thus to abstract logical assertion from its natural context inevitably breaks down. In actual knowing the forces which generate the assertion and determine its actual meaning reside in the psychological context . . . Clearly, therefore, if such was the original meaning of the assertion, it must be wholly transformed or destroyed when it is violently severed from its context. For it has its roots in these things, and unless they are adequately known, no one can tell what is the logical meaning it actually intends when it is made. Sever it from the source of its meaning in the personality of its assertor and every guarantee that it means what it meant *in situ*, or that any one still means to assert it, disappears.”³⁸

All of which is peculiarly true of many “value” judgments. When one says “This is beautiful,” his conclusion is often incurably personal and “subjective”. He can communicate his preferences. But it is almost impossible for him to formulate in communicable terms the bases for his preferences. He will only torture himself if he insists on finding an “objective” basis for his decisions that, “This is a great play”, “That is a splendid novel”, “This is a beautiful painting”. Always, “the devil whispers behind the leaves, ‘It’s pretty, but is it Art?’ ” The only proper answer to such a devilish question is that “there are nine and twenty ways of constructing tribal lays and every-single-one-of-them-is-right”.

There is sound wisdom in the derided saying that, “I don’t know what is Art, but I know what I like.” It is far sounder than to say, “I know what is Art, but I don’t know what I like.” The art critic who so asserts is not unlike the law teacher who is interested in what he calls “law” but not in specific decisions. And their resemblance goes deep: They are both unwilling to face the inherent “subjectivity” of the “value” judgments in their respective fields.³⁹

Dickinson is given to the use of the word “private”, as in the phrases⁴⁰ “more purely private” influences on the mind of the judge, or “the purely private and personal character of the picture evoked by each separate case in the mind of the judge who decides it”, or the “private mind of the judge”.⁴¹ Presumably, he has transplanted that locution from the field of scientific philosophic discussion where some writers have suggested that the

³⁸ SCHILLER, *FORMAL LOGIC* (1912) 5, 9-10. Granted that Schiller’s statements are too broad as to all assertions, they are, at any rate, moderately accurate as to many judicial opinions in “contested” cases. See Frank, *Are Judges Human?* (1931) 80 U. OF PA. L. REV. 17, 36-38.

³⁹ As to the inherent subjectivity of the “facts” of cases and the effect thereof on decisions, see the writer’s forthcoming article in the *ILLINOIS LAW REVIEW*. See Appendix II hereto, point 7.

⁴⁰ See Dickinson, *op. cit. supra* note 3, at 843, 1080, and DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 142.

⁴¹ Cf. Dickinson, *op. cit. supra* note 3, at 1069, where he speaks of “unique and subjective” thought-units.

old distinction between "subjective" and "objective" be abandoned in favor of "private" and "public".

But Dickinson has overlooked the significance of that distinction. See what its chief proponents tell us: The "public" is limited to that which can be communicated from person to person with a minimum of misunderstanding. The more communicable, the more "public"; the less communicable, the more "private". The realm of the public is, then, the realm of the natural sciences, for, writes Hogben, "the most important characteristic of scientific beliefs is their communicability . . . Up to a certain point we succeed in pooling our experiences by the method of science. In so doing we construct the public world . . . The classification of different experiences as external or internal is less important than the recognition that some are communicable and others are less so. In this nomenclature scientific beliefs are distinguished by their publicity . . . The important feature about the world construction of science is not its externality but its communicability."⁴² The "public" in this sense is the realm of the relatively certain, accurate, explicit and definite; of those experiences which have been formulated in nicely communicable terms.

Wherefore—and here is what Dickinson has ignored—value judgments, such as aesthetic and many ethical judgments, are at home in the "private" and not in the "public" world. For they are based upon fundamentally incommunicable experiences. "Aesthetic experiences", says Hogben, "come within of the domain . . . of privacy . . . Ethical values represent the private component of social behavior."⁴³

Now we need not commit ourselves unqualifiedly to this distinction. But since Dickinson has invoked its application, let us consider what place, in this terminology, would be occupied by judicial decisions. It may be strongly suspected that Hogben would allocate them to the domain of the "private", alongside ethical and aesthetic judgments.

⁴² HOGBEN, *op. cit. supra* note 26, at 30, 221, 246, 247, 248, 260, 261, 269, 270. Hogben writes: "The theory of a *public world* corresponds very closely with the attitude adopted by Poincaré in the following passage which occurs in his *Foundations of Science*:

"Sensations are therefore intransmissible or rather all that is pure quality in them is intransmissible and forever impenetrable. But it is not the same with relations between these sensations. From this point of view all that is objective is devoid of all quality and is pure relation. . . . Nothing therefore will have objective value except what is transmissible by discourse. . . ."

⁴³ Cf. HAR, *op. cit. supra* note 27, at 19: "Life is an organization of value-attitudes such as likes and dislikes. . . . Science being a conceptual unification of experience, at the basis of it there is always to be found an irreducible residue of sense data which can be known only by immediate perception, and which are peculiar to individuals. *The realm of experience which is peculiar to individuals is the world of private values and personal appreciation. The realm of experience which is common to all is the world of description of science. . . . A scientific truth is, therefore, an abstract truth and public property accessible to all. But the world of experience is a personal, phenomenal world; and the deepest, the most intimate part of one's experience is one's private property.*"

For many a decision there is some devil to ask: "It's pretty, but is it Law?" And the answer, it might be said, runs: "There are nine and twenty ways of constructing tribal laws and every-single-one-of-them-is-right!"⁴⁴

That would be an exaggerated statement. For just as it is possible to say that 98 per cent. of Americans would reject artistic creations too far out of line with customary American art forms (Chinese music, for instance), so there are some few simple and dramatic legal issues on which all American judges would be likely to agree. Where the facts of cases are (1) very simple, (2) based on uncontradicted testimony, and (3) tender a dramatic or highly stereotyped issue (such as violent assault or driving rapidly on the wrong side of the road or dynamiting in a capital-labor dispute) and (4) the cases are tried without a jury, by (5) judges who are honest—then there is moderate uniformity in the decisions.

But few cases are of that kind. In the making of most judicial decisions of "contested" cases⁴⁵ the unknowable, incommunicable, "private"⁴⁶ elements of the judge's thinking play an incalculable part.

⁴⁴ Using "law" as the equivalent of "court-law" and "court-law" as the equivalent of "decisions".

⁴⁵ Here there should be noted the inherently subjective character of "the facts" of a "contested" case: (1) If the evidence is conflicting, there is no way to test the judge's fact-finding by reference to the "record" or "objective" facts. Who can say whether the judge erred in believing some and disbelieving other witnesses? (2) The facts of the case are, then, what the judge thinks they are. And how are we to know whether he correctly reports what he thinks? (3) The difficulty is still further augmented, if the judge does not report his findings of fact or law but gives a laconic judgment. (4) If a jury's verdict determines the judgment, any guessing becomes almost absurd.

See the writer's forthcoming article in the ILLINOIS LAW REVIEW and Appendix II hereto, point 7.

⁴⁶ The distinction between "public" and "private" is too sharp. It does not sufficiently suggest that there are many shades of communicability, and it may induce a too optimistic belief in the attainability of a universe completely expressible in "public" terms. It would, doubtless, encounter further objections from the acute scientific philosophers. (Cf. COHEN, REASON AND NATURE, 89, 367-8, and RUSSELL, THE SCIENTIFIC OUTLOOK, 143.)

Yet these terms, if used with a lively sense of their lack of finality and of their necessary limitations, may be a useful way of avoiding some of the major difficulties encountered when using the words "subjective" and "objective".

Consider the following questions which might be put to a proponent of the distinction between "public" and "private":

(1) Are not even the purest formulations of the physicist "subjective" in the sense that they are incurably anthropomorphic?

(2) Is not the non-quantitative or relatively non-measurable as real as the quantitative or relatively more measurable?

(3) Is not the "private" as real as the "public"?

(4) Does not the "personal equation" (in the form of the motives, prejudices and predictions of the scientific thinker) often enter into the making of even the physicist's formulations?

The questioner might refer to the writings of such as Pearson, Mach, Rignano, Julian Huxley or Eddington. He might quote such passages as these:

"The *a priori* necessity of the proposition that 'space has only three dimensions' was determined, according to Kant, by the existence of an 'external sense' which is 'a property of the mind'. If he had lived fifty years later he would have realized that the Cartesian frame work is a material consequence of the structure of the internal ear. If Kant had been familiar with Sherrington's work on the proprioceptor organs, he would have seen a deeper significance in the experiment which Galileo performed, when he used his own pulse to measure the period of a swinging lamp. . . . The human body is itself a clock from whose tickings we can never escape. . . . To annihilate space is not an impossible feat for a modern biologist. . . . The philosophy of fishes might well contain many axioms that are omitted in the Kantian critique." HOBGEN, *op. cit. supra* note 26, at 53-54, 239. Cf. Dampier-

IV

The more we learn about how men think the more obvious it becomes that the process is exceedingly intricate. And since judges are men, it must be true that the way judges think is no simple matter. Yet Dickinson employs descriptions of judicial thinking which involve such dogmatic simplisms as these:

*"The process falls into two parts: first a complete and accurate examination of the facts; second, a balancing of the facts according to some general standard of judgment."*⁴⁷

*"The operation of rules is to make certain factors the primary elements before the judge's attention, and to push other considerations into the background until he has reached conclusions on those which the rules single out as primary."*⁴⁸

*"It is a presupposition of a system of law that a legal tribunal feels and must feel a sense of obligation to employ in the decision of litigated controversies those applicable rules which happen to be stamped as authoritatively legal, irrespective of whether the tribunal agrees with them, and whether or not it would employ them if they were not so authoritative. Only an appellate court will exercise its power to decide a case in disregard of a rule which it feels has once been accepted as authoritative, and in the rare cases where the power is exercised, it must be for reasons far stronger than would cause the disregard of commonly accepted general propositions in some other field of thought."*⁴⁹

Whetham, ENCYCLOPEDIA BRITANNICA (14th ed. 1929) 122: "The electric fish or torpedo may have an electric sense, and a fish-philosopher might argue that it is more intelligible and satisfactory to explain mass in terms of electricity than electricity in terms of mass." Huxley, *op. cit. supra* note 25, at 200, writes of "biological relativity", saying that "we are but parochial creatures endowed only with sense-organs giving information about the agencies normally found in our own little environment. . . . Electrical sense . . . we have none. . . . When we begin trying to quit our anthropocentricity and discover what the world might be like if only we had other organs of the body and mind for its assaying, we must flounder and bump. . . . Even the few senses we do possess are determined by our environment." Needham, *op. cit. supra* note 24, at 74, says, "Very little study of the history of scientific thought is required to show that the tacit background of a great experimentalist's mental operations exercises a profound influence on the line of progress which knowledge takes." (See also LEWIS, THE ANATOMY OF SCIENCE (1926) 90-93; cf. FRANK, *op. cit. supra* note 24, at 285-288.)

The proponent of the distinction between "public" and "private" avoids the necessity for discussing those questions. He can say: "Assume, if you like, that all human formulations, including those of the physicist, are anthropomorphic or anthropocentric; that the relatively quantitative is no more "real" than the relatively non-quantitative; that the "private" is as real as the "public"; and that the peculiar biases of the physicist do sometimes affect his statements of relations. Still, the difference between

(a) the formulations describable as personal value judgments and

(b) the formulations of the physicist,

lies in the lesser and greater degree of precise and unambiguous communicability. And that difference is so immense that it should be accepted as a difference of kind.

"ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 142. Here Dickinson is talking of "India-rubber concepts" like "due care". In *op. cit. supra* note 3, at 1079, he makes a similar statement with reference to "highly specific rules". He says: "In most instances of this kind the question of the application of the rule, *once the facts are ascertained*, is so simple as to be practically mechanical."

⁴⁷ *Op. cit. supra* note 3, at 849.

⁴⁸ *Ibid.* 856.

"Only by thus visualizing the judge as he stands in the presence of the rules which will help him decide, can an outsider undertake to make accurate forecast of what decision will be reached."⁵⁰

"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*" (*i. e., the rule*) "*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.*"⁵¹

How to account for the continued teaching of such over-simplified psychology? The answer may perhaps be found in a comment of a law teacher in a recent letter to the writer. "How", he asked rhetorically, "am I to teach the sort of stuff you mention?" What he meant was that the mental peace and comfort of the pedagogue demand over-simplification. Here before him are a class room of law students. The subject is "law". The students are expected to practice "law" in courts and with reference to what courts actually do. But the class room is not the court room or a law office. Time was when a law school was a law office and perforce the students frequently visited the court house. But not today in our most honored law schools. Such schools, which should be leaders in realistic study of their subject matter, are committed against the apprentice system in its old form or more sophisticated forms. Theirs is called the "case-system". But they do not study cases. They do not even study the printed records of cases, let alone cases as living processes.⁵² They restrict their attention to upper court opinions. So that, at the outset, the teaching is over-simplified. And having thus mistakenly withdrawn from and misdescribed the richness, variety and confusion of the actual, the temptation is strong to continue to withdraw and to continue to distort the description—in the interest of ease in teaching.

A false psychology and a crippled pedagogy are bound to result. The actual ways of lawyers and judges are, by the very nature of such teaching, "out of bounds". Since court room actualities are not to be found in the case-books used by teachers and students; references to such actualities are made humorously, or sarcastically or in jesting asides or foot-notes. To

⁵⁰ *Ibid.* 844.

⁵¹ *Ibid.* 839.

⁵² Medical case-histories are far more complete than the materials in legal "case-books". Even so, what would we think of a medical school in which students studied only what was contained in medical case-histories, and were deprived of all clinical experience? Legal education is certain in the future to give the student an increasing amount of clinical experience while he is in law-school. In other words, it will revert, although with more sophisticated conceptions, to the apprentice system.

law teachers and students the actual seems unreal. It is unreal—in law schools as “law” is usually taught.⁵³

The conventional over-simplified description of the ways of judges is, then, perhaps due in part to the fact that they are seen “*through a glass, darkly*”.⁵⁴

For some few years there has been an infiltration into the law schools of the so-called “social sciences”. That is all to the good—or will be when those disciplines cease to be applied only to the sterilized and artificially selected data found in the opinions of appellate courts and are applied to the material with which lawyers and judges deal.⁵⁵ Properly expand the field of the law students’ attention and you may say that when studying law he is studying one of the “social sciences”.

But you will at once want to note the dangers lurking in the name “social science”—a danger against which Woodrow Wilson warned.⁵⁶ To many people “science” connotes the more exact departments of knowledge such as chemistry and physics. And some such idea was in the mind of Comte, the father of sociology, who thought of it as “social physics”. But in that sense there are no social “sciences” and probably never will be. Of “scientific laws”, similar to the scientific laws developed by the physicist, there are none in economics, politics or sociology. Har, in his book, *Social Laws*, examines 168 alleged “social laws” which purport to be “scientific” in the narrow connotation of that term. At most, he finds, there are a few generalizations of a reasonable degree of probability—Gresham’s “law” and the Malthusian population conjectures, for instance.⁵⁷

⁵³ Dickinson (*op. cit. supra* note 3, at 837-838) is scornful of the notion that those interested in “law” should deem it worthy of their dignity to consider as fully as important as rules such facts as these: That “a police magistrate will exercise his discretion in accordance with the wishes of a particular politician”; that “in jurisdictions where justices of the peace rely for their fees on amounts collected from defendants, there is likelihood that such officials will give judgments for plaintiffs”; the “fact of Judge A’s known animosity to lawyer X” which will lead Judge A in a given instance to disregard a rule. See Appendix I hereto.

⁵⁴ Quoted by LIPPMANN, *PUBLIC OPINION* (1927) 119, from Phillip Littel, who said of a distinguished professor that “he sees life as through a glass darkly”. As some readers of this article may be less familiar with scriptures than with the advance sheets, it is perhaps wise to quote from I CORINTHIANS, 13:11-12: “When I was a child, I spake as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things.

“For now we see *through a glass, darkly*; but then face to face: now I know in part; but then shall I know even as also I am known.”

⁵⁵ But there is to be observed the wise caution of Frankfurter ((1930) 15 IOWA L. REV. 129): “In the treacherous domain of the social sciences we must be wary lest we live on one another’s washing—lest we prove an unknown in one field by an unknown in another.”

⁵⁶ See HAR, *op. cit. supra* note 27, at 212.

⁵⁷ COHEN, *REASON AND NATURE*, 347-368, discusses the same subject in a profoundly searching manner. His analysis reveals that “the general rules employed in evidence or explanation of particular facts” in the social sciences are implicit and not explicit, and “consequently unexamined and of uncertain truth value”; that “the subject matter of the social sciences is inherently more complicated in the sense that we have more variables to deal with than in physics or biology”; that “with the greater complexity of social facts are connected (1) their less repeatable character, (2) their less direct observability, (3) their greater variability and lesser uniformity, and (4) the greater difficulty of isolating one factor at a time”; that it is difficult to apply the mathematical methods which have proved fruitful in

Even those few generalizations, he believes, should be called "statements of tendencies" rather than scientific social laws. For such generalizations must be accompanied by indispensable companions such as "other things being equal", "it tends to", "in the long run", "by and large", or "on the whole". "What", asks Har, "do these phrases mean? Let us take, for example, 'the long run'. The 'long run' cannot be a short run; the 'long run' cannot be eternity, for eternity can only be thought of, but not lived through. The 'long run' is not a period of time which can be marked off with any degree of precision. For, if we were so certain as to be able to mark off 'the long run' with any degree of precision, we would not find it necessary to take refuge in such a vague phrase, 'in the long run'. There remains only one possible meaning which might render the expression sensible; namely, that 'the long run' is such a length of time as is just sufficient to fulfill the conditions implied in the expression. *Any social law which contains the phrase 'in the long run' in this sense may be a circular statement. The same may be said of the other phrases such as 'on the whole', 'by and large', and 'other things being equal' . . . A law of this type . . . is always characteristically too vague to be much of a law; and if it be made a little more explicit, it frequently turns out to be a circular statement. Other things are rarely equal, and the various tendencies continually counteract one another.*"⁵⁸

Har concludes that, to avoid the misunderstanding created by the misleading use of the word "science", "the more accurate designation for the social studies should be 'social art', just as we should properly speak of 'medical art' rather than 'medical science'. By an art we mean the skill or wisdom in performing certain actions, which is acquired through experience and inference. *A social art might then be defined as skill*⁵⁹ or wisdom

the natural sciences, "for these mathematical methods depend upon our ability to pass from a small number of instances to an indefinitely large number by the process of summation or integration"; that "in the social sciences the very categories we use are hazy, subject to variable usage and to confusing suggestion"; that "physical laws are in fact all expressed in relatively simple analytic functions containing a small number of variables" but social phenomena usually "depend upon more factors than we can readily manipulate"; that "unless social forces are measurable and there is some common unit or correlation of social forces, the whole notion of laws as employed in the physical sciences may be inapplicable"; that the best we can expect in the foreseeable future in the social sciences is the development and application of "type analysis", such as "the average man", "the Renaissance", "freedom of contract",—kinds of "composite photographs", "concretions in discourse and thought", "ideal configurations of distinguishable but not always separable features", relatively "definite combinations or patterns which became familiar to us through continual reference"; such type analysis, "involving as it does a certain lack of explicitness in its assumptions, of definiteness in its terms, of coherency and accuracy in its conclusions, may not be the ultimate ideal of social science, but it is all we can expect in the foreseeable future."

⁵⁸ ADLER, DIALECTIC (1927) states that the social sciences are still using "baby-talk".

⁵⁹ Cf. the recent decision of the Illinois Supreme Court defining the practice of law in effect as rendering services which "involved the use of legal knowledge and skill". See *Late Decision on Unlawful Practice of Law by Corporations* (1931) 17 A. B. A. J. 487, 490, and cf. 507.

Cohen, *op. cit. supra* note 28, at 89-90, denies the right of psychiatry and psycho-analysis to be called "scientific", saying that "the demand to be 'cured' must be met by more *intuitional*

which is useful to the appreciation of human values, to the improvement of human relations and the accompanying conditions of living".

And so, if we view law as akin to such a discipline as, say, economics, we might do well to consider law rather a social "art" than a "science". We would thereby get rid of that dream of mathematical exactness in judicial processes which all too long has messed up legal thinking. Granted that even physical science is not the perfection of absolute certainty it was once supposed to be,⁶⁰ still the degree of precision and communicability attained by the physicist is so far beyond the grasp—present or reasonably foreseeable—of the lawyer that it is almost imperative that the lawyer cease deluding himself by using the same word as does the physicist to describe what he is doing or has done or is likely to do within any appreciable period in the future.

Of course, the word "science" has been and can be employed in the sense of "verified knowledge" or "classified knowledge", or "systematic knowledge", or "the acquisition of reliable knowledge in any field", or "the significant synthesis of fact", or "the persistent and skilled use of the mind and the stores of knowledge about anything", and the like. And the labels "science", "scientific", "scientist" cannot be exclusively appropriated by physics and physicists, else geology would not be a science or Darwin a scientist. But "science" evokes in the mind of most persons a central image resembling something like physics, at any rate, something with a very high degree of certainty, accuracy and definiteness. "The word science, to the popular mind, suggests a limited kind of professional activity. It means a working with test-tubes, and telescopes, plotting curves, calculating equations", writes Max Eastman.⁶¹ Since, as Morris Cohen says, it is almost impossible "to rob words of their old flavour or the penumbra of meanings they carry with them in ordinary intercourse",⁶² it seems to fol-

methods (in plain words, happy guesses) of those who have acquired skill by practice. But this practical necessity of acting on inadequate information does not make science out of the psychiatrists' or psycho-analysts' ideologies, no matter how technical their vocabulary". With a change of but a few words, that comment would be applicable to the work of lawyers and judges.

⁶⁰ For some convenient references to and summaries of the pertinent discussions of that subject, see FRANK, *LAW AND THE MODERN MIND*, 7, 325-326, 285-288, 245-248, 259, 94-99.

⁶¹ In a forthcoming book, *THE LITERARY MIND*, c. I.

⁶² Eastman, who is interested in distinguishing poetry from science, perhaps warrantably defines science, for his purposes, as "the persistent and skilled use of the mind and the stores of knowledge about anything". But, for most purposes, it is harmful to try, by the use of a blanket word, to obliterate the differences imposed on the thinker by the differences in the materials about which the thinker is thinking. Cohen (*op. cit. supra* note 28, at 366) says that "the fundamental unity of common sense, social science and natural science is apparent. But it will not do to dismiss the differences in certainty, accuracy, universality, and coherency that actually distinguish these fields as 'mere matters of degree'. . . . Not only are differences of degree as important as any other differences, but the similarity of different things which leads the superficial to renounce further thought is the necessary basis for significant distinctions."

And yet Cohen would apparently apply the adjective "scientific" to the work of a legal scholar like Maitland. Cohen's amazing erudition and sagacity entitle any of his opinions to

low that it is unwise to confuse the average person by saying that Adam Smith and Spinoza are scientists. By using the same words to denote the work of Newton or Einstein and also that of Maitland or Holmes, to paste the same pictures on the jackets of books relating to what chemists do and of books relating to what judges and lawyers do, is needlessly to invite misunderstanding.

Undoubtedly lawyers and legal scholars should develop towards their subject what we think of as "the scientific habit of thought", the intellectual and emotional attitude of the natural scientist⁶³ when he is at work as scientist.⁶⁴ For the spirit of the physicist can be differentiated from his products and from his mathematical method, from his use of "laws expressing the invariant repetition of elements", from his discovery of "abstract universals dealing with repeatable elements".⁶⁵

But the growth of scientific spirit among lawyers will not make law a science. That spirit has been said to entail "the discipline of suspended judgment, elimination of the personal factor, a patience in the attempt to be consistent, a serene passion for verification".⁶⁶ *Lawyers imbued with such a scientific spirit will probably deny that law is or is likely ever to be a science,* (just as many scientific-minded physicians today deny that medicine is or is likely ever to be a science). And that, not because lawyers are inferior to physicists, but because law is far less simple than physics. A Maitland or Holmes is no less profound, no less a genius, than a Newton or an Einstein, but he has devoted himself to a more unruly body of material.

The wise lawyer will learn to say, "We must not look for the same degree of accuracy in all subjects; we must be content in each class of subjects with accuracy of such a kind as the subject matter allows, and to such extent as is proper to the inquiry . . . An educated person will expect accuracy in each subject only so far as the nature of the subject allows."⁶⁷ He will solace himself by noting that, "Our judgments about atoms and

the greatest respect. *But the writer—(at the moment of writing this paper)—feels that calling Maitland a scientist and his subject matter a science may have unfortunate consequences in that it may delay the development among legal scholars of that humility, that confession of ignorance, which is demanded as a condition of the growth of wisdom concerning that subject matter.*

⁶³ The writer has expressed a doubt as to whether the "scientific spirit" concerning law can be developed among lawyers merely by teaching them the history and methods of the natural sciences. See FRANK, *op. cit. supra* note 24, at 93-99.

⁶⁴ Not the natural scientists as amateur philosopher or when on a theological spree.

⁶⁵ Cf. COHEN, *op. cit. supra* note 28, at 347, 353, 358, 361.

The scientific spirit must not be confused with the belief that everything is reducible to mechanics. See *ibid.* bk. 2, c. 2; cf. FRANK, *op. cit. supra* note 24, at 285 n., 288. See Russell, *op. cit. supra* note 25, at 120.

⁶⁶ EASTMAN, *op. cit. supra* note 61.

⁶⁷ ARISTOTLE, *ETHICS*, Bk. I, c. vii; Bk. I, c. ii. Cf. VINOGRADOFF, *op. cit. supra* note 32, at 59: "Such a task is difficult to fulfill; but is it not the blessing as well as the curse of the modern student that he is conscious of being confronted on all sides by tremendous problems, instead of facing in happy ignorance obvious dangers and mistakes? . . . In any case, we may envy the blind who does not notice them, but it is not proper for those who see to shut their eyes on purpose."

stars are more exact and mathematical than other judgments, but perhaps only because our acquaintance with these objects is so shallow. If the stars came near, if one atom could be caught and delved into, the astronomers and physicists might find themselves almost as humble and distracted as the student of human nature."⁶⁸

Perhaps even "scientific spirit" promises too much; it may be that some less equivocal and less optimistic phrase—such as "constructive scepticism"⁶⁹—would be preferable to describe the revised enlightened attitude towards which reflective lawyers and law teachers are groping today.⁷⁰ At any rate, the "science of law" seems too pretentious an appellation. It contains two highly ambiguous words—"science" and "law". It would

⁶⁸ EASTMAN, *op. cit. supra* note 61. Morris Cohen, speaking of the far greater accuracy of physical laws as compared with statistical averages in the social field, says, "Part of the precision may be due to the fact that in the human field individual variations obtrude themselves, while in the physical realm the constituent individuals or atoms are for the most part beyond our range of observation. . . . But when we remember that the number of atoms in a pinhead is greater than that of all the human beings now alive, we can readily understand why any tangible piece of sodium behaves so like any other piece." *Op. cit. supra* note 28, at 222. Again (at 352) he writes, "Reasoning from examples in the social realm is intellectually a most hazardous venture. We seldom escape the fallacy of selection, of attributing to the whole what is true only of our selected instances. To urge as some philosophers do, that this is true only because physical knowledge is thinner and depends more upon the principle of indifference, is to urge an interpretation, not a denial of the fact."

⁶⁹ What is needed is some descriptive name to indicate questioning detachment and the substitute of the "fear of being deceived" for the desire for certitude. See RIGNANO, *THE PSYCHOLOGY OF REASONING*, 224 (1923). Cf. Bishop Butler: "Things and actions are what they are and the consequences of them will be what they will be; why then should we desire to be deceived?" See Appendix II hereto, points 4, 5 and 6.

The legal scholar can share the attitude of constructive scepticism with the scientist. Morris Cohen tells us that "the progress of science always depends upon questioning the plausible, the respectably accepted, and the seemingly self-evident"; that "science pushes doubt as far as possible and so arrives at propositions which are not so readily doubted"; that "progress in science is thus possible because no single proposition in it is so certain that it can block the search for one better founded"; that science is, "in its assumption of the existence of truth and in its reliance on logic, the very antithesis of dogmatic scepticism, which seeks to deny truth of all propositions"; and that "the certainty which science aims to bring about is not a psychologic feeling about a given proposition but a logical ground on which its claim to truth can be founded". *Op. cit. supra* note 28, at 348, 86, 87, 84. But see Frank, *op. cit. supra* note 38, at 26 (note 22), 36 (note 46), 44 and 48 (note 73) to the effect that Cohen has not been scientifically sceptical in his recent criticisms of the legal sceptics.

On the value of sound scepticism, see Russell, *op. cit. supra* note 25, at 100.

⁷⁰ The phrase "legal realism" has been suggested to describe this spirit in legal thinking in so far as it is concerned with the revolt against the traditional pseudo-rationalism. See Llewellyn, *A Realist Jurisprudence—The Next Step* (1930) 30 COL. L. REV. 431; Pound, *A Call for a Real Jurisprudence* (1931) 44 HARV. L. REV. 697; FRANK, *op. cit. supra* note 24, at 42-47, 264-284; Radin, *Legal Realism* (1931) 31 COL. L. REV. 825; Llewellyn, *Some Realism About Realism—Responding to Dean Pound* (1931) 44 HARV. L. REV. 1222.

Perhaps a preferable name for this movement would be "legal actualism", "legal observationism", "legal descriptionism", "legal pragmatism", or "legal modesty".

For "realism" has many meanings. In philosophic discourse it is necessary to distinguish logical realism (contrasted with nominalism) and metaphysical realism (contrasted with idealism). See SCHILLER: "In metaphysics 'realism' is opposed to 'idealism' and not to 'nominalism'. It asserts that perceived objects are 'independent' of their percipients, or that a real world exists whether there exists a mind to know it or not. How different these uses are is shown by the fact that, though Plato and Aristotle are both 'realists' in logic, Plato would be called an 'idealist' and Aristotle a 'realist' in metaphysics."

"Realism" is also used in opposition to "romanticism", "fantasying", "prettifying", and "wishful thinking". It is in this sense that "realism" was employed in the label "legal realism".

seem wiser for the law schools to devote themselves to something less high-sounding and more realizable,—the teaching of four separate but related arts:⁷¹

- (a) The *art* of the *judge* (or the judging process, or official dispute-deciding),⁷²
- (b) The *art* of the *lawyer* (or the “practice of law”),⁷³
- (c) The *art* of the *critic* of the work of lawyers and judges,
- (d) The *art* of the *teacher* of the other three arts.

And if we view the practice of law and the judging process as arts, we shall keep a weather eye open for those unverified or inadequately verified generalizations⁷⁴ about what courts do which now masquerade as authentic, infallible statements or invariant relations.

The arts of the lawyer and the judge involve daily dealing with uncertainties, contingencies, imponderables, unpredictable. Were that not true, life would be simpler for clients, judges, lawyers and teachers of law. As it is, those arts are not easy to learn and therefore not easy to teach.⁷⁵

⁷¹ The teaching of these arts should, of course, give much consideration to the ideals of these arts and to the means of improving them. The “legal realist movement” is in large part inspired by a “a zeal for justice and the improvement in its administration” and by disgust for the “sterile, cold indifference of conventional legalism to actual justice”. See Llewellyn (1931) 44 HARV. L. REV. at 1262; Yntema, *The Rational Basis of Legal Science* (1931) 31 COL. L. REV., 925 at 935. The “realists” are distinctly—sometimes excessively—interested in what ought to be, but they insist that improvement must be based on knowledge of what is now going on.

⁷² *There is a crying need in American legal education for the treatment of judging as an art separate from but related to that of the lawyer.*

Judging is an art used not only by those labelled “judges”. It should be taken in the sense of official *dispute-deciding*.

⁷³ In this paper attention has been directed primarily to the relation of the lawyer to the work of judges. As indicated in the previous note, the word “judges” should be read as meaning “dispute-deciders”. For the lawyer will be increasingly concerned with arbitration (cf. Pressman and Baum, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts* (1930) 8 N. Y. U. L. Q. REV. 238, 428), and with the work of such bodies as the Inter-State Commerce Commission and the Federal Trade Commission.

The lawyer has to deal also with other officials. But, in so far as such officials are not dispute-deciders or the servants of dispute deciders (like sheriffs), the lawyer in his dealings with them is not exercising his peculiar function as lawyer. This does not mean that as lawyer it may not often be desirable for him to know how such other officials work; it does mean that knowledge of that kind is not the lawyer’s specialty and could be omitted from the law school curriculum.

The lawyer at times may need to know about anthrax, meteorology, the commercial geography of Peru, or ballistics, but law schools can afford not to teach such subjects.

⁷⁴ Har writes: “Now even an art presupposes certain working principles which need not be exact, but which must possess some measure of probability.” The lawyer’s art has, as yet, developed few such working principles.

Dickinson (*The Law Behind Law* (1929) 29 COL. L. REV. 285, at 295, n. 22) wisely notes the essential point when he says that “a field of increasing usefulness is opening up for the application of science to law” in “indicating whether a proposed rule of law is adapted to accomplish the end desired”. In other words, the judicial art can use scientific knowledge as does the medical art.

⁷⁵ The use of the word “art” stresses, too, the fact that the practice of the lawyer and the judge involves much that is in the realm of the “private”—much which, like painting or the writing of fiction, cannot be taught through the use of precise precepts but must be learned, so far as it is learnable, through contact with the working habits of those experienced in the field. *The revival of the apprentice system in training lawyers deserves serious consideration, —not the apprentice system in its old form, but combined with the skills developed in our leading law schools.*

If, in order to make teaching easier, law school teachers invent an unreal somewhat which they call "law", and delude themselves and their students into accepting the learning of that unreal "law" as a preparation for the practice of law or the task of judging, they are shirking their obligations.⁷⁶

APPENDIX I

A NOTE ON "SOURCES" AND "CAUSES" OF "LAW" AND THE "MOTIVES" OF JUDGES.

1. Austin

Law, according to Austin, consists of the commands, in the form of rules, laid down by the sovereign, either directly or through the sovereign's subordinates. Such rules can be expressed in legislation (statutes) or in judicial legislation (judgments or decisions in particular cases).

The "sources" of law, says Austin, are the officials who make these rules, *i. e.*, legislators and judges. (The same official—such as the Roman Emperor—may sometimes be legislator and sometimes judge.)

He chides his predecessors for saying that customs, precedents or morality can be "sources" of law. They are, Austin insists, merely "causes" or "motives" which affect the law-maker (as legislator or judge) when creating the law (the rules). Thus, says Austin, a custom is no more a "source" of law than the blandishments of the Emperor's wife which induce him to enact a law. Such blandishments, together with customs, morality and the like, are "motives". *The motives which determine a judge to adopt the rules of law are "numberless".*⁷⁷

2. Gray

Gray's definition of law⁷⁸ differs from Austin's. The Law, writes Gray, consists exclusively of the rules which the judges—as the judicial organs of the State—lay down (and hold themselves out as ready to enforce) for the determination of legal rights.

The Law, Gray insists, must not be confused with the "sources" of Law to which, by the direction of the State, the judges have recourse when they are establishing their rules. Those accredited or "legitimate sources" are Statutes, precedents, the opinion of learned experts, custom and morality.

Decisions are not law, says Gray, for the law consists of rules. The decisions and the rules must be distinguished.

Gray and Austin differ in their definition of law principally in this: that Gray excludes rules found in statutes and includes only rules laid down by the courts.

⁷⁶ As Judge Frederick E. Crane recently said (New York Times, March 29, 1931, at 2 N.): "With the practical working of the law he" (the law student) "has little or no familiarity. He may come to the bar almost ignorant of how the law should be applied, and is applied, in daily life. It is, therefore, not unusual to find the brightest student the most helpless practitioner, and the most learned surpassed in the profession by one who does not know half as much".

That statement disclosed a shocking state of affairs. Suppose that medical schools turned out students ignorant of how medicine "should be applied, and is applied, in daily life".

⁷⁷ AUSTIN, JURISPRUDENCE (4th ed. 1879) 554, 560, 561, 562, 564. Of course, according to Austin, the rules are the law, not the motives.

⁷⁸ GRAY, THE NATURE AND SOURCES OF LAW (1927) 191, 200, 213, 222-230, 236, 257, 266-269, 273-276, 337, 369, 498, 602, 619, 656.

Their difference as to "sources" is in part verbal. What Gray calls "sources" Austin calls "causes" or "motives".

Let us use Austin's terminology. Then two differences appear:

(1) Gray put the rules found in statutes among the "causes" or "motives" of "law". But he denied that such rules were a part of "law". Austin, on the other hand, insisted that statutory rules in the Law were an inherent part of "law".

(2) Gray sharply limits the causes or motives to "legitimate" or respectable causes or motives: "Of course", he writes,⁷⁹ "the motives of a judge's opinion may be almost anything,—a bribe, a woman's blandishments, the desire to favor the administration or his political party, or to gain popular favor or influence; but these are not sources which jurisprudence can recognize as legitimate."

There Gray breaks most decisively with Austin.⁸⁰ For to Austin all motives affecting a law-maker (judge or legislator) have a causal relation to the law and therefore, presumably, all motives deserve consideration.

3. Dickinson

Dickinson's attitude is essentially like Gray's. Law consists exclusively of the legal rules employed by courts. Statutes, customs, legal theories and the like are "influences". They lead to the making of law (rules), but are no part of law.⁸¹ He strongly intimates that improper motives of the judges (bias, response to political pull and the like) should not be regarded by a self-respecting lawyer as among the "influences" which deserve his consideration.⁸²

4. Holmes

To Holmes the law, for the lawyer, seems to consist of specific enforceable decisions of the courts.⁸³ They determine legal rights and duties.

Holmes, in an early article,⁸⁴ followed Austin in distinguishing law from "motives". Since Holmes stresses decisions, the distinction he made in that early article is presumably between (a) decisions, and (b) "motives for decisions".

But, in that early article, he made a further differentiation. He seemed to divide the motives for decisions into two kinds:

(1) Motives "which can be relied upon as likely in the generality of cases to prevail." Such are constitutions, statutes, customs and precedents. Those motives "are sufficiently likely to prevail to afford a ground for prediction."

(2) "Singular motives" are not sufficiently likely to prevail. They "are not a ground of prediction, are therefore not considered." Such motives are: a doctrine of political economy, blandishments, the political aspirations of the judge, or his gout.

Holmes did not elsewhere repeat this classification of motives. His later writings warrant the belief that he abandoned it.⁸⁵

⁷⁹ *Ibid.* 619.

⁸⁰ Cf. Bertrand Russell's statement that "deductions from inspired books is the method of arriving at truth employed by jurists . . ."

⁸¹ *The Law Behind Law* (1929) 29 COL. L. REV. 113, 285; ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 145.

Dickinson curiously misdescribes Gray's attitude and therefore fails to see the resemblance to his own. See FRANK, *op. cit. supra* note 24, at 264-271 and especially 266 n.

⁸² Dickinson, *op. cit. supra* note 3, at 837.

⁸³ See FRANK, *op. cit. supra* note 24, at 124, 126.

⁸⁴ Book Notices (1871) 6 AM. L. REV. 723, reprinted in (1931) 44 HARV. L. REV. 788.

⁸⁵ Cf. HOLMES, THE COMMON LAW (1881) I, 5, 35-36; and HOLMES, COLLECTED LEGAL PAPERS (1920). See also Frankfurter, *Mr. Justice Holmes and the Constitution* (1931) 41 HARV. L. REV. 121, and *The Early Writings of O. W. Holmes, Jr.* (1931) 44 HARV. L. REV. 717.

5. *Goitein*

Goitein⁸⁶ defines "law for the jurist" as "the sum of the influences that determine decisions in courts of justice." There is, he says, "no *legitimate consideration* which is not covered by the definition." He avowedly wants to include non-intellectual ingredients. Whether he would include political pull or bribery and the like is not clear; doubt is created by his use of the word "legitimate".

Observe that to Goitein law is not the decisions but *all the influences* that produce or determine decisions. The aggregate of all of Gray's "causes" (and perhaps all of Austin's "motives") would seem to constitute law (for the jurist).

6. *Frank*⁸⁷

Frank, when he defines law, refers to "court-law" and says that "court-law" consists of specific, enforceable⁸⁸ judicial decisions (judgments, orders and decrees). There is (a) existing court-law (*i. e.*, actual past specific decisions) and (b) future court-law (*i. e.*, guesses as to future specific decisions).⁸⁹

Frank has suggested that the word "law" is so ambiguous that its use should be avoided when possible. He prefers to speak either (1) of what courts do in fact or (2) of legal rights and duties.⁹⁰ In either case, past specific decisions in actual lawsuits and guesses as to such future decisions are pivotal.

The rest of the judicial process is subsidiary to specific decisions and guesses concerning them. He agrees with Austin in rejecting differentiations between different kinds of causes of, or motives for, or influences producing decisions. *He thoroughly disagrees with Gray and Dickinson in rejecting consideration of some of the motives, causes or influences as illegitimate or unworthy of the study of a gentleman-lawyer. He disagrees with Goitein if Goitein means to limit study to "legitimate" influences.* He also disagrees with Goitein, because Goitein focuses attention on the "influences"; Frank says the *attention should be centered on the result of the influences, i. e., the decisions.*

*But when considering—as a lawyer must—the causes of or motives for decisions, none whatsoever (whether "legitimate" or not) can properly or safely be omitted.*⁹¹

The early Holmes' view he criticizes for this reason: It assumes that some motives and influences are regular in their operation and other are "singular", in other words, that some motives are better bases than others of prediction—aids to guesses about future decisions. This Holmes does not prove. Frank doubts whether it is provable. In "contested cases" (cases where questions of fact are in issue and there is conflicting testimony as to those questions of fact) it has by no means been demonstrated that any one influence is more operative than others. Precedents, statutes, constitutions, customs, morals, biases, the personality of the judge, his gout or other ailments, political pull, desire for popularity—

⁸⁶ 13 ENCYC. BRIT. (14th ed. 1929) 198.

⁸⁷ To relieve the monotony the writer here refers to himself in the third person.

⁸⁸ See also the suggestion made in Part I of this paper (1931) 80 U. OF PA. L. REV. 17, for an "enforcement approach" or a "what-will-happen-if" approach.

⁸⁹ FRANK, *op. cit. supra* note 24, at 46-47, 100-159.

⁹⁰ See the main body of both instalments of the present article.

⁹¹ Of course, this is *peculiarly true of cases tried by a jury*. See FRANK, *op. cit. supra* note 24, at 170-186, 302-310.

Dickinson pays little heed to the effect of the jury; his references to the jury include a repetition of the old myth that the judge controls the jury's decision; see his ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW, 151-154, and *cf.* FRANK, *supra*, at 170-173, 302-309.

Gray sagely refers once to the jury; *op. cit. supra* note 78, at § 235.

Goitein specifically and wisely notes the effect of the jury; *op. cit. supra* note 86, at 198.

Holmes has it well in mind; see THE COMMON LAW, 126, 129, 152.

who knows which of those influences will determine the judgment to be entered in a lawsuit which may hereafter arise somewhere, before some now unknown judge, in some now unknown jurisdiction?⁹²

With specific reference to the views of Gray and Dickinson, the following passage from Wallas' *Human Nature in Politics*⁹³ is apposite:

"In the ideal democracy", says Mr. Bryce, "every citizen is intelligent, patriotic, disinterested. His sole wish is to discover the right side in each contested issue, and to fix upon the best man among competing candidates. His common sense, aided by a knowledge of the constitution of his country, enables him to judge wisely between the arguments submitted to him, while his own zeal is sufficient to carry him to the polling booth."

"A few lines further on Mr. Bryce refers to 'the democratic ideal of the intelligent independence of the individual voter, an ideal far removed from the actualities of any State.'

"What does Mr. Bryce mean by 'ideal democracy'? If it means anything it means the best form of democracy which is consistent with the facts of human nature. But one feels, on reading the whole passage, that Mr. Bryce means by those words the kind of democracy which might be possible if human nature were as he himself would like it to be, and as he was taught at Oxford to think that it was. If so, the passage is a good instance of the effect of our traditional course of study in politics. No doctor would now begin a medical treatise by saying, 'the ideal man requires no food, and is impervious to the action of bacteria, but this ideal is far removed from the actualities of any known population'. No modern treatise on pedagogy begins with the statement that 'the ideal boy knows things without being taught them, and his sole wish is the advancement of science, but no boys at all like this have ever existed.'

"And what, in a world where causes have effects and effects causes, does 'intelligent independence' mean?"

APPENDIX II

MISCELLANEOUS COMMENTS ON DICKINSON

I. Dickinson, in criticising certain writers with whom he differs, employs a method which he seems to have borrowed from Dean Pound.⁹⁴ That method deserves study. It may be roughly described thus:

(1) Jones disagrees with Smith about the tariff. (2) Robinson disagrees with Smith about the virtues of sauerkraut juice. (3) Since both Jones and Robinson disagree with Smith about something, it follows that (a) each disagrees with Smith about everything, and that (b) Jones and Robinson agree with one another about the tariff, the virtues of sauerkraut juice, the League of Nations, the quantity theory of money, vitalism, Bernard Shaw, Proust, Lucky Strikes, Communism, Will Rogers—and everything else.

Llewellyn, Green, Cook, Yntema, Oliphant, Hutcheson, Bingham and Frank, in their several ways have expressed disagreement with conventional legal theory. Dickinson therefore assumes (a) that they disagree with that theory for identical reasons; and (b) that they agree with one another on their proposed substitutes for that theory. It is as if he were to assume that all men leaving Chicago at a given instant were going North and were bound for the same town. He has produced a composite photograph of the writers he is discussing. One sees, so to speak, the hair of Green, the eyebrows of Yntema, the teeth of Cook, the neck of

⁹² Add that it is now unknown whether the case will be tried by a jury.

⁹³ (1921) 126-127.

⁹⁴ See Pound, *A Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 691, and Llewellyn's reply, *Some Realism About Realism* (1931) 44 HARV. L. REV. 1223.

Oliphant, the lips of Llewellyn. . . . The picture is the image of an unreal imaginary creature, of a strange, misshapen, infertile hybrid.⁹⁵

2. To study carefully arguments against one's favored prejudices is none too easy. The writer freely confesses that he finds himself prone to exaggerate the irrelevant errors of those with whom he disagrees. He suspects that most human beings have like tendencies. But the writer believes—he may well be prejudiced on the subject—that in the case of all thinkers (judges and others), prejudices are made less blinding to the extent that the thinker is aware of them and consequently on his guard against them.⁹⁶ Those writers who urge the recognition of the personal element in judging seem, on the whole, better able to control the more unfortunate aspects of that element in their own thinking.

3. The foregoing doubtless in part explains several of Dickinson's curious distortions of the views of others.

Thus, almost unbelievably, Dickinson portrays the writer as opposed to the belief that language is often indispensable to thought,⁹⁷ as (1) maintaining that whatever takes the "form of words" is therefore to be disparaged, and (2) asserting (on the basis of the theories of C. K. Ogden) that "primitive 'word magic' persists in so far as modern thought is dependent on language". Here Dickinson is ruthlessly ignoring the evidence. It is true that the writer has summarized the language theory of C. K. Ogden.⁹⁸ But nothing in the writings of Ogden or in what the writer has said remotely resembles Dickinson's description. Ogden has elaborated the warning that, while words as symbols are essential to thinking and to rationality, they are also often the means of betraying clear thinking. This dual aspect of language has been long observed by thinkers. Ogden and his associates are its chief contemporary expositors and have brilliantly (although at times exaggeratedly) insisted on this dualism. Nothing could be a more perverse misdescription of their aim, which they tirelessly pursue, than Dickinson's. Precisely because Ogden recognizes more than most thinkers how dependent thought is on words, he wants to perfect the use of words as aids to clear thinking.

Ogden's thesis is that there is a distinction, of which he wants men to be constantly aware, between (1) the "emotive" or "poetic" use of words, and (2) the use of words as "symbols of reference". The first use dates, he argues, from the origins of language.⁹⁹ The failure to distinguish between the two uses leads, says Ogden, to the continuance of "word magic". It is such "word magic", resulting from the confusion of the two uses of words, which leads to that "verbalism" and that "word slavery" to which (following Mr. Justice Holmes) Dean Leon Green and others, including the writer, ascribe some of the obstacles to adequate legal thinking. "Thingifying" of concepts, vicious unreflective abstractionism, hypo-

⁹⁵ Dickinson seems at times to assume that if writer *A* quotes from writer *B* this means: (1) *A* adopts as his own whatever he quotes from *B* regardless of whether *A* quotes *B* approvingly; (2) *A* adopts as his own everything else that *B* has written. The latter assumption is peculiarly unjustified. For instance, the writer agrees with many things Llewellyn has said and perhaps Llewellyn reciprocates. But see the writer's review of Llewellyn's book, *THE BRAMBLE BUSH*, in (1931) 40 *YALE L. J.* 1120, 1122-1125, and Llewellyn's review of the writer's book (1931) 31 *COL. L. REV.* 82. Cf. also, FRANK, *op. cit. supra* note 24, at 93, 98, with (1931) 31 *COL. L. REV.* 108. Many a scientist who relies on the best work of Kepler would repudiate many of Kepler's ideas as nonsense. The writer approves much of what Dickinson has written and will doubtless quote Dickinson, but, as the present paper indicates, finds himself unable to agree with some of Dickinson's ideas.

⁹⁶ Darwin said that he found it so easy to pass over cases that opposed a favorite generalization, that he made it a habit not merely to hunt for contrary instances, but also to write down any exception he noted or thought of—as otherwise it would be almost sure to be forgotten.

⁹⁷ Dickinson, *op. cit. supra* note 3, at 842 and n. 23 and 24.

⁹⁸ FRANK, *op. cit. supra* note 24, at 84-92, 332-336, 57-63.

⁹⁹ Cf. JESPERSOON, *LANGUAGE* (1922).

statisation, "wousining"¹⁰⁰ seems to be in part due not to language but to the misuse of language, "diseases of language". The writer believes and has ventured to state that there may be other deeper-lying causes of "diseases of thought" than the emotive origins of speech to which Ogden constantly refers, and that a mere attack on verbalism will not overcome the damages of wishful or emotive thinking; accordingly, he has criticized the Ogdenite's position for its overemphasis,¹⁰¹ although accepting it as a partial diagnosis.

But it is almost absurd to say of Ogden and of the writer that they do not recognize how indispensable language is to most thought. Their warnings against the evils of *bad* uses of words do not mean that they disparage all words or all verbal formulas. Words convey valuable ideas, they help create valuable ideas. But words also convey lies, nonsense or misdescriptions of others' ideas (*vide* Dickinson with regard to Ogden and the writer) and stimulate the basest passions, the most stupefying emotions. Like many another precious instrument—such as, for instance, dynamite, roach powder, formal logic or knives—words may be put to bad as well as good uses. To urge men not to become drug-addicts is not to urge the abandonment by physicians of the use of morphine or cocaine. To advocate that surgical instruments should be antiseptic does not signify a disbelief in the worth of surgical implements.¹⁰²

Healy, in his study of the *Individual Delinquent* (501), in discussing the subnormal verbalist, says: "The strangest feature of this class is the aptitude which verbalists show for using the law. The only explanation I see for this is that since a large share of the business of the law is carried on merely by the use of language, even superficial acquaintance with legal phraseology comes a considerable distance towards making others believe in the qualifications of the verbalist. A person who has a special ability to use words well is, of course, likely to get ahead in all those branches of social effort where the usual evidence of good ability is displayed by language."

4. In other ways, too, Dickinson creates pseudo-dilemmas on the paper maché horns of which he seeks to impale those with whom he disagrees. The writer has queried whether reason plays as large a part in the judicial process as is customarily supposed. He has done so in the interest of (a) intellectual honesty, and (b) of increasing so far as possible the role that reason may play. He believes that *there is no greater obstacle to the development of rationality than the illusion that one is rational when actually one is the dupe of illusions*.¹⁰³ He has urged at length that the inveterate trick of "rationalization" (that trick, by which motivated judgments are concealed by a self-deceptive show of false reasoning and to which so-called thinking about law is peculiarly addicted) is the enemy of true rationality.

But Dickinson describes the writer and his like as "anti-rationalists".¹⁰⁴

5. In like manner, the writer's scepticism as to the amount of effect on judges of so-called legal rules is perverted by Dickinson into a denial by the writer "of the possibility of reasoning from general propositions".¹⁰⁵

The writer did not question the "possibility" of such reasoning. He did question whether most judges, in most cases, actually do decide their cases primarily by means of reasoning from the general propositions set forth in the so-called

¹⁰⁰ See FRANK, *op. cit. supra* note 24, at 85.

¹⁰¹ *Ibid.* 87-91, 321-322 n.

¹⁰² It is interesting to recall that when the father of Mr. Justice Holmes was waging his fight for antiseptic conditions in the treatment of maternity cases he was severely criticized by one of the University of Pennsylvania professors of medicine.

¹⁰³ Cf. Pascal: "Two extravagances: to exclude Reason, to admit only Reason."

¹⁰⁴ *Op. cit. supra* note 3, at 1061, 1069.

¹⁰⁵ *Ibid.* 857, n. 41.

rules which they quote in their opinions. He said repeatedly that the rules do affect judicial decisions, but he voiced a grave doubt as to whether conventional legal theory adequately reports the character and amount of the influence of rules on the thinking of judges.¹⁰⁶

6. Dickinson refers to the legal sceptics as "disappointed absolutists".¹⁰⁷ Doubtless they are. So is every adult. For children are absolutists and experience of life, as they grow older, brings recurrent affronts to their absolutes. Some grown-ups manage to find one or more of several forms more sophisticated absolutism; some lapse into a barren scepticism; some develop constructive scepticism. The current legal sceptical movement seems to the writer to be in this third stage.¹⁰⁸

7. The writer has said:

"Perhaps one of the worst aspects of rule-fetichism and veneration for what judges have done in the past is that the judges, in writing their opinions, are constrained to think of themselves together too much as if they were addressing posterity. Swayed by the belief that their opinions will serve as precedents and will therefore bind the thought processes of judges in cases which may thereafter arise, they feel obliged to consider excessively not only what has previously been said by other judges but also the future effect of those generalizations which they themselves set forth as explanations of their own decisions. When publishing the rules which are supposed to be the core of their decisions, they thus feel obligated to look too far both backwards and forwards. Many a judge, when unable to find old world-patterns which will fit his conclusions, is overcautious about announcing a so-called new rule for fear that, although the new rule may lead to a just conclusion in the case before him, it may lead to undesirable results in the future—that is, in cases not then before the court. Once trapped by the belief that the announced rules are the paramount thing in the law, and that uniformity and certainty are of major importance and are to be procured by uniformity and certainty in the phrasing of rules, a judge is likely to be affected, in determining what is fair to the parties in the unique situation before him, by consideration of the possible, yet scarcely imaginable, bad effect of a just opinion in the instant case on possible unlike cases which may later be brought into court. He then refuses to do justice in the case on trial because he fears that 'hard cases make bad laws'. And thus arises what may aptly be called 'injustice according to law'."

Dickinson's comment on this passage runs thus: "It is a natural consequence of Mr. Frank's general position that he would not have a judge in deciding a particular case seek for a rule which will be applicable to other cases."¹⁰⁹ That is not at all the consequence of the writer's "general position".¹¹⁰ The position, briefly, is this: The conventional rule theory has at least two harmful results:

(1) It induces some judges at times to do what those judges themselves consider injustice in the cases before them because the theory leads them to believe that their decisions will not be "according to law" unless they can be worked

¹⁰⁶ Frank, *op. cit. supra* note 24, at 101-105, 126-145, 148-152, 362.

Dickinson quotes the writer's statement that "in a sense" all legal rules are "fictions". But he ignores or misunderstands what that "sense" is; *i. e.*, he overlooks the writer's discussion of the nature and indispensability of valid fictions. See *ibid.* 312-322, 37-40.

The harmful effect of rules (as binding stereotypes) on mediocre judges is discussed by the writer in *LAW AND THE MODERN MIND*, 130-131, 154; in Book Review (1931) 40 *YALE L. J.* 1121, 1123-1124; and in *What Courts Do in Fact*, shortly to appear in the *ILLINOIS LAW REVIEW*. The writer is at work on a more elaborate presentation of that thesis.

¹⁰⁷ *Op. cit. supra* note 3, at 385, 1069.

¹⁰⁸ For a more complete statement of this theme, see FRANK, *op. cit. supra* note 24, at 259-260, 244-245, 251-252, 159, 165-166, 17-18.

¹⁰⁹ *Op. cit. supra* note 3, at 857, n. 45; see also 1052-1053.

¹¹⁰ Dickinson ignores, too, the writer's suggestion that there may possibly be discoverable generalizations about decisions and judges which do not appear in the books. Frank, *op. cit. supra* note 24, at 132.

out in terms of artificially worded rules which will (a) jibe with artificially worded rules previously announced by the same or other judges, and (b) be applicable to imaginary cases which may thereafter be litigated. The highly intelligent judges are seldom thus hampered, for they know how, in many cases, to "run around the end", *i. e.*, to manipulate the rules so as not to interfere with what they consider desirable specific results. But mediocre judges—when they are fatigued or rushed—are often thus led to do "injustice according to law".

(2) In the second place, the conventional theory makes for the concealment of the real premises upon which the decisions are based:

*Since (as opinions are written today) the real reasons for decisions are usually suppressed, the true generalizations which a judge may have employed in deciding a particular case are not available for use by other judges, with the result that we now have a system of "illusory precedents".*¹¹¹ So that when Judge *A* purports to follow the rule announced by Judge *B* he is often not following the actual but suppressed process by which Judge *A* arrived at his decision. Hence there is waste of time and confusion involved in working out opinions containing false generalizations—false in the sense that they incorrectly purport to be the real bases of the decisions.

It is highly desirable that a judge should not decide a given case unless he is ready to decide in the same way all future substantially similar cases. But the conventional theory prevents the judge from reporting—even to the extent that he would be able to do so—the way in which he does decide a case. From which it follows that if he applied to case *B* the rule which he published when deciding case *A*, he would in fact not be deciding case *B* according to the true rule of case *A*, *i. e.*, he would not actually be using the same basis for both decisions. The sterilized character of opinions (as customarily written) means that when the current precedent theory is actually followed,¹¹² cases which are really similar are treated dissimilarly and cases which are really unlike are treated as if they were identical.¹¹³ To protest against a theory because it leads to such results is not to take the position that a judge in deciding a case should not seek for a rule applicable to other cases.

In sum, the writer believes that, until opinions are so written as to report fully the true bases of decisions, opinions will be inadequate and misleading guides to decisions in later cases.¹¹⁴ Whether opinions can ever be so written it is hard to say; the writer is sceptical as to that possibility; for no experiments in that direction have as yet been made.¹¹⁵

¹¹¹ *Ibid.* 150.

¹¹² As it sometimes is followed by mediocre judges.

¹¹³ FRANK, *op. cit.* *supra* note 24, at 150.

¹¹⁴ The writer is sceptical about the proposal to build a new precedent system by looking to the court records rather than to the opinions.

¹¹⁵ Failure to discuss other of Dickinson's comments is not to be taken as estoppel by silence.

Errata in Frank, Are Judges Human? (1931) U. OF PA. L. REV., 17 et seq.:

Page 19, lines 7-9 should read: a measuring of it by a rule in order to reach a universal solution for a class of causes of which the cause in hand is but an example." Such treatment of lawsuits he called "justice according to law".

Page 27, footnote 22, lines 7-8 should read: "unbearable". Holmes, as the writer says elsewhere, is the lawyers' Vesalius, the lawyers' Galileo. See *infra* note 73, for Cohen's criticism of Holmes.

Page 43, line 12 should read: be influenced by general propositions", or would deny that the minds of judges are

Page 43, line 20 should read: that the cow eats it. So while rules are not the only factor in the

Page 53, line 17 should read: Likewise rules, where we proceed mechanically, are more, adapted to property and to business transactions, and standards; where we proceed upon intuitions, are more adapted to human