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Modern and Ancient Legal Pragmatism--John Dewey & Co. vs. Aristotle: II

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MODERN AND ANCIENT LEGAL PRAGMATISM— JOHN DEWEY & CO. VS. ARISTOTLE:* II

V.

Dewey on the Courts

Dewey's article, "Logical Method and Law," published in 1924,[122] did more, I think,[123] than anything written in English up to that time to illuminate the subjects of (1) how lawyers reason when preparing themselves to bring about decisions favorable to their respective clients, and (2) how courts reason both in reaching their decisions and in publicly justifying them. But there and elsewhere Dewey has said next to nothing (a) of the methods employed (often successfully) by lawyers to sway courts non-rationally, and especially of (b) the judicial problem of determining witnesses' credibility. These grave deficiencies in Dewey's exposition are apparent in his description of lawyers' reasoning. The lawyer, writes Dewey in his 1924 article: [124]

> . . . begins with a conclusion he intends to reach, favorable to his client of course, and then analyzes the facts of the situation to find material out of which to construct a favorable statement of facts, to *form* a minor premise. At the same time he goes over recorded cases to find rules of law employed in cases which can be presented as similar, rules which will substantiate a certain way of looking at and interpreting the facts. And as his acquaintance with the rules of law judged applicable widens, he probably alters perspective and emphasis in selection of the facts which are to form his evidential data. And as he learns more of the facts of the case he may modify his selection of rules of law upon which he bases his case.

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*Part I of this article appeared in the Winter issue of the *Lawyer*, 25 NOTRE DAME LAWYER 207 (1950).

122 10 CORN. L. Q. 17 (1924).

123 See FRANK, LAW AND THE MODERN MIND 100, 337 n. 1 (1930).

124 Dewey, *supra* note 122, at 23.

That is admirable as a description of a lawyer's reasoning, when preparing for trial, on his tentative assumption that he may be able to prove facts which will support a theory advantageous to his client; admirable, too, as a description of a lawyer drafting a brief for an upper court, after the trial court has rendered a decision at the trial, in the course of which the trial court has already determined the facts. But one would like to ask Dewey these questions: In a case in which (as in most cases) witnesses will give conflicting testimony, what are the "facts," the "evidential data," before the trial has begun, before the trial court has heard that testimony? At that stage, are there such facts, waiting as "data," ready-made, from which the lawyer can pick and choose? Patently not.

Consider, for instance, the first trial of Alger Hiss. Could the prosecutor or Hiss' lawyer, when preparing for trial, count on any fixed "data" as constituting the "facts of the case"? Of course not. The "facts," for purposes of the decision, consisted of the future reactions of the jury to the disagreeing witnesses. Unless and until the jury brought in a verdict, the "facts," for that purpose, were unknown and unknowable. Since the members of the jury were not unanimous in their reactions, there was no verdict — and therefore no judicially determined facts came into existence. If the jurors had been unanimous — either as to innocence or guilt — then, for the first time, the "facts," judicially, would have come into being. As it was, the jury was dismissed, and a new trial was held; not until the second jury reported its verdict were the "facts" judicially determined. Had the case been tried before a trial judge without a jury,[125] there would have been no such "facts," in that sense, until the judge announced his decision. In short, the "facts," in such a lawsuit, are the judicially determined facts; they are non-existent before the trial court's

125 Hiss, with the approval of the court and the consent of the Government. could have waived a jury and gone to trial before a judge without a jury.

decision. And their judicial determination — by the jury in a jury trial or by the judge in a non-jury trial — is a product of human factors many of which are hidden from scrutiny, and the operations of which are therefore often unforeseeable.

For one fleeting second, Dewey seemed to sense this difficulty: Referring to the "acceptable premises" of the lawyer's reasoning, Dewey said that, "Of course the judge and jury have eventually to do with their being accepted." Only in that brief remark did Dewey mention the trial court's fact-finding. Not a word did he utter about conflicting testimony, about the efforts of the opposing lawyers to persuade the trial judge or jury to believe one witness rather than another, or about the appeals to the trial judge's or jury's emotions.

Dewey has not attempted to describe the decisional process in a jury case; had he done so, he would surely have altered his notions of judicial logic. But, in 1910, in his book, *How We Think*, he specifically discussed the logic of a trial judge in a jury-less case. There Dewey said that, for the judge at "the trial," the "consideration of a legal dispute" involves two problems: (a) "sifting the evidence" — the "determination of the data that are important in the given case" — so as to arrive at the "facts," and (b) "selecting the rules that are applicable" — the "law" of the case. The phrase "sifting the evidence" should have pushed Dewey into searching reflection on the difficulty for the trial judge in deciding which of the stories told in court by the several disagreeing witnesses is to be taken as true. But Dewey did not touch on that difficulty. His concern was solely with "relevance." He declared that "to be a good judge is . . . to know what to eliminate as irrelevant." With that in mind, Dewey concluded that the two judicial tasks he had singled out — i.e., that of "sifting the evidence" and that of "selecting the rules" — are "strictly correlative,"

with "the answer to each depending upon the answer to the other." I think that Dewey's conclusion is correct — once some part of the testimony is accepted as true. But the trouble, un-noted by Dewey, is that there is more to trial court judging than solving this double-jointed problem of relevance: A "good judge" is indeed one who knows "what to eliminate as irrelevant." A "good trial judge," however, must also know — as well as any human being can know — how to sift the true from the false or inaccurate testimony.[126]

Because Dewey failed to consider that important phase of a trial court's task, he also necessarily underestimated the difficulties of utilizing precedents. A decision, he said, creates "a presumption . . . in favor of a similar interpretation in other cases where the features are not so obviously unlike as to make it inappropriate." [127] What does Dewey mean by "not so obviously unlike"? He means that the "relevant" facts in the later cases are not too dissimilar from those in the earlier cases. But how, in each of the cases, the earlier and the later, the "relevant" facts are selected from conflicting testimony Dewey does not intimate.[128]

In 1938, in his book, *Logic, The Theory of Inquiry,* Dewey gave an analysis of judicial logic, at a trial, as illustrative of the logical process in general. Logic he there defined as a process of "inquiry" which occurs when a "situation" is "problematic." In any such inquiry, he said, there are two kinds of operations "in functional correspondence with each other": (1) The first kind — "the technique . . . of observation" — supplies, he said, the "facts of the case."

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126 I happen to believe that a jury is not as well equipped to do such sifting as a well-trained, intelligent, conscientious trial judge. As to juries, see Chapters 8 and 9, FRANK, COURTS ON TRIAL (1949). As to trial judges, see *id.* at 146-85; as to the need for special education of future trial judges, see *id.* at 247-53.

127 DEWEY, HOW WE THINK 107 (1910).

128 See Chapter 23, FRANK, COURTS ON TRIAL (1949); *id.* at 328. See also the discussion of Cook and Levi in the first installment of the present article.

(2) The second kind — ideas or concepts representing possible solutions of the problem — functions "in directing observation and obtaining relevant facts." For the "facts" are "not self-sufficient"; they "are selected . . . for a purpose, namely a statement of the problem . . ."; they acquire "significance only in relation to ideas." Thus observation "locates and describes the problem," while the idea "represents a possible mode of solution." The "ideas" not only "instigate and direct . . . operations of observation" but also "organize all the selected facts" in arriving at a solution.

As an illustration of this process of inquiry, Dewey used the "judgment of a court in settling some issue which, up to that point, has been in controversy. The occurrence of a trial at law," he said, "is equivalent to the occurrence of a problematic situation which requires settlement. There is uncertainty and dispute," he said, "about what shall be done because there is conflict about the significance of what has taken place, even if there is agreement about what has taken place as a matter of fact — which, of course, is not always the case." The court's judgment is "the outcome of inquiry conducted in the court-hearings." Dewey goes on, as follows, to show the two kinds of operation in a trial: [129]

> [1] On the one hand, propositions are advanced about the state of facts involved. *Witnesses testify to what they have heard and seen . . . This subject-matter is capable of direct observation and has existential reference.* As each party to the discussion produces its evidential material, the latter is intended to point to a determinate decision as a resolution of the as yet undetermined situation. The decision takes effect in a definite existential reconstruction. [2] On the other hand, there are propositions about conceptual subject-matter; rules of law are adduced to determine the admissibility (relevancy) and the weight of facts offered as evidence. The *significance* of factual material is fixed by the rules of the existing judicial system; it is not carried

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129 See Chapters 6 and 7, DEWEY, LOGIC, THE THEORY OF INQUIRY 121 (1938).

> by the facts independent of the conceptual structure which interprets them. And yet, the quality of the problematic situation determines which rules of the total system are selected. (Emphasis partially supplied.)

Before criticizing this analysis of the judge's decisional process, it may be well to quote Cairns' more simply worded rephrasing of Dewey's analysis: [130]

> The judge begins with an indeterminate or problematic situation. An important step is for the judge to determine exactly what the problem is. To ask the right question, Bacon long ago observed, is the half of knowledge. The way in which the problem is conceived decides what specific suggestions are entertained and which are dismissed; what data are selected and which rejected; it is the criterion for relevancy and irrelevancy of hypotheses and conceptual structures. Upon the determination of the problem, a possible solution then presents itself as an *idea*. Ideas are the anticipated consequences or forecasts of what will happen when certain operations are carried out. Various activities are involved in executing the operations, and in the process the problem may be further delimited. Eventually, the ideas that represent possible modes of solution are all tested and a final conclusion is reached . . . The vital point is that the judge does not first find the facts, then ascertain and develop the law, and then apply the results to the facts. He does even not know what the operative facts of the case are until the apparently relevant facts have been tested in conjunction with the ideas that forecast the solution. He does not know what the law is until he has settled upon the solution which he believes he will accept. At that point the judge then "finds the law," and it may well be that the provisional solution will have to be abandoned if the "law" as the judge "finds it" will not permit the proposed solution. The judge will then seek a different solution, and again "find the law." This process will continue until a solution is found which will withstand the test of the law, the facts and any other materials the judge deems relevant.

Cairns (who applauds Dewey's analysis) brings out clearly Dewey's primary emphasis on "relevance" in the judge's job of "finding" the interacting "facts" and "law" (i.e., the rules). Cairns' description, however, does not bring out

130 CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 238-39 (1949).

the following remarkable feature of Dewey's analysis: Dewey, in his general discussion of logical inquiry, asserts that "the facts of a case" rest on "observation." In his specific discussion of a trial court at work, Dewey writes as if "the facts" — when there is not "agreement about what has taken place as a matter of fact" — are "capable of direct observation." But what is the character of this "direct observation"? According to Dewey, it comes in part from witnesses who "testify to what they have heard and seen." But can this be called "direct observation" by the trial judge, by the man who is called upon to ascertain the "facts"? Of course not. The trial judge's only "direct observation" consists of his direct observation of the witnesses. Can he thereby, with approximate adequacy, ascertain the "facts"? To do so, he would have to learn how competently those witnesses had conducted their "direct observations." Can he do so? The answer to that question is basic. The entire process of adjudging "relevance," in terms of rules which interact with "selected facts," comes to nothing unless the judge can learn whether, and to what extent, the witnesses accurately conducted (and accurately reported to the judge) their "direct observation" about what happened in the past. Dewey does not discuss the two weakest spots in the judicial "inquiry": (a) The defects in the witnesses' "direct observations." (b) The defects in the trial judge's methods of determining the reliability of the witnesses.

Dewey's analysis, excellent as far as it goes, is, then, inadequate because it does not go far enough: Dewey (like Cook and Patterson) seriously over-simplifies by omitting the difficulties of the process by which the trial judge obtains "facts," some of which he then selects as "relevant."

But even that criticism is too restricted. Dewey's picture of the trial judge leaves out of account the trial judge's "sovereignty" — "his discretion" to choose (as he will) to

believe or disbelieve parts of the oral testimony. This "sovereignty" allows the judge a wide range — far wider than that described by Dewey — in which to roam in "finding" facts to justify the judge's tentatively projected judgment. When Dewey depicts the judge as, in effect, confined to picking out "relevant" facts from among those already somehow determined, the picture pretty well fits an upper court judge's operations. But a trial judge in most cases (i.e., cases where the testimony is oral and conflicting) can select (or purport to select) "relevant" facts from any substantial portion of the oral, but conflicting, testimony.[131] This latitude — a product of the necessity of conferring upon the trial judge the power to determine credibility — adds a dimension to judicial "logic" that Dewey neglected.[132]

It is all too obvious that Dewey was thinking primarily of cases in which the determination of testimonial reliability has no importance. He was apparently thinking either of (a) cases in trial courts where there is no dispute about the evidence or (b) cases in upper courts where the facts are "given" — "given" to the upper courts because, as we saw, the trial courts have previously "found" them and because those "findings" are usually accepted by the upper courts.[132a]

In his book, *Logic, The Theory of Inquiry,* Dewey also considered history-writing, i.e., "historical inquiry" and "historical judgments." [133] He noted that "historical propositions" are "inferred constructions" made by historians, and that these propositions, thus founded on inference, are not "directly given," since they derive from "selections" by

131 Subject only to the condition that it was properly received in evidence.

132 It added what I have called the trial judge's "gestalt."

132a *Warning*: After the first installment of this article was written, I wrote an opinion for our court which, in the light of *United States v. United States Gypsum Co.*, 333 U. S. 364, 394-96, 68 S. Ct. 525, 92 L. Ed. 746 (1949), points out some of the niceties of the position of an upper federal court with respect to the findings of fact made by a federal trial court. See Orvis v. Higgins, ...F. (2d) .... (2d Cir. 1950).

133 DEWEY, LOGIC, THE THEORY OF INQUIRY 230 *et seq.* (1938).

the historian from "selections" which, in turn, were "made by the people of the past." Those people of the past, says Dewey, in arriving at their selections, relied on memory, "which is selective," and on their own "selective evaluations" of the events that they observed; moreover, there are "things they forgot to tell." It is regrettable that Dewey, in his analysis of courtroom "inquiries," did not see (1) that they, too, are "historical inquiries," with the same dependence on inferences by trial judges functioning as historians, those inferences being far from "directly given"; and (2) that judicial "inquiries" suffer from the same weakness of dependence on the testimony of witnesses, who often made defective observations and whose memories are selective and frequently fallible.[134]

The serious flaws in Dewey's thinking about the courts are the more remarkable because, a year or so before the appearance of Dewey's *How We Think*, a far less able philosopher, Muensterberg, in his book, *On the Witness Stand*, had pointed up [135] some of those inescapable difficulties, in the process of trial court ascertainment of facts, on which I have been dwelling — difficulties that cannot be avoided by that judicial capacity for selecting "relevant" facts which Dewey depicted as the essence of that process. Muensterberg related many instances in which several honest witnesses, all present at the occurrence of an event, had given flatly contradictory testimony about that event. He underscored the "great differences between men's perceptions," in sight, in taste, in hearing, in estimates of distances; the distortion of observation through "fluctuating attention" or through the "inhibitory influences which result from excitements and emotions"; the "different types of memory" possessed by different witnesses; the way in which "mixtures of truth and untruth, combinations of

134 To say nothing of witnesses' perjury and bias.

135 See quotations in FRANK, LAW AND THE MODERN MIND 108-09, 338 n.6 (1930).

memory and illusion, of knowledge and of suggestion" affect witnesses' recollections; the fact "that, every day, errors creep into the work of justice through wrong evidence which has the outer marks of truth and trustworthiness." He noted, too, that the "dangerous susceptibility" of jurymen, when appraising contradictory testimony, "interferes with the purpose of justice."

Not that Muensterberg was at all profound; others before him had more competently discussed these defects of courtroom ways; and he jumped too easily to the conclusion that those defects would vanish if only the courts availed themselves of the services of laboratory psychologists. Yet Dewey's contributions to legal thinking would have been much improved if he had seriously pondered what Muensterberg said, instead of listening exclusively to the academic legal pundits. Those pundits misled Dewey, kept him from applying to the workings of the courts his own knowledge, as a psychologist, of the fallibilities of human perceptions and memories.[136] (In his writings on the subject of education, he has been mindful of those fallibilities. He would scorn, as psychologically superficial, an approach to education resembling his own approach to the way courts function.)

Sheldon describes one of Dewey's main philosophic theses thus: "True knowledge or truth is a plan that can be carried out; false knowledge or error is a plan that cannot. If you tried to cut with a pencil or write with a knife, the plan would fail. There lies the difference between truth and error." [137] Judged by that standard, much of Dewey's pronouncements about the judicial process is in error: his theory or "plan" resembles that of writing with a knife.

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136 Another American philosopher, Otto, has written an interesting paper discussing the way in which witnesses' fallibilities may lead to erroneous — and therefore unjust — decisions. Otto, *Testimony and Human Nature,* 9 J. CRIM. L. &. CRIMINOLOGY 98 (1918).

137 Sheldon, *The Conquest of Dualism,* New Republic, Oct. 17, 1949, pp. 29, 31.

VI.

Aristotle as "Pragmatist"

Dewey, articulating his own theory of the proper relation of theory and practice, has compared his views with those of Aristotle. Dewey grants that, for his time and culture, many of Aristotle's ideas were those of a genius; but Dewey has tried to expose the shortcomings of those ideas when measured by modern pragmatist standards. It is my thesis that, in respect of the judicial process, Aristotle, because he observed at first-hand what courts actually did, was a better pragmatist than Dewey and than those of Dewey's disciples whom I have discussed.

It is not difficult to show, I think, that, as to certain phases of court activities considered by both of them, Aristotle anticipated Dewey. In his article, "Logical Method and Law," [138] Dewey said that "principles of interpretation do not signify rules so rigid that they can be . . . literally and mechanically adhered to. For the situations to which they are to be applied do not literally repeat one another in all details . . . ." "Statutes," he continues: [139]

> . . . cannot at the very best avoid some ambiguity, which is due not only to carelessness but also to the intrinsic impossibility of foreseeing all possible circumstances, since without such foresight definitions must be vague and classifications indeterminate. Hence to claim that old forms are ready at hand that cover every case and that may be applied by formal syllogizing is to pretend to a certainty and regularity which cannot exist in fact.

Now listen to Aristotle: [140]

> [The] equitable is indeed "just" but not equivalent to the "legal." It is rather an improvement on the merely legally-just. The reason is that every statute speaks in general terms, but there are some cases upon which it is impossible to make a universal statement which will be correct. In

138 10 CORN. L. Q. 17, 25 (1924).
139 *Ibid.*
140 NICOMACHEAN ETHICS 5.10, 1137 b 11-29.

those cases, then, in which it is necessary to speak generally but not possible to do so correctly, the statute embraces only the majority of cases, although well-knowing the possibility of error. Nor is it the less correct on this account; for the fault is not in the statute nor in the legislature, but in the nature of the subject matter. For it is plainly impossible to pronounce with complete accuracy upon such a subject matter as human action. Whenever, then, the statute reads in general terms, but a case arises which is not covered by the general statement, then it is right, where the legislator's rule is inadequate because of its over-simplicity, to correct the omission which the legislator, if he were present, would admit, and, had he known it, would have put into his statute. That which is equitable, then, is just, and better than one kind of justice, not better than absolute justice but better than the error that arises from legal generality. This is in fact the nature of the equitable; it is a correction of the statute where it is defective owing to its generality.

Aristotle also wrote: [141]

We saw that there are two kinds of right and wrong conduct towards others, one provided for by written ordinances, the other by unwritten. We have now discussed the kind about which the laws have something to say. The other kind has itself two varieties . . . The second kind makes up for the defects of a community's written code of law. This is what we call equity; people regard it as just; it is, in fact, the sort of justice which goes beyond the written law. Its existence is and partly is not intended by legislators; not intended, where they have noticed no defect in the law; intended, when they find themselves unable to define things exactly, and are obliged to legislate as if that holds good always which in fact only holds good usually; or where it is not easy owing to the endless possible cases presented . . . — a lifetime would be too short to make out a complete list of them. If, then, a precise statement is not possible and yet legislation is necessary, the law must be expressed in wide terms . . . Equity bids us to think less about the laws than about the man who framed them, and less about what he said than about what he meant. . . .

To be sure, Dewey deviates from Aristotle, especially in phraseology; for the American philosopher stresses the functions of legal rules and principles as "tools" to be used in a

141 RHETORIC 1.13, 1374 a 19-1374 b 13.

"logic relative to consequences rather than to antecedents." Essentially, however, I think that Dewey adds little to Aristotle's legal insights.[142] My appraisal may come as a shock to those who have read Dewey's criticisms of Aristotle. (Here I have in mind, and for the next several pages I shall discuss, Dewey's criticisms of Aristotle's thinking generally, not of his legal thinking in particular.)

For, according to Dewey, Aristotle too sharply separated theory and practice; this attitude, Dewey says, reflected Aristotle's own social status as one of a class of free citizens in a culture which gave that class freedom because it "had a servile class as its substratum." This, Dewey asserts, led to a snobbish attitude towards artisans, the workers, whose activities left men like Aristotle free to devote themselves to "higher things." [143]

From this social situation, says Dewey, stemmed a glorification of the unchanging, the invariant, and a depreciation of the practical.[144] Knowledge — rational science — was (for Aristotle as Dewey reads him) the learning about the unchangeable: Nature was taken as "unchanging substance"; things that change were considered too unstable to be subjects of knowledge in its most exact and complete sense; truth, therefore, could not alter, and hence its objects must be invariable; natural science thus dealt with eternal and universal objects and therefore possessed necessary truths. The Greeks, says Dewey, were keen observers of nature, but in their science they did not use instruments

142 One of Dewey's admirers, however, has noted the surprising fact that Dewey has never adequately acknowledged his indebtedness to Aristotle, although Dewey might be described "as an Aristotelian more Aristotelian than Aristotle himself." See Randall, *Dewey's Interpretation of the History of Philosophy* in 1 THE LIBRARY OF LIVING PHILOSOPHERS 77, 102 (Schilpp ed. 1939).

143 Dewey, *Challenge to Liberal Thought*, Fortune, Aug. 1944, p. 155, col. 1.

144 The summary and quotations in this paragraph are taken from DEWEY, THE QUEST FOR CERTAINTY (1929) *passim*, and from Chapter 5, DEWEY, LOGIC, THE THEORY OF INQUIRY (1938). In the latter volume, Dewey suggests that Aristotle's "classification-logic" derived from "the class structure of the culture."

to bring about changes in nature; they took "the material of perception 'as is,' " and "depended upon thought alone." Greek thought "acknowledged the presence of contingency in natural existence" but "used this property of uncertainty to assign to natural existence a lower status than that which belongs to necessary Being."

True, says Dewey, the Greek thinkers did not separate "activity" from "practice." But they "distinguished activity from action — that is, from making and doing. 'Pure activity' was sharply marked off from practical action. The latter, whether in the industrial or the fine arts, in morals or politics, was concerned with an inferior region of Being in which change governs . . . Pure activity is rational." It followed, Dewey tells us, that with Aristotle there was "no room for any logic of discovery and invention . . . Invention of the new had no place. It had only its etymological meaning of coming upon something already there." [145]

This description of Aristotle's views seems correct [146] — in part. For Aristotle did say that the inventors of those arts and sciences which do "not aim at utility" are "naturally regarded as wiser." [147] He did say that "the object of scientific knowledge is of necessity," and is therefore "eternal, for things that are of necessity in the unqualified sense are all eternal" and "universal"; that such knowledge is concerned with "things that are invariable"; that "art" and "practical wisdom," since they deal with variable things, are not the same as "scientific knowledge." [148] He did seem to regard the scientist as but "a spectator of the truth." [149] He did declare that "happiness . . . must be some form of contemplation." [150] He did maintain that the life of labor-

145 See Chapter 5, DEWEY, LOGIC, THE THEORY OF INQUIRY (1938).

146 But see McKeon, *Aristotle's Conception of the Development and the Nature of Scientific Method*, 8 J. OF THE HISTORY OF IDEAS 3 (1947).

147 METAPHYSICS 1.1, 981 b 18-20.

148 NICOMACHEAN ETHICS 6.3-7, 1139 b 22-1141 b 12.

149 *Id.* at 1.7, 1098 a 32. There he refers to the "geometer," which, I take it, includes the scientist.

150 *Id.* at 10.8, 1178 b 31-32.

ers, mechanics, tradesmen and husbandmen is "ignoble," and that the best form of state will not admit them to citizenship, which should be accorded only to those who have leisure by being freed from "necessary services." [151]

Yet Dewey's characterization of Aristotle is so shaded, omits so much, that I think it seriously inaccurate, indeed unfair. For Aristotle recognized, and at length explained how, even in the best political state, a citizen must engage in some of the arts and also — employing "practical wisdom" — in many practical affairs. He maintained that both the arts and "practical wisdom" — as distinguished from "science" — involve human "choice" in coping with variable things, i.e., things that do "not always happen in the same way," "things that are in our power and are brought about by our own [i.e., human] efforts." An art relates to "making," to "contriving things that do not come into being by nature." [152] It arrives at generalizations, based upon experience. It "arises when from many notions, gained by experience, one universal judgment about a class of objects is produced." So, says Aristotle, it is "a matter of experience" to have a judgment as to how this particular man can be cured of a disease, and a similar judgment about another particular man, while it is a "matter of art" to generalize that the same treatment "has done good to all persons of a certain constitution, marked off in a class, e.g., to phlegmatic or bilious people when burning with fever." [153]

"Practical wisdom," as distinguished from the arts, writes Aristotle, relates to "doing." But in both the arts and "practical wisdom," where — as distinguished from "science" as he defines it — men make "choices," they employ "deliberation," as, for instance, about "questions of medical treatment or of money-making" or "the art of navi-

151 POLITICS 3.5, 1278 a 8-10; 7.9, 1328 b 39-41.
152 NICOMACHEAN ETHICS 3.2-3, 1112 a 19-1112 b 10.
153 METAPHYSICS 1.1, 981 a 5-12.

gation." The "less exactly worked out" matters are, the "more doubt" that exists, the greater the need for deliberation. "Deliberation is concerned with things . . . in which the event is obscure . . . indeterminate"; and "all deliberation is investigation." [154] The "man who is deliberating . . . is searching for something and calculating." "Excellence in deliberation" is "rightness with regard to the expedient — rightness in respect both of the end, the manner, and the time." [155]

Here Aristotle seems very close to Dewey's notions of the way men deal with "problematic situations," [156] and of the "logic of discovery." Indeed, throughout his treatment of matters "practical," Aristotle seems to me to be refreshingly "modern" in his exposition of the need for an interaction of "theory" and "practice." Thus he writes that:[157]

> . . . in regard to action, experience seems in no respect inferior to art, and we even see men of experience succeeding more than those who have theory without experience. The reason is that experience is knowledge of individuals, art of universals, and actions and productions are all concerned with the individual; for the physician does not cure *man,* but "some particular person" who happens to be a man.

Consequently, if one "has a theory without the experience, he will often fail to cure; for it is the individual that

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154 NICOMACHEAN ETHICS 3.3, 1112 b 5-10; 3.3, 1112 b 22-23.

155 *Id.* at 6.9, 1142 b 14-15.

156 Aristotle's notion of "deliberation," with its stress on "choice" and doubts, is, I think, not unrelated to his notion of the irreducibility of individual instances to rules.

It is interesting to compare his position with that of Kallen, a highly original thinker, whose attitudes derive, in part, from Dewey and James. Kallen writes that many thinkers unfortunately use the word "problem" so that their "problems seem to follow from their solutions, not their solutions from their problems. The answers are all known in advance . . . and *problem* designates the formal or systematic elaboration of the unproblematical . . . When the Greeks first used the word, they meant by *problem* some thing or event thrown unexpectedly into experience, breaking up its coherences . . . interposing alternatives . . . . " It called "to the task of finding new and different ways of going and getting on . . . . " The "happening of problems points to the reality and power of freedom." KALLEN, LIBERAL SPIRIT 9-10 (1948).

157 METAPHYSICS 1.1, 981 a 13-20.

is to be cured." [158] Theory (knowing the "why" a "thing is so") [159] plus experience is usually better than mere experience; but theory alone may have little value. For example, "While in general rest and abstinence from food are good for a man in a fever, for a particular man they may not be." [160] For "each person to get what suits his case" requires that the physician have "general knowledge of what is good for every one or for people of a certain kind," but also that he has learned from experience, since "medical men do not seem to be made by a study of text books." Information about "how particular classes of men can be cured and should be treated . . . seems useful to experienced people, to the inexperienced it is valueless." [161]

It surely sounds much like Dewey when Aristotle says that "credit must be . . . given to theories only if they accord with the observed facts";[162] or, again, when he writes that "the truth in practical matters is judged from operations and life, for the decisive factor is to be found in them," that a theory in such matters should be brought "to the test of operations and life, and if it . . . disagrees with them, we must suppose it to be mere theory." [163]

Nor is it true that Aristotle invariably adhered to the traditions of his social class: In regard to biology, he broke through the tradition that that subject — intimate knowledge of which had theretofore been the possession of the farmer, the huntsman, and the fisherman — was not proper

158 *Id.* at 1.1, 981 a 20-23.

159 *Id.* at 1.1, 981 a 20-24.

160 NICOMACHEAN ETHICS 10.9, 1180 b 8-10.

161 *Id.* at 10.9, 1180 b 13-15; 10.9, 1181 b 2-7. Aristotle's frequent use of the medical art and medical practices as examples is explained by the fact that he was a son of a physician and had been brought up in contact with physicians.

As to the "experimental" or "experiential" character of Greek medicine, and its advanced combination of theory and practice, see, *e.g.*, Singer, *Medicine* in THE LEGACY OF GREECE 202 (Winn ed. 1923); Singer, *Ancient Medicine* in SCIENCE AND CIVILIZATION 43 (Marvin ed. 1926).

162 ON THE GENERATION OF ANIMALS 3.10, 760 b 31 *et seq.*

163 NICOMACHEAN ETHICS 10.8, 1179 a 18-23.

for a "gentleman." [164] In that field — in which he pioneered so brilliantly that Darwin remarked, "Linnaeus and Cuvier have been my great gods, but they are mere schoolboys to old Aristotle" — it is said of him:[165]

> Where pure intelligence, power, grasp, insight are required, no modern can surpass him. And he is great as an observer too, and well aware that speculation must be tested by observation . . . Wherever you look in biology he is first and midst and without end . . . Aristotle was in certain points ahead not only of Harvey, but of *all* modern [biological] science until about the year 1900.

In *Novum Organum,* Bacon said that "no weight" should be given to the fact that, in Aristotle's book on animals, there is "frequent dealing with experiments." For, Bacon continues: [166]

> . . . he had come to his conclusion before: he did not consult experience, as he should have done, in order to frame his decisions and axioms; but having first determined the question according to his will, he then resorts to experience, and, bending her into conformity with his placets, leads her about like a captive in a procession. . . .

That criticism, read in the light of Aristotle's biological studies, should perhaps be taken as praise. For it really says that Aristotle approached "experience" with questions in mind; and Aristotle's own biological writings show that his method was to test out his questions by observation of

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164 Thompson, *Natural Science* in THE LEGACY OF GREECE 136, 143 (Winn ed. 1923). Even in respect to physics, Dewey has probably overstated the effect of the Greek slave system. *Cf.* Clagett, *Science and Its History,* 18 AMER. SCHOLAR 236, 238-39 (1949): "Thus Farrington assures us that Greek science was born in Iona in the fruitful union of theory and practice, and that by the fourth century B.C. the progress of a slave-based society was such that already Plato, and to a lesser extent Aristotle, reflected the separation of theory and practice and thus sounded the death knell of Greek science. It should be pointed out that, slave-based or not, the society of the succeeding centuries produced the great flowering of Greek science in the brilliant and deathless works of Euclid, Archimedes, Aristarchus, Appollinius of Perga, Eratosthenes and Hipparchus. And whatever the reason for the decline of Hellenistic society, much more evidence than has been previously advanced will be necessary to show that slavery was an important factor in the decline of Greek science."

165 Thompson, *Aspects of Biological and Geological Knowledge in Antiquity* in SCIENCE AND CIVILIZATION 72, 79, 81-82 (Marvin ed. 1926).

166 See Aphorism 63, BACON, NOVUM ORGANUM (1620).

"experience." [167] See, for example, the following passages in his treatise *On the Generation of Animals*: [168] "Such appears to be the truth about the generation of bees, judging from both theory and from what are believed to be the

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167 McKeon, in a fascinating discussion of the "logic of discovery," points out that Bacon's suggestion of the use of that sort of logic was criticized in the Nineteenth Century as an effort to carry over a method of invention from the "cross-questioning methods of the law courts."

McKeon goes on to show that the Scholastic logicians, whose work Bacon scored as "purely verbal . . . in turn had learned from Boethius to repeat Cicero's distinction of logic into two parts, invention and judgment, and to find the great virtue of Aristotle in his discovery and development of the logic of invention . . . The Roman's philosophy in turn is a more simple practical adaptation of Aristotle's rhetoric and Socrates' cross-questioning elenchus, both of which have obvious derivations from legal procedure." McKeon, *Democracy, Scientific Method and Action,* 55 ETHICS 235, 251-52 (July 1945).

For Cicero's discussion of Aristotle and "invention," see Cicero, *On Topics,* in 4 CICERO'S ORATIONS 459-60 (Bohn ed. 1852), and Cicero, *The Treatise on Rhetorical Invention* in 4 CICERO'S ORATIONS 241 (Bohn ed. 1852).

Bacon, prejudiced against Aristotle as depicted by some of the Scholastics, was closer than he knew to the real Aristotle. Morris Cohen, somewhat similarly, reacts unfairly to a one-sided version of Bacon's contribution to the advancement of science. See, *e.g.,* COHEN, A PREFACE TO LOGIC 135, 155 (1944), where he refers to "the Baconian method of accumulating empirical facts without hypotheses or anticipation of nature." No doubt Bacon did advocate such a method. But he also underscored the idea that man should "put nature to the question"; and any such question is an "hypothesis or anticipation of nature." I hereby apologize to Bacon for having glibly voiced another view in my book, FRANK, LAW AND THE MODERN MIND 337 n.4 (1930) (where I also overlooked what Bacon had said of "equity" in his *Advancement of Learning*).

Harvey's remark concerning Bacon, "He writes philosophy . . . [*i.e.,* science] like a Lord Chancellor," is quoted by Morris Cohen as settling Bacon's hash with respect to scientific thinking. Harvey's remark was interpreted by de Morgan as a reference to "the legal character of Bacon's notions" of science. See 1 DE MORGAN, A BUDGET OF PARADOXES 78-79 (2d ed. 1915).

Collingwood writes: "Francis Bacon, lawyer and philosopher, laid it down in one of his memorable phrases that the natural scientist must 'put Nature to the question' . . . What he was asserting was two things at once: first, that the scientist must take the initiative, deciding for himself what he wants to know and formulating this in his mind in the shape of a question; and secondly, that he must find means of compelling nature to answer, devising tortures under which she can no longer hold her tongue." COLLINGWOOD, THE IDEA OF HISTORY 269 (1946). See also, *id.* at 237, to the effect that "natural science finds its proper method when the scientist, in Bacon's metaphor, puts nature to the question, tortures her by experiment in order to wring from her answers to his own questions . . . ."

See Book 5, Chapter 3, BACON, ADVANCEMENT OF LEARNING (1605), for a discussion of "prudent questioning" as "a kind of half-knowledge" and as an aid to man in the "art of discovering" (since "we are masters of questions").

168 3.10, 760 b 27 *et seq.*

facts about them. The facts, however, have not yet been explored sufficiently. If ever they are, then credit must be given rather to observation than to theories, and to theories only if they accord with the observed facts." Whitehead remarks that Aristotle introduced "into sciences other than Astronomy the much-needed systematic practice of passing beyond theory to direct observation of details." [169]

In divers contexts, Aristotle cautions that, when meeting practical problems, theories — types, classifications, generalizations, rules and principles — are alone insufficient. He says that "in practical life, particular facts count more than generalizations." [170] He remarks that "none of the arts theorizes about individual cases"; that is not their business, since "individual cases are so infinitely various that no systematic knowledge about them is possible." [171] "Practical wisdom" is not "concerned with universals only — it must also recognize the particulars; for it is practical, and practice is concerned with particulars," with "the ultimate particular facts." [172] The "man of practical wisdom is one who will act, for he is a man concerned with individual facts. . . ." [173] In considering what is ethical:[174]

> . . . the whole account of matters of conduct must be given in outline and not precisely. . . ; matters concerned with conduct and questions of what is good for us have no fixity, any more than matters of health. The . . . account of particular cases is yet more lacking in exactness; for they do not fall under any art or precept since the agents [actors] themselves must in each case consider what is appropriate on the occasion, as happens also in the art of medicine or of navigation.

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169 WHITEHEAD, ADVENTURE OF IDEAS 128 (Pelican ed. 1942).

170 RHETORIC 2.19, 1393 a 16-17.

171 *Id.* at 1.2, 1356 b 28-33. *Cf.* PHYSICS 2.4, 196 b 28: "The possible attributes of an individual are innumerable."

172 NICOMACHEAN ETHICS 6.7, 1141 b 15-16. *Cf.* Bacon, who (in giving a list of "commonplaces suited to both sides of the question") said: "Generals are to be construed so as to explain particulars." See Book 5, Chapter 3, BACON, ADVANCEMENT OF LEARNING (1605).

173 *Id.* at 7.2, 1146 a 7-9.

174 *Id.* at 2.2, 1104 a 2-9.

In politics, "it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars." [175]

All this has a special bearing on government, including the conduct of the courts. "Political writers," comments Aristotle, "although they have excellent ideas, are often impractical . . . ." [176] "In framing an ideal we may assume what we wish, but should avoid impossibilities." [177] We "must pre-suppose many purely imaginary conditions, but nothing impossible." [178] The "best" government "is often unattainable, and therefore the true . . . statesman ought to be acquainted, not only with that which is best in the abstract, but also with that which is best relative to circumstances." He should also "be able to find remedies for the defects of existing institutions. . . ." [179] Those "who aim at knowing about the art of politics need experience as well" as theory.[180] Both are desirable, for "the details can best be looked after" by a man "who has the general knowledge," i.e., knowledge of the general principles.[181]

"Practical wisdom" in government has two parts: (a) The first is "legislative wisdom." It is "practical wisdom." [182] For "laws are, as it were, the 'works' of the political art. . . ." [183] (b) The second part consists of rendering "decrees" (e.g., decisions of particular lawsuits). It "has to do with action," for "a decree is a thing to be carried out in the form of an individual act." [184] Legal rules enacted by legislators "are prospective and general,"

175 POLITICS 2.8, 1269 a 11-12.
176 *Id.* at 4.1, 1288 b 35-36.
177 *Id.* at 2.6, 1265 a 17-19.
178 *Id.* at 1.2, 1252 b 39-40.
179 *Id.* at 4.1, 1288 b 25-28; 4.1, 1289 a 6-7.
180 NICOMACHEAN ETHICS 10.9, 1181 a 11-12.
181 *Id.* at 10.9, 1180 b 13-15.
182 *Id.* at 6.8, 1141 b 22-25.
183 *Id.* at 9.9, 1181 a 24.
184 *Id.* at 9.9, 1181 a 25-27. As to Aristotle's emphasis on the importance of differentiating (1) legislation and (2) specific decrees, see Chapter 12, FRANK, IF MEN WERE ANGELS (1942).

but judges "find it their duty to decide on definite cases brought before them." The legislature must therefore leave to the judge "questions as to whether something has happened or has not happened [185] — i.e., questions of fact which relate to "things already done." [186]

Since practical wisdom in such matters means that "things have to be done," it deals with "particulars" which are "ultimates." These particulars must be attained by "intuitive reason" which grasps "the variable fact." Such "practical reasonings" call for men with "judgment," — which "is the right discrimination of the equitable" (the disposition to "make allowances"). Men possessed of this capacity are said to be "sympathetic judges." Their power to judge equitably results from experience. Such practical wisdom is not necessarily accompanied by "strict reasoning." That goes to show, says Aristotle, that "we ought to attend to the undemonstrated sayings and opinions of experienced and older people" (those with practical wisdom) "not less than to demonstration; for, because experience has given them an eye, they see aright." [187]

Putting this in modern terms, a decision based on an experienced "hunch" may be wiser than a logical decision by an inexperienced man. That such, in effect, is Aristotle's view he makes plain when he refers to:[188]

> . . . the fact that, while young men become geometricians and mathematicians and are wise in matters like these, it is thought that a young man of practical wisdom cannot be found. The cause is that such wisdom is concerned not only with universals but with particulars, which become fa-

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185 RHETORIC 1.1, 1354 b 6-12.

186 *Id.* at 1.3, 1358 b 17.

187 NICOMACHEAN ETHICS 6.11, 1143 b 10-13.

188 *Id.* at 6.8, 1142 a 12-15. See also *id.* at 6.9, 1142 b 23, to the effect that "it is possible to attain even good by a false syllogism."

Compare Patterson, *Logic in the Law*, 90 U. OF PA. L. REV. 875, 896 (1942): " . . . the task of formulating the opinion should be entrusted to the judge or judges having the best logical talents — which are not necessarily accompanied by the best ethical insights or the best political wisdom."

> miliar from experience, but a young man has no experience, for it is produced only by length of time.

Which is to say that, although science (as Aristotle defines it) can get along without experience, the art of government cannot. And it should be noted that Aristotle says that the student of politics must study psychology.[189]

Aristotle thinks experience is of major importance in government not merely on grounds of practical expedience. He thinks experience essential to conduct: He writes that "it is not possible to be good in the strict sense without practical wisdom," that "the choice will not be right without practical wisdom any more than without virtue." [190] And he maintains that participation by citizens in government is essential, that a man is not a real citizen unless he so participates.[191]

In short, Aristotle was no more an "Aristotelian" [192] than is Dewey a "Deweyite." [193]

Of course, Dewey differs from Aristotle at many points, and especially with regard to the nature and methods of science. Dewey says that "science is an art" and therefore concerned with the practical.[194] Aristotle would not have agreed. But aside from science (in which young inexperienced men can be proficient, according to Aristotle), his views are in considerable measure like Dewey's. As to what Aristotle considered practical affairs — and notably government — he would have endorsed Dewey's criticism [195] of Kant's thesis that perceptions without concepts (sensations without thoughts) are blind, and concepts without percep-

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189 The "student of politics must somehow know the facts about the soul . . . The student of politics, then, should study the soul. . . . " NICOMACHEAN ETHICS 1.13, 1102 a 18-23.

190 NICOMACHEAN ETHICS 6.13, 1144 b 30-1145 a 5.

191 POLITICS 3.5, 1278 b 5; 3.11, 1281 b 2-9; 3.13, 1283 b 44.

192 In Dewey's sense of that term.

193 In Dewey's critics' sense of that term.

194 DEWEY, EXPERIENCE AND NATURE 354 *et seq.* (1925).

195 DEWEY, INFLUENCE OF DARWIN ON PHILOSOPHY 271-99 (1910).

tions (thoughts without sensations) are empty. Dewey comments on this thesis that — although "no one can fairly deny that both sense and reason are implicated in every significant statement of the world" — it is "unconvincing because we are . . . left with these two opposed things still at war with one another, plus the miracle of their final combination." The solution of the apparent dilemma, says Dewey, "reveals itself when we conceive of knowledge as a statement of action, that statement being necessary, moreover, to the successful ongoing action." This view of the need of interaction between theory and practice is Aristotle's — as to all "variable" practical matters, including those affecting government. It follows that in what Aristotle included in the realm of the practical — of human, social affairs — Aristotle was a pragmatist. And in respect of government he was far more pertinaciously so than Dewey.

Peculiarly does this appear when we compare their respective explorations of the work of the courts. Unlike Dewey, Aristotle had direct acquaintance with courts in action, because almost every free Athenian over thirty served frequently as a judge, i.e., as a member of the popular courts which, in deciding cases, not only passed on issues of fact but also interpreted and applied legal rules. For that reason, Aristotle's political theorizing reveals an intimate knowledge of actual judicial operations. His discussions of "equity" and statutory interpretation — which influenced Roman, Continental-European, and Anglo-American theories and practice [196] — bore a direct relation to the methods of the Athenian courts. So, too, did his exposition of the notion — which has come down to us through James Harrington and thence to John Adams — of a "government of laws and not of men": Aristotle, in that context, under-

[196] See Usatorre et al. v. The Victoria et al., 172 F. (2d) 434, 439-41 (2d Cir. 1949).

scored the unavoidability of delegating discretion to men, despite their human fallibilities.[197]

Because Aristotle knew of his own knowledge what happened in the courts to a far greater extent than does Dewey, Aristotle's theories about court-doings are more illuminating than Dewey's. Not only did Aristotle warn that, in dealing with all phases of government, not excepting courts, one cannot be an exact scientist; that, in courts, individualization is essential to justice; that judicial justice cannot be achieved unless the legal rules are flexibly adjusted to the unique circumstances of particular suits.[198] He went much further than Dewey. And, although no one could have urged more eagerly than Aristotle that legal rules should conform to ethical ideals, he did not permit that eagerness to blur his observation of court realities. Because his reflections are founded on what he saw for himself in the courts, Aristotle's discussion of judicial "logic" is far superior to Dewey's.

I must here break in to say that I, a rank amateur in philosophy and no Greek scholar, may have misinterpreted Aristotle. By way of partial excuse, I suggest that perhaps no one in our day can be sure that he always understands an ancient Greek writer. As I have suggested elsewhere, "Ancient Greek glassware, buried in the soil and excavated after centuries, has acquired an iridescence not native to its original condition. Something not unlike that metamorphosis often affects ancient Greek texts." [199] Nevertheless, I grant that my reading of Aristotle may be inaccurate, not only because of my unique deficiencies, but because it is true of all men that what one gets out of an author often is, unavoidably, in considerable part what one puts in. We all do

197 See Chapter 12, FRANK, IF MEN WERE ANGELS (1942).

198 Of this, more later.

199 See FRANK, IF MEN WERE ANGELS 193 (1942).

tend, in varying degrees, to pull non-existent rabbits out of existing hats.[199a] But to continue . . . .

VII.

Aristotle's Manual on How to Win Lawsuits

Nothing written by Dewey or by any legal Deweyite (or for that matter by any other legal philosopher) remotely resembles that large portion of Aristotle's *Rhetoric* which constitutes a manual containing detailed practical advice to litigants on how to win lawsuits. It shows that Aristotle — who (as above noted) had said elsewhere that the student of government must study psychology, and who had watched courts in action — thoroughly comprehended the non-rational and irrational factors which often mightily affect judicial decisions. His wishes, his ethical ideals, his strong liking for rationality, did not deflect him from a calm, detailed delineation of judicial actualities, no matter how ugly and unethical. Here we have a model for modern legal theorists — an ancient legal theorist informed by observation of practice. It is remarkable, and unfortunate, that even those of our contemporary writers on "jurisprudence" who cite and quote Aristotle [200] have not reflected on the full implications of the *Rhetoric*; [201] and the modern writers of those treatises on "trial tactics" which resemble Aristotle's manual do not theorize but borrow their legal theories from our contemporary "jurisprudes." [202]

199a For a more extensive discussion of this theme, see Frank, *A Sketch of an Influence* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 189, 237-39 (1947); FRANK, IF MEN WERE ANGELS 234-35 (1942); KALLEN, ART AND FREEDOM 1, 16-17 (1942).

200 See, *e. g.*, Cardozo and Patterson.

201 This is true even of Cairns' unusually painstaking and thoughtful exposition of Aristotle's legal philosophy. See Chapter 3, CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL (1949).

202 See, *e.g.*, CUTLER, SUCCESSFUL TRIAL TACTICS (1949). See the suggested explanation in FRANK, COURTS ON TRIAL 78 (1949).

In the *Rhetoric,* Aristotle brings out clearly that, while legal rules are necessarily "prospective and general," [203] courts decide "definite cases." [204] And each case, he says, involves specific facts that happened in the past, "things already done." [205] He notes that "witnesses are concerned with past events." [206] He recognizes that the truth about those past events often cannot be reliably ascertained. More, he makes no bones about disclosing that decisions frequently do not turn on the evidence: He says that, under an ideal judicial system, each party to a suit would "in fairness fight [his case] with no help beyond the bare facts," and that "nothing . . . should matter except the proof of those facts." [207] But Aristotle leaves his readers in no doubt that, in the lawsuits he saw, "other things affect the result considerably." [208] He remarks that, in litigation, "unscrupulous practices" are often employed.[209] Although it is wrong "to pervert the judge by moving him to anger or pity" — since the arousing of "prejudice, pity, anger and similar emotions has nothing to do with the essential facts, but is merely a personal appeal to the man who is judging the case" [210] — nevertheless, in actual lawsuits, such appeals are often successfully made: Judges "often have allowed themselves to be so influenced by feelings . . . that they lose any clear vision of the truth. . . ." [211] Consequently, to protect himself,[212] one who presents a just claim or defense must under-

203 RHETORIC 1.1, 1354 b 6. Here Aristotle is speaking of rules contained in statutes, but his remark applies as well to all legal rules.

In POLITICS 4.1, 1289 a 15, he says that "laws" are "the rules according to which the magistrates should administer the state." In the *Rhetoric* his point is that, in judicial administration, those rules are administered in specific lawsuits.

204 RHETORIC 1.3, 1354 b 7.

205 *Id.* at 1.3 1358 b 17; cf. *id.* at 1.1, 1354 b 13-14.

206 *Id.* at 1.14, 1375 b 8.

207 *Id.* at 3.3, 1404 a 4-6.

208 *Id.* at 3.3, 1404 a 7.

209 *Id.* at 1.1, 1354 b 29.

210 *Id.* at 1.1, 1354 a 16-25.

211 *Id.* at 1.1, 1354 b 8-10.

212 *Id.* at 1.1, 1355 b 1-5.

stand judicial realities:[213] He must know the ways of "working on the emotions of the judges . . . ." [214]

Aristotle goes on, therefore, to tell in great detail how this is to be done. For instance, one should aim at obtaining the judge's "good will, or at arousing his resentment, or sometimes at gaining his serious attention to the case, or even at distracting it — for gaining it is not always an advantage," so that sometimes one should "try to make him laugh." [215] Aristotle advises what to do if one has evidence in his favor — and what to do if one has not. In the latter event, he says, one should, among other things, seek to "discredit" his opponent or his opponent's witnesses. Again and again, Aristotle tells of alternative devices, one or the other to be used to fit the litigant's particular needs. For instance, there is one way of presenting a case involving a contract if the contract helps you, and another "if it tells against" you. After describing a certain kind of argument, he adds, "We are to make either such assumptions or their opposites, as suits us best." [216] He explains at length the several kinds of emotion and how to stimulate each of them. He also explains, for several pages, the different emotional reactions of old and young judges. But he carefully points out that he is writing only of what will probably affect "men of a given type," and not of any "given individual," because individuals are "infinitely various." [217]

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213 I have elsewhere suggested, Frank, Book Review, 52 YALE L. J. 934, 936-37 (1943), that Holmes' "bad man" thesis resembles what Aristotle says in the *Rhetoric*. I think that, as Aristotle takes the "unruly" into account, he is more penetrating than Holmes, who tended at times to emphasize the generalized elements of the decisional process. As to Holmes, see Frank, *Say It With Music*, 61 HARV. L. REV. 937-38 (1948); FRANK, COURTS ON TRIAL 178 (1949).

214 RHETORIC 3.1, 1403 b 12; cf. *id.* at 3.14, 1415 a 33 ("how" to excite prejudice).

215 *Id.* at 3.14, 1415 a 34-37.

216 As to Aristotle's discussion of Natural Law in this context, see Frank, Book Review, 57 HARV. L. REV. 1120, 1124 (1944); FRANK, COURTS ON TRIAL 358-59 (1949).

217 RHETORIC 1.2, 1356 b 26-34; *cf.* PHYSICS 2.5, 196 b 28-29.

The reader of the *Rhetoric* is never allowed to forget that judges are human, all-too-human, and that uniformity is not to be expected in their reactions. Since Aristotle is discussing the Greek popular courts, in which usually witnesses did not testify orally, he says nothing of witnesses' demeanor. But that witnesses are men, and that men are fallible observers of events, Aristotle knows well. He writes elsewhere, for instance, that the "organ which perceives color, is not only affected by its object, but also reacts upon it. . . ."[218] And he continues:[219]

> [We] are easily deceived respecting the operations of sense perception when we are excited by emotions, and different persons according to their different emotions . . . Thus, too, both in fits of anger, and also in all states of appetite, all men become easily deceived, and more so the more the emotions are excited.

VIII.

Aristotle on the Avoidable and Unavoidable Sources of Legal Certainty

The outstanding feature of Aristotle's legal philosophy is that, as it does not confuse the actual and the ideal, it does not seek to minimize legal uncertainty — whether desirable or undesirable, preventable or unpreventable — by pretending that it is relatively unimportant, exceptional, not vast in extent.

Aristotle, as I read him, reported two main categories of legal uncertainty:

(1) *Rule-uncertainty.* This subdivides, in his writings, into:

(a) the undesirable and avoidable (i.e., poorly-drafted laws);[220]

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218 ON DREAMS 1, 460 a 23-24.

219 *Id.* at 1, 460 b 4-11.

220 In RHETORIC, 1.1, 1354 a 33-35, and 1.1, 1354 b 11-13, he says that "well drawn laws should themselves define all the points they possibly can and leave as few as may be to the decisions of the judges . . . In general, the judge should . . . be allowed to decide as few things as possible."

(b) the undesirable but unavoidable (i.e., laws well-drafted but incapable of anticipating all future particular situations, and therefore necessarily and purposely vague); and

(c) the avoidable but desirable (i.e., laws sufficiently flexible to allow courts to do "equity").[221]

(2) *Litigation-uncertainty.* Aristotle reported that, entirely aside from uncertainty in the legal rules, and in ways that rules cannot possibly prevent, most legal uncertainty is caused by the irrepressible presence in litigation of fallible human characteristics.[222]

Aristotle did not commit the all-too-common fallacy of identifying "necessary" and "sufficient" conditions, a simple illustration of which is this: Man cannot live without salt, for it is a necessary condition of human life; but it is obviously a fallacy to assume that salt alone suffices to sustain man's survival. So, while rule-certainty is essential to legal-certainty, the latter cannot be had unless there is also litigation-certainty — and, as Aristotle saw clearly, litigation-certainty seldom exists.

Nor did he — out of a longing to achieve more of legal certainty than is humanly possible — put rule-certainty and litigation-uncertainty in separate compartments. His *Rhetoric* exposes their inextricable intertwinings — that, for instance, the emotional reactions of judges often nullify

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221 Some commentators seem to deny that Aristotle included (c); they say that (c) is a misinterpretation of (b).

222 *Warning*: In one brief passage, RHETORIC 1.1, 1354 a 19-28, Aristotle suggests that at least one of the sources of "unruly" elements in litigation can be eliminated; he there says that appeals to judges' emotions can be prevented by "rules for trials which are now laid down in some states," *i.e.*, rules restricting litigants to the bare presentation of the evidence and precluding them from any discussion of "whether a thing is important or unimportant, just or unjust." As, except for a reference, RHETORIC 1.1, 1355 a 1-3, to the fact that "in many places . . . irrelevant speaking is forbidden in the law-courts," he does not pursue this theme, one wonders whether he seriously believed that such rules would substantially reduce the effects of emotional factors.

precise legal rules.[223] Many modern legal writers, as I said earlier, do compartmentalize — even some of those who pay some attention to litigation-uncertainty.[224] When they thus compartmentalize, they artificialize; they separate theory and practice, ideals and realities; and they cultivate the illusion that somehow rule-certainty can guaranty legal-certainty, despite the strikingly uncertain outcome of most lawsuits in which definite rules are applied.

Whenever I read the *Rhetoric,* I recall Judge Learned Hand's complacency-disturbing remark, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." [225] As Aristotle knew, men must often submit to the terrors of litigation. Its dangers, chanciness and dread-inspiring character were obviously not to his liking. But he refused to substitute his wishes for his eyesight.

He would be astonished, were he alive today, to hear it said that an accuracy in narration, like his, of the unpleasant truths about litigation means that the narrator has a preference for those unpleasant truths; that honest revelations, like his, of the unavoidable "personal element" in decision-making constitute approbation of, or lend dangerous encouragement to, the vicious "personalized justice" of the

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223 That study of the interpretation of statutes, for example, is arid when not coupled with a study of trial court nullification of statutes, via "fact-finding," see Frank, *Words and Music: Some Remarks on Statutory Interpretation,* 47 COL. L. REV. 1259 (1947).

224 See, *e.g.,* Barrett, *Confession and Avoidance? — Reflections on Rereading Judge Frank's Law and the Modern Mind,* 24 NOTRE DAME LAWYER 447, 454 (1949).

225 Hand, *The Deficiencies of Trials to Reach the Heart of the Matter,* 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).

Several centuries earlier, Montaigne had said: "No judge has yet, thank God, spoken to me as a judge in any cause whatever, whether my own or another's, whether criminal or civil . . . I . . . will never, if I can help it, place myself in the power of a man who can dispose of my head, when my honor and life depend on the skill of a lawyer more than on my innocence . . . How many innocent people we have known to be punished, I mean without the fault of judges; and how many there are that we have not known of!" See Book 3, Chapter 13 of MONTAIGNE, ESSAYS (1588).

Hitler regime.[226] It may well be imagined that, were he now alive, Aristotle would reply to such comments somewhat like this:

> It is shocking, of course, to see how this personal element in justice has been shamefully exploited by totalitarian governments. They have put the best of things to the most evil uses.[227] But that personal element, whether one likes it or not, is an inherent part of the decisional process, under any form of government. It is therefore folly to conceal its presence in the working of courts in a democracy. To conceal it, indeed, is to ensure that it operates at its worst, surreptitiously, without such intelligent ethical restraints as experience and wisdom show us both can be and should be imposed. Here, as elsewhere, we must distinguish the desirable and the possible. The wise course is openly to acknowledge the personal element, and then to do whatever can practically be done to get rid of its evils and to bring about its constructive uses. For the rest, we shall have to put up with it, however bad, as we do with ineradicable sickness and death.

In sum, Aristotle did not shut his eyes, or seek to shut his readers' eyes, to the human weaknesses which create obstacles to the just judicial administration of justice. He did not suggest many specific means for overcoming those obstacles.[228] But he believed that only by an honest facing of the problem is it possible to solve it, so far as its solution is possible. He had no fatuous notion that its solution lay solely or chiefly in any elaboration or revision of rules, inspired by high ideals, for he knew that the major difficulties arise from what I call the "unruly" factors in litigation. In my bumbling way, I tried to follow in Aristotle's footsteps when I wrote:[229]

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226 See Barrett, *supra* note 224, at 449, 454 (1949).

227 See RHETORIC 1.1, 1355 b 3: "And if it be objected that one who uses such power of speech unjustly might do great harm, *that* is a charge which may be made in common against all good things except virtue, and above all against the things that are most useful, as strength, health, wealth, generalship. A man can confer the greatest of benefits by a right use of these, and inflict the greatest of injuries by using them wrongly."

228 Except in the brief passage in RHETORIC 1.1, 1354 a 19-28, discussed *supra* note 222.

229 FRANK, IF MEN WERE ANGELS 3-9 (1942). Earlier, in 1930, with specific reference to the courts, I said: "No, the pretense that judges are without

> It is imperative that in a democracy it should never be forgotten that public office is, of necessity, held by mere men, who, of course, have human frailties. It is only where government officials are deemed to be semi-divine that people have any excuse for ignoring the unavoidable personal factor in government. It is for that reason that the belief that government can ever consist of perfect creatures is alien to a democracy. That false belief is the core of the philosophy of dictatorship; it is the basis of "personal government" in its most extreme and pernicious form. For, where "personal government" is at its maximum, the effects on government of the all-too-human personalities of government officials is least open to discussion . . . To cover up the effects of their personalities leads to the operation of their personalities in the most sinister and damaging form. It develops concealed personal government. It yields a government of men at their worst — of men pretending to give us nothing but a government of self-operating laws. Here we arrive at . . . [a] paradox: The thorough awareness that there is an unavoidable personal factor in government is the best way to reduce to a minimum the bad effects of that personal factor . . . Properly interpreted, the phrase "a government of laws, and not of men" is of inestimable value.[230] Thus interpreted, it means that [the effects of] the personal prejudices . . . of government officers should be reduced, by statutory provisions and other means, to as narrow confines as is possible, having due regard to the practical workings of the governmental functions involved . . . But to that end, legal machinery is not enough. This, too, is needed: The men who operate that machinery must be men keenly alive to their own prejudices, to their own human weaknesses, and, armed with that self-knowledge, must discharge their obligations to our citizens. And the citizens, also, must be watchful of the be-

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the power to exercise an immense amount of discretion and to individualize controversies, does not relieve us of those evils which result from the abuse of that judicial power. On the contrary, it increases the evils. The honest, well-trained judge with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses is the best guaranty of justice. Efforts to eliminate the personality of the judge are doomed to failure. The correct course is to recognize the necessary existence of this personal element and to act accordingly . . . Improvement of the judicial process will be possible only if the unavoidability of discretion and individualization is accepted. *The question is not whether judges should exercise the powers of discretion and individualization. The only question is whether these powers are to be exercised consciously and skillfully.*" FRANK, LAW AND THE MODERN MIND 138, 362 (1930).

230 As to the historical genesis and meaning of the phrase, see FRANK, IF MEN WERE ANGELS 190-211 (1942).

> havior of those officers. They must not go to sleep on the phrase about a government of laws.

Concerning the courts, then, Aristotle, thanks to his far more intimate acquaintance with judicial actualities, surpasses Dewey in recognizing the effects of practice on legal theories and generalizations. It is deplorable that Dewey did not intensively study the trial courts in action, and that the legal thinkers from whom Dewey learned were upper court addicts. For Dewey, well versed in psychology, if he had closely observed many trials, would surely have perceived that, in considerable measure, the decisional process in trial courts is a psychological process, and that much of the improvement in judicial justice must stem from informed revision of our trial practices, based in part upon careful study of the psychology of litigants, witnesses, juries and trial judges. (I note again that Aristotle said that the student of politics must study psychology.[231])

IX.

The Trial Judge as Artist

I have elsewhere suggested that the trial judge (in a non-jury case), in his reaction to his experience at a trial when orally-testifying witnesses disagree, functions somewhat like an artist; that his reaction, a sort of "gestalt," has unique characteristics incapable of being accurately reported in logical (or "scientific") form.[232] I therefore regret the more that Dewey did not study the trial courts, since he has sagely insisted that scientific and artistic reactions, although partaking of common elements, are nevertheless importantly distinct. He writes:[233]

> The odd notion that an artist does not think and a scientific inquirer does nothing else is the result of converting a

231 NICOMACHEAN ETHICS 1.13, 1102 a 18-23.

232 See Frank, *Say It With Music,* 61 HARV. L. REV. 921 (1948); FRANK, COURTS ON TRIAL 170 *et seq.* (1949).

233 DEWEY, ART AS EXPERIENCE 15-16, 84-85 (1934).

> difference of tempo and inference into a difference in kind. The thinker has his esthetic moment when his ideas cease to be mere ideas and become the corporate meanings of objects. The artist has his problems and thinks as he works. But his thought is more immediately embodied in the object. Because of the comparative remoteness of his end, the scientific worker operates with symbols, words and mathematical signs. The artist does his thinking in the very qualitative media he works in, and the terms lie so close to the object that he is producing that they merge directly into it . . . Science states meanings; art expresses them . . . The poetic as distinct from the prosaic, esthetic art as distinct from scientific, expression as distinct from statement, does something different from leading to an experience. It constitutes one . . . The poem, or painting, does not operate in the dimension of correct descriptive statement but in that of experience itself. Poetry and prose, literal photograph and painting, operate in different media to distinct ends. Prose is set forth in propositions. The logic of poetry is super-propositional even when it uses what are, grammatically speaking, propositions. The latter have intent; art is an immediate realization of intent.

Although I incline to agree with Mrs. Langer that it is a mistake to talk of "the logic" of poetry or the other fine arts,[234] I would agree substantially with Dewey's statement.

Had he considered the trial judge's obligation to render a decision resulting from his unique composite (or gestalt) reaction after hearing conflicting oral testimony, Dewey might well have revised his notion[235] that a judge's "hunch" can always initiate an analysis of a logical kind which will necessarily clarify his reasoning and expose its roots to other persons.[236] (Aristotle, as I have indicated,

234 LANGER, PHILOSOPHY IN A NEW KEY (Penguin ed. 1948).

235 See Dewey, *Logical Method and Law*, 10 CORN. L. Q. 17 (1924). See also the discussion of Dewey's thesis in Patterson, *Logic in the Law*, 90 U. OF PA. L. REV. 875 (1942), and in PATTERSON, AN INTRODUCTION TO JURISPRUDENCE (2d ed. 1946).

236 Compare DEWEY, *Qualitative Thought* in PHILOSOPHY AND CIVILIZATION 93, 100 (1931): "When it is said that I have a feeling, or impression, or 'hunch,' that things are thus and so, what is actually designated is primarily the presence of a dominating quality in a situation as a whole, not just the existence of a feeling as a psychical or psychological fact. To say I have a feeling or impression that so and so is the case is to note that the quality in question is not yet resolved into determinate terms and relations; it marks a conclusion without statement of the reasons for it, the grounds upon which it

seemingly knew better.) Had Dewey recognized the baffling nature of the trial judge's composite reaction — the way it is often suffused with emotions stimulated by unconscious prejudices for or against some of the witnesses or the lawyers or the parties to the suit — Dewey might have reached this conclusion: A trial judge, no matter how brilliantly logical his mind, and no matter how gifted he may be in the capacity for lucid expression, frequently has a "qualitative" experience which he cannot possibly translate into a "discursive" or logical form. That experience, I think Dewey would have seen, may issue in a judgment which *sometimes* "may find better expression" in a laconic "ejaculation" than "in a long-winded disquisition," because "no verbal symbols can do justice to the fulness and richness" of the trial judge's reaction, the "dominant quality" of which is such "that translation into explicit terms gives a partial and inadequate result." [237]

Viewing the trial judge as one often engaged in something which partly resembles an artistic process, Dewey, I think, would drastically have modified his exposition of judicial methods. He would have seen that the exposition should have been limited, for the most part, to upper court judging. On that basis, Dewey, I surmise, would have criticized as gravely insufficient — because grounded on woefully insufficient observation of practice — the theories of such men as Cook, Llewellyn, Cardozo and Patterson.

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rests. It is the first stage in the development of explicit distinctions. All thought in every subject begins with just such an unanalyzed whole."

237 The quoted phrases are from DEWEY, *Qualitative Thought* in PHILOSOPHY AND CIVILIZATION 101-02 (1931). Perhaps, however, I am misinterpreting Dewey. For, since he depicts the artistic process as essentially "communication," he might be impatient with the notion that the trial judge, as artist, ever has had an incommunicable experience which shapes his decision. *Cf.* DEWEY, ART AS EXPERIENCE (1934); KALLEN, ART AND FREEDOM 914-15 (1942).

Warning: The reader, I trust, will not mind my use of the italicized word "sometimes." I am referring to a large subject, briefly discussed in the first installment of this article, and more extensively discussed in Chapter 12, FRANK, COURTS ON TRIAL (1949), and in Frank, *Say It With Music*, 61 HARV. L. REV. 921 (1948). I there advocate the requirement that a trial judge shall make and publish special findings of fact, but I suggest that often those findings do not, because they cannot, adequately express the trial judge's composite (gestalt) reaction to his experience at the trial.

X.

The Reality of the Uncertain

With a few verbal changes, the following remarks of Dewey might be applied to those legal thinkers:[238]

> Any philosophy that in its quest for certainty ignores *the reality of the uncertain* in the ongoing processes of nature denies the conditions out of which it arises. The attempt to include all that is doubtful within the fixed grasp of that which is theoretically certain is committed to insincerity and evasion, and in consequence will have the stigmata of internal contradiction. (Emphasis supplied.)

In part at least, Aristotle would have agreed. For, as Dewey admits, Aristotle "acknowledged the presence of contingency in natural existence." Aristotle said that in physical nature there is something lawless, something "accidental"; that chance is a true part of reality, not merely a name for human ignorance; and that, consequently, individual things occur which science cannot explain.[239] This recognition of partial indeterminism in the physical realm ties in with Aristotle's departure from that social and political regimentation advocated by Plato in his *Laws,* and with Aristotle's conception of "equity."[240]

The Individualization of Lawsuits:

It also ties in with Aristotle's espousal of what today we call "individualization" in the judicial treatment of lawsuits. There Aristotle pointed the way, a way that today

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238 DEWEY, THE QUEST FOR CERTAINTY 244 (1929).

239 See, *e.g.,* METAPHYSICS 6.2-3, 1026 b 24-1027 b 14, and 11.8, 1064 b 30-1065 a 6; PHYSICS 2.5, 196 b 10 *et seq.,* and 2.7, 199 a 35-199 b 7; RHETORIC 1.10, 1369 a 31-1369 b 5; *cf.* ON GENERATION AND CORRUPTION 2.11, 337 b 10 *et seq.*

See the discussion in PEIRCE, CHANCE, LOVE AND LOGIC 180 (1923); MEAD, MOVEMENTS OF THOUGHT IN THE 19TH CENTURY 4-5 (1936); FRANK, FATE AND FREEDOM 95, 119, 324, 355n.5, 361n.19 (1945); CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 83-84 (1949).

240 See FRANK, FATE AND FREEDOM 119, 324 (1945); Frank, Book Review, 57 HARV. L. REV. 1120, 1127 (1944).

should lead to trial court reforms in which most legal Deweyites have shown scant interest.

Against atomic individualism, Dewey constantly and justifiably protests. He decries its callousness, its cruel consequences. Yet, at times, he seems to carry his protest further—to the point of objecting to the acknowledgment of unique individualities, human particularities. "The world seems mad," he once wrote, "in preoccupation with what is specific, particular, disconnected, in medicine, politics, science, industry, education . . . But recovery of sanity depends on seeing and using these specifiable things as links functionally significant in a process." [241] Applied to the work of the courts, this view would tend to over-value the rule aspect of decisions, to under-value the need of looking for the unique aspects of lawsuits.

This may account for the absence in Dewey's legal writings of any discussion of a distinction recurrently drawn by Aristotle.[242] Aristotle differentiated "legal" and "equitable" justice: (1) "Legal justice," he said, underlines an "arithmetical" equality. According to such justice, "it makes no difference whether . . . it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal. . . ." [243] (2) But the "equitable," said Aristotle, although also justice, is a "correction of legal justice," a "better" kind of justice.[244] So, considering the litigants, Aristotle says that the "equitable man . . . is no stickler for his rights in a bad sense, but tends to take less than his share though he has the law on his side. . . ." [245] Again, considering those who administer justice, Aristotle reaches the same result: [246]

241 DEWEY, EXPERIENCE AND NATURE 436 (1925).

242 In his writings on ethics, however, Dewey does recognize the evils of "legalism." See FRANK, COURTS ON TRIAL 388, 392 (1949).

243 NICOMACHEAN ETHICS 5.3, 1131 a 30-1131 b 23.

244 *Id.* at 5.10; 1137 b 27.

245 *Id.* at 5.10, 1138 a 1-2.

246 RHETORIC 1.13, 1374 b 10-22. See also NICHOMACHEAN ETHICS 6.11, 1143 a 19-32, to the effect that "to 'have judgment' is the right discrimination of

> Equity bids us be merciful to the weakness of human nature . . . not to consider the actions of the accused so much as his intentions, nor this or that detail so much as the whole story; to ask not what a man is now but what he has always or usually been. It bids us . . . to prefer arbitration to litigation — for an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity.

I repeat that Dewey by-passes this sort of "equitable justice" with its sensitiveness to the unique in individual litigants. This blind spot in Dewey is very probably due to his inexperience with trials and trial courts, where the desirability of "individualization" becomes more apparent than in arguments of appeals and in upper court opinions.[247]

Lessons From Greek Legal Practice:

Because of his attitude, Aristotle highly praised the Greek practice of arbitration.[248] With that practice in mind, Aristotle made the statement, quoted above, that the "arbitrator goes by the equity of a case . . . and arbitration was invented with the express purpose of securing full power for equity." In China, too, where Confucianism, with its em-

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the equitable," so that we call "sympathetic judges" those whose judgment "is equitable" and who are "disposed to make allowances."

Lon Fuller's description of present-day arbitration sounds much like Aristotle's. See FULLER, BASIC CONTRACT LAW 713 (1946). Fuller says that the arbitrator "cannot be driven into a corner by logic, and will be unimpressed by arguments resting upon the abstract 'rights' of the parties," will "give weight to factors which seem legally irrelevant, and will find duties which the law does not dream of, such as that of 'going easy' on a buyer caught by an unfavorable contract. . . . " Fuller, however, fails to see that, in a law court, the trial judge often learns much that is "legally irrelevant" and which, despite the formal impropriety, he uses when deciding the case.

Fuller, *op. cit. supra,* at 415-18, does recognize that sometimes judges, to some extent, are affected by "background facts" concerning business practices in a certain trade, of which they learn by means that, formally, are "irregular." But Fuller does not perceive that the same is true of other "irrelevant" facts which Patterson regards as legally worthless, theoretically irrelevant "gossip." See PATTERSON, AN INTRODUCTION TO JURISPRUDENCE 31 (2d ed. 1946). See also the first installment of this article, 25 NOTRE DAME LAWYER 207, 243-45.

247 For a more extended discussion, see FRANK, COURTS ON TRIAL 378 *et seq.* (1949).

248 NICOMACHEAN ETHICS 6.11, 1143 a 19 *et seq.*

phasis on ethics, has inculcated the belief that settlements of disputes should be highly "individualized," arbitration has been employed for centuries, and litigation has been frowned upon. In China, if, despite efforts to negotiate a settlement, litigation does occur, the judge uses the legal rules as but a general guide, and considers all the unique aspects of the controversy.[249] So, too, (as Aristotle saw) did the Greek popular courts. Modern writers have often called the members of those Greek courts "jurors," and have criticized their actions as if they were the same as our modern American jurors. But, as Calhoun[250] and others have explained, those who sat on those Greek courts had long experience with, and much knowledge of, the legal rules, so that the Greek "jurors" more nearly approximated our judges. Their decisions, compounded of "law" and "fact," were "gestalts" in which the courts could, and did, make "equitable" allowance for the unique, individual characteristics of the disputes.

It may well be that we have much to learn from the judicial process as conducted in Aristotle's Athens. Most of our legal pundits glorify the legal rules — and then applaud surreptitious methods of evading them, as, for instance, through the general verdicts of jurors wholly untrained in legal affairs[251] (as the Athenian "jurors" were not). If Dewey had not been tutored by modern legal thinkers who, as upper court addicts, are obsessively rule-worshippers, he might — through a revaluation of Athenian justice and of Aristotle's views of "equity" — have urged that we adopt a frank, not a furtive, "individualization" of lawsuits.

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249 FRANK, COURTS ON TRIAL 381-83 (1949).

250 CALHOUN, INTRODUCTION TO GREEK LEGAL SCIENCE (1944). See also FRANK, COURTS ON TRIAL 379 (1949).

251 See Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18-19 (1910); Wigmore, *A Program for the Trial of Jury Trial*, 12 AM. JUD. SOC. 166, 170 (1929). See comments in Skidmore v. Baltimore & O. R. Co., 167 F. (2d) 54 (2d CIR. 1948); Frank, *Say It With Music*, 61 HARV. L. REV. 921, 953 (1948); FRANK, LAW AND THE MODERN MIND 173-74 (1930); FRANK, COURTS ON TRIAL 127-35 (1949).

XI.

Theory, Practice, and Reforms

Dewey's thesis about the interaction of theory and practice has sometimes been so interpreted as to support the glib assertion — of Marxists and non-Marxist economic determinists — that *all* valuable scientific theories have derived from practical social needs. That assertion (with which I think Dewey disagrees) is demonstrably unfounded.[252] Even the judicial administration of justice, an eminently practical affair, has frequently been much improved by the impact on judges of theories[253] — metaphysical, political, economic, psychological, and scientific — which originated with men whose interests were not practical or responsive to the practical social needs of their times, with men who were engaged in "useless" theorizing. But, in respect of courts' performances, there remains profound wisdom in Dewey's thesis if wisely employed: The study of the legal generalizations we call legal rules and legal principles is arid, sterile, when divorced from observation of the consequences of the way courts apply — and do not apply — those generalizations in actual practice. Worse, that divorce prevents the invention of improved methods for ensuring that, as far as practically possible, desirable legal rules and principles will be actually applied to the actual facts in the decisions of specific lawsuits. The grave fault of Dewey and his legal disciples is that they have perpetuated the divorce, and thus, with respect to the courts, have sterilized Dewey's teachings.

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252 See, *e.g.*, FRANK, FATE AND FREEDOM 49-51, 77, 182-84, 200 (1945); Frank, *The Place of the Expert in a Democratic Society*, 16 PHIL. OF SCIENCE 3, 11-13 (1949); Clagett, *Science and Its History*, 18 AMER. SCHOLAR 236, 238 (1949).

253 See, *e.g.*, FRIEDMANN, LEGAL THEORY 250-51 (1944); Frank, Book Review, 59 HARV. L. REV. 1004 (1946); *cf.* Silving, *The Unknown and the Unknowable in Law*, 35 CALIF. L. REV. 352 (1947). The judges affected by such theories are often not consciously aware of them.

Each of the four legal disciples of Dewey whom I have discussed has made distinguished contributions to legal thinking — on the upper court level. But all of them — by shunning the trial courts, by escaping from the harsh realities of actual practice in those courts into the relative quiet of upper court theorizing — have not only diminished the usefulness of their theories but have also, by their influence on other students of our legal system, blocked that intelligent observation of its daily operations without which much needed and long over-due reforms cannot be achieved. With the gap between legal theorists and legal practitioners, "important problems tend to fall into oblivion." [254]

Among the needed reforms, I think, are these:[255] Abandonment of the manner in which witnesses are often bullied and otherwise interrogated so that their testimony creates false impressions; the increased participation of government in bringing into court evidence which one or other of the parties is unable, for lack of funds, to obtain; the provision of special training for future trial judges, a training which will include increased self-awareness of their own prejudices; adequate education for jurors; special training for prosecutors in their obligation to be fair to defendants in criminal trials; a revised recruiting and training of our police (in the manner of the F.B.I.) which will lead to the disuse of the now widely used "third degree."

One may perhaps hope that, encouraged by Dewey's insistence on the evils of divorcing theory and practice, younger men will soon undertake such, and other, reforms. When those younger men read Cook, Llewellyn, Cardozo and Patterson, they should bear in mind Aristotle's wise (Dewey-esque) comments that "those whom devotion to abstract discussions has rendered unobservant are too ready to dogmatize on the basis of a few observations," [256] and

254 The quoted phrase is from LYND, KNOWLEDGE FOR WHAT? 1 (1939).
255 See FRANK, COURTS ON TRIAL 422-23 (1949).
256 ON GENERATION AND CORRUPTION 1.2, 316 a 5.

that the "true . . . statesmen . . . should be able to find remedies for the defects of existing institutions." [257]

XII.

Aristotle's Rhetoric as a Touchstone

I would not limit my criticism to the legal Deweyites. I would apply to any systematic legal thinking or legal philosophy this touchstone: Has it come to grips with those characteristics of litigation revealed in Aristotle's *Rhetoric*? For most of those characteristics are universal: They inhere in litigation in every human legal system which can be conceived or which has ever existed — in ancient Greece or Rome, medieval Europe, modern England, America, South America, France, Russia, Germany or elsewhere. The same sort of basic variable human subjectivities, resulting in grave uncertainties, affect the decisions of lawsuits everywhere, when facts are in dispute, irrespective of the juristic ideals and dominant moral principles, or of the certainty of the legal rules (statutory or "unwritten"), and without regard to the respect paid to precedents, or to the use or non-use of trial by jury. In litigation, the ideals, the moral principles, the legal rules, the precedents, are not self-operating but, to a large extent, get their meanings, their practical moral impacts on human lives, in specific court decisions.

Just to the extent, then, that those litigation-uncertainties exist will it be unknowable to what extent, if at all, the ideals, principles, rules and precedents have been efficacious in particular lawsuits. Courts do business at retail, not wholesale. No matter how noble are the ideals of a legal system, no matter how splendidly its legal rules embody those ideals, that system works shocking evils when, because of its avoidable "unruly" features, its courts sentence men

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[257] POLITICS 3.4, 1288 b 25-1289 a 3.

to death for murders they did not commit or mulct men in money damages for acts they did not do.

Thomists and Aristotle:

Of course, the "broader problems" of legal philosophy, as Barrett designates them,[258] also merit exploration. But irrespective of one's answer to those "broader problems," the problems concerning litigation, posed by Aristotle's *Rhetoric,* will not down. I would suggest to Thomists that, no more than non-Thomists, can they afford to evade those problems by insisting on the quest for justice "through impersonalized rules." [259] For any legal philosophy will be largely futile, practically, in so far as it does not grapple with those "personalized" problems. Thomists, with their high esteem for Aristotle, should be among the first to admit that those problems should be honestly faced.[260]

Those problems can be honestly faced whether or not one renounces the belief that there is not "any law other than civil law or any authority above the State which establishes and promulgates civil law . . . ." [261] Certainly, mere renunciation of that belief will not ensure a facing of those problems. Nor would those problems be faced and solved (as far as they can be) merely through the acceptance of Thomism by every lawyer, legislator, government administrator or executive, juror and judge. Presumably there is such acceptance in Spain and South Ireland; yet no one suggests that, in those lands, specific court decisions are more predictable and just, less subject to avoidable mistakes of trial court "fact-finding" and litigation-uncertainty, than in the United States.

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258 Barrett, *supra* note 224, at 458 (1949).

259 *Ibid.*

260 As I read Aquinas' discussion of the problem of a judge when confronted with conflicting testimony, he was thoroughly aware of the inescapable personal (subjective) element in the decisional process. See FRANK, COURTS ON TRIAL 366 (1949).

261 Walsh, *Marriage and Civil Law,* 23 ST. JOHN'S L. REV. 209, 213 (1949).

A Challenge to Thomists:

Thomists, I submit, should meet non-Thomists on this neutral ground: They should become active participants, together with decent men of other creeds, in seeking to remove obstacles to the just administration of justice, resulting from the "unruly" elements in the decisional process, that are practically removable.

Jerome Frank