

CARDOZO AND THE UPPER-COURT MYTH

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The practical is disagreeable, a mean and stony soil, but from that it is that all valuable theory comes.¹

[The] first step toward improvement is to look the facts in the face.²

I

There has recently been published a volume, *Selected Writings of Benjamin N. Cardozo*,³ which every thoughtful lawyer and judge will want ready at hand. It will repay constant re-reading. It includes nearly all Cardozo's extra-judicial writings, notably *The Nature of the Judicial Process*, first published in 1921, and *The Growth of the Law*, first published in 1924.⁴ In these two books, one of our most eminent appellate judges set forth his legal philosophy. More important, he showed how this philosophy aided him in his judicial work, and, in that connection, disclosed some of the intimate details of upper-court techniques. I say "more important" because, before Cardozo, no judge, with the exception of Holmes, had been similarly candid. Cardozo's frankness emboldened others, lawyers and judges, to be less diffident in thinking about and commenting on courthouse ways.⁵

He did not confine himself to a description of what appellate judges do. He told, also, what they ought and ought not do. While wisely indicating the proper limits of judicial legislation, he exhorted these judges to put moral ideals into practice. His descriptions and exhortations he both illustrated refreshingly by his own judicial opinions, and fortified by apposite reflections on a variety of legal and non-legal philosophies.

This sort of critical self-revelation by a judge was novel and exciting. Somewhat less novelty and inventiveness appear in the contents of his own philosophy—far less than in the off-the-bench writings of his great master, Holmes, all of which contain highly original insights. Cardozo, more productive than Holmes, was also more eclectic. But, as in the case of Cicero, brilliant eclecticism became itself creative.

It was tonic that a revered judge, by no means "radical," should boldly declare, "I take judge-made law as one of the realities of life."⁶ To be sure, this had often been said previously,⁷ once forthrightly (and with appropriate qualifications) by Holmes in a dis-

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¹ Holmes, Letter to Wu, January 31, 1926, reprinted in SHRIVER, HOLMES, HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 184 (1936).

² Holmes, Introduction, RATIONAL BASIS OF LEGAL INSTITUTIONS (1923).

³ Edited by Margaret E. Hall, and with a Foreword by Professor E. W. Patterson. New York: Fallon Law Book Company. 1947. Pp. xxiv, 456. \$5.00.

⁴ Also the following: THE PARADOXES OF LEGAL SCIENCE (1928); LAW AND LITERATURE (1931); JURISPRUDENCE (1932); and several other papers and addresses.

⁵ I am here paraphrasing what I said more at length eighteen years ago; see FRANK, LAW AND THE MODERN MIND 236, 239 n. (1930).

⁶ THE NATURE OF THE JUDICIAL PROCESS 10 (1921).

⁷ See, e.g., GRAY, THE NATURE AND SOURCES OF LAW §222 (1900); THAYER, A PRELIMINARY TREATISE ON EVIDENCE 319, 327, 331 (1898); DICEY, LAW AND OPINION IN ENGLAND 361-398, 483-484 (2d ed. 1914); Cohen, *The Process of Judicial Legislation*, 48 AM. L. REV. 161 (1914); DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 122 n. 22, 200 n. 23 (1922); WIGMORE, *The Judicial Function*, Editorial Preface to THE SCIENCE OF LEGAL METHOD xxx (1917).

Holmes had often expressed that idea before he became a Supreme Court Justice. See, e.g., HOLMES, THE COMMON LAW 1, 5 (1881); Holmes, *Common Carriers and the Common Law*, 13 AM. L. REV. 609 (1879); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in HOLMES, COLLECTED LEGAL PAPERS 166, 181 (1920).

For a list of eight Supreme Court Justices who have so said, see New England Coal & Coke Co. v. Rutland R. R., 143 F. 2d 179, 189, n. 31 (C. C. A. 2d 1944).

senting opinion⁸ to which Cardozo acknowledged his indebtedness.⁹ But many lawyers then regarded Holmes as queer and flighty. Holmes, too, had frequently noted that sometimes subconscious factors affected judges, that they sometimes decided cases intuitively, that policy attitudes, too often entertained unconsciously, influenced decisions.¹⁰ "The very considerations which the courts most rarely mention, and always with an apology," Holmes wrote as early as 1879, "are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to public policy in the last analysis."¹¹ Again, however, it was important that such a judge as Cardozo should enunciate that thesis; especially valuable was it to have Cardozo say:¹² "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. . . . There has been a certain lack of candor in much of the discussion of the theme, or rather in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. . . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass judges by."¹³ Following Holmes, he sagely

⁸ "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221 (1917).

For similar qualifications, see, e.g., *New England Coal & Coke Co. v. Rutland R. R.*, 143 F. 2d 179, 189 (C. C. A. 2d 1944); *Commissioner v. Beck's Estate*, 129 F. 2d 243, 245-246 (C. C. A. 2d 1942); *Guiseppe v. Walling*, 144 F. 2d 608, 620-621 (C. C. A. 2d 1944).

⁹ THE NATURE OF THE JUDICIAL PROCESS 69 (1921).

¹⁰ See, e.g., the following writings of Holmes; *Common Carriers and the Common Law*, 13 AM. L. REV. 609, 630, 631 (1879); THE COMMON LAW I, 5, 35, 68, 116, 204-205 (1881); *The Path of the Law*, 10 HARV. L. REV. 457, 466-467 (1897); Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 HARV. L. REV. 717, 719, 774, 779, 781, 791 (1931); *Vegeahn v. Guntner*, 167 Mass. 92, 104, 106, 44 N. E. 1077 (1896); cf. *Chicago B. & Q. Ry. v. Babcock*, 204 U. S. 585, 598 (1907).

¹¹ Holmes, *Common Carriers and the Common Law*, *supra* note 10.

¹² THE NATURE OF THE JUDICIAL PROCESS 167-168.

¹³ Cf. MONTAIGNE, ESSAYS, Bk. II, c. 12 (1588): "The lawyers in our Palaces of Justice have a customary saying, referring to a criminal who happens to have a judge in good humor and an indulgent mood: *Gaudeat de bona fortuna*, 'let him rejoice in his good fortune!' For it is certain that we meet with judges who are at one time harsher, more captious, more prone to convict, and at another more easy-going, complaisant and more inclined to pardon. When Justice So-and-so leaves his house suffering from the gout, from jealousy or from resentment against his valet who has been robbing him, his whole soul dyed and steeped in anger, we cannot doubt that his judgment will be warped accordingly. That venerable Senate of the Areopagus used to sit in judgment by night, lest the sight of the litigants might corrupt their sense of justice. The very atmosphere and the serenity of the sky have some power to change us, according to these Greek lines quoted by Cicero,

"The minds of men oft with the weather change,
As the days, foul or fair, dark or serene. (Homer)"

"Not only do fevers, potions, and serious happenings upset our judgment; the least thing in the world will turn it like a weather-cock. And there is no doubt, though we are not conscious of it, that, if a continuous fever can prostrate our soul, the tertian fever will impair it to a certain extent, in proportion to its severity. If the apoplexy dims and totally extinguishes the light of our intelligence, we cannot doubt but that the influenza will blind it. And consequently, hardly for a single hour in life will our judgment chance to be in its proper trim, our body being subject to so many continual changes and stuffed with so many different springs of action that (I take the word of the physicians for it) it will be strange if there is not always one that shoots wide of the mark. Moreover, this infirmity is not so easily detected, unless it be extreme and quite past remedy; inasmuch as reason always walks

added: "The training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions."¹⁴

Interested in matters of policy, Cardozo was fascinated by cases presenting situations where gaps in the precedents existed, or by those which invited deviation from the precedents because the old doctrines had produced unduly harsh results. He delighted in portraying the "creative function" of the judges in such instances, a function Cardozo brilliantly performed in some of his landmark opinions.¹⁵ Wisely, however, he warned repeatedly that those were "exceptional cases."¹⁶

Perhaps Cardozo's most original suggestion was that a judge, in determining what legal rules or principles to apply in deciding a case, can and should employ four methods. Cardozo called them the methods (1) of philosophy (or analogy or logic), (2) of evolution (historical development), (3) of tradition (customs), and (4) of sociology (justice, morals, and social welfare).¹⁷ This suggestion stimulates the advocate who aims to persuade judges, and supplies judges with some very useful tools in decision-making. These tools, to be sure, have some rough edges. As Professor Patterson says in his Preface to this volume, the four methods "were not exactly phrased or clearly delimited" by Cardozo. In particular, Cardozo's use of the word "logic" sometimes confuses, as when he speaks of a choice "between one logic and another,"¹⁸ although what he really means, as the context shows, is this: The choice relates to the principle which becomes the major premise of the judge's logic—whether that premise be found in historical development or in tradition or in social welfare, or in a compromise between two or more of those three.

The following comments, in 1918, by Hoernlé (in a review of a book of legal essays¹⁹ by divers writers, a book from which Cardozo often quotes) point up this common fallacy in which Cardozo indulges: "What logician ever demanded of a lawyer a procedure yielding artificial, unreasonable, unjust results? It is the lawyer, not the logician, who has insisted . . . on torturing the ever-novel, ever-changing forms of social and industrial life into a strait-jacket of concept and rules, which are . . . treated as rigid and fixed. . . . There is no logic known to me which forbids the recognition that 'legal systems do and must grow, that legal principles are not absolute, but relative to time and place'; or which demands the ignoring of the connection between law and economics. . . . But what makes the difference . . . between the kind of thinking that is rightly de-

crooked, lame and broken-hipped, and in the company of falsehood as well as of the truth. Hence it is difficult to discover her miscalculations and irregularities. I always call by the name of Reason that semblance of it which every man imagines himself to possess. This kind of reason, which may have a hundred counterparts around one and the same subject, all opposed to each other, is an implement of lead and wax, that may be bent and stretched and adapted to any bias and any measure; it needs but the skill to mould it. However well-meaning a judge may be, if he does not closely hearken to his own conscience, which few waste their time in doing, his leaning toward friendship, kinship, the fair sex and revenge, and not only things so weighty, but that fortuitous instinct which inclines us to favor one thing more than another, and which, without the permission of reason, gives us the choice between two like objects, or some equally empty shadow, may imperceptibly creep into his judgment, and prompt him to allow or disallow a cause, and give a tip to the scales."

¹⁴ THE NATURE OF THE JUDICIAL PROCESS 176. Cf. Holmes, *The Path of the Law*, *supra* note 10; *Vegehlahn v. Guntner*, *supra* note 10.

¹⁵ Outstanding are *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916); and *Meinhard v. Salmon*, 249 N. Y. 458, 164 N. E. 545 (1928).

¹⁶ See, e.g., THE NATURE OF THE JUDICIAL PROCESS 165; JURISPRUDENCE (as reprinted in the present volume) 7, 20.

¹⁷ THE NATURE OF THE JUDICIAL PROCESS 30.

¹⁸ THE NATURE OF THE JUDICIAL PROCESS 41; THE GROWTH OF THE LAW 79-80 (1924).

¹⁹ THE SCIENCE OF LEGAL METHOD (1917).

nounced as formalism, logic-chopping, hair-splitting, . . . and the kind of thinking which our authors seek to secure . . . by the introduction of historical, sociological, psychological considerations? *The difference is material, not formal.* Formally, thinking is good or bad, according as the conclusion does, or does not, follow from the premises. Materially, thinking is good or bad, according as the premises from which conclusions are drawn are more or less complete as measured by the whole range of the problem, or more or less relevant to the task and the purpose in hand. What our authors criticize as bad logic is really bad premises, not a faulty technique in deducing conclusions, but a faulty subject matter. . . . What our authors call for, and seek to secure, is better premises, a fuller and completer range of *material* considerations out of which to elicit 'substantial justice' The solution depends on what view we take of the . . . factors which ought to be considered, if concrete justice is to be secured in each particular case. . . . No logician can legislate for the lawyer on such material points."²⁰

But if, in company with many other legal philosophers, Cardozo sometimes went astray in his conception of logic,²¹ that was a minor fault. Despite it, these books constitute invaluable treatises on upper-court judging, treatises which almost certainly will never be equalled. I can testify that they have proved an indispensable guide to the perplexed for at least one upper-court judge, and, for him, an inexhaustible source of moral inspiration. To avoid any possible misunderstanding of the balance of this article, let me say, then, that I join whole-heartedly with the many who hail Cardozo as one of our greatest appellate judges and who appraise his books as priceless contributions to a comprehension of what appellate courts do.

By the way of preface to what follows, I quote the following: "That he [Cardozo] was a great judge, that he advanced the progress of keen thinking about the purposes and workings of the courts, is beyond question. That he was a great person, too, is undeniable. . . . Surely here was a wise and good man, entitled to veneration. But he was neither an immortal nor a mortal god. Being human, he escaped perfection. . . . No man is great in all his aspects. Diderot observed that 'everything even among the greatest of all the sons of men is incomplete, mixed, relative; everything is possible in the way of contradictions and limits; every virtue neighbors elements of uncongenial alloy; all heroism may hide points of littleness; all genius has its days of shortened vision.' Unmitigated or monolithic praise of the great departed often encourages imitation of their errors and weaknesses. . . . If it should be said that it is presumptuous for so unaccomplished a person to criticize . . . one so great as Cardozo, my answer will be this: It is a prized democratic maxim that even an alley cat may look at a king; it was an untutored boy who saw the true nature of the emperor's clothes."²²

II

Since Cardozo, when at the bar, was principally an upper-court lawyer, and, in his long tenure on the bench, an upper-court judge (except for a few months), it would

²⁰ Hoernlé, Book Review, 31 HARV. L. REV. 807, 810-811 (1918).

²¹ In *THE GROWTH OF THE LAW* 62-63, Cardozo, for a moment, sensed this error. Referring to his four methods, he said: "No doubt there is ground for criticism when logic is represented as a method in opposition to others. In reality, it is a tool that cannot be ignored by any of them. The thing that counts chiefly is the nature of the premises. We may take as our premise some pre-established conception or principle or precedent, and work it up by an effort of pure reason to its ultimate development, the limit of its logic. We may supplement the conception or principle or precedent by reference to extrinsic sources, and apply the tool of logic to the premise as thus modified or corrected." But then he fell back into the old error, for he added: "The difference between the function of logic in the one case and in the other is in reality a difference of emphasis. The tool is treated on the one hand as a sufficient instrument of growth, and on the other as an instrument to cooperate with others. The principle of division is a difference, not of kind but of degree."

²² Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 629-630 (1943).

have been understandable if he had avowedly limited himself to writing of "The Nature of the Appellate Phases of the Judicial Process." In that event, these books would have deserved the all but uniform praise they have received. But I think they merit a marked criticism almost never voiced: unfortunately, Cardozo purported, without qualification, to describe the entire judicial process. Because of his reputation, the very excellence of his teachings in the narrow appellate field, to which they legitimately pertain, has tended to dampen inquiry in a far larger field where inquiry is far more necessary.

For Cardozo completely by-passed the operations of the trial courts, as if to say either that they had little significance or that their unique decisional activities and distinctive functions had no place in that process. Although, before he used the phrase, the "judicial process" had been defined to include "all the steps and proceedings in a cause from its commencement to its conclusion,"²³ Cardozo excluded, as if non-existent, the events occurring in the trial stage of thousands of cases, events which occur in trial courts but never in upper courts: the witnesses testifying, the lawyers examining and cross-examining the witnesses, the jurors listening to the witnesses and to the arguments of the lawyers, the trial judge (when sitting without a jury) passing on the credibility of the witnesses' oral testimony.²⁴ The omission of all these phenomena—familiar to every trial judge, trial lawyer, and newspaper reporters who "cover the courts"—renders Cardozo's exposition, as a description of how courts work, seriously misleading. Eminently satisfactory as an account of appellate-court ways, it is bizarre as an account of trial-court ways—as bizarre as would be an account of manners at Buckingham Palace if taken as also applicable to rush-hour behavior in the New York subways. Nor was Cardozo's misdescription inadvertent. On the contrary, as we shall see, he grew irritated when his grave omission of trial-court happenings was called to his attention, and did his best to discourage efforts to correct his description.

The omission was grave for this reason: because of it, Cardozo, with seeming justification, could give credence to a gross over-estimation of the reliability and excellence of our courthouse products. "Nine-tenths, perhaps more, of the cases that come before a court," he wrote, "are predetermined—predetermined in the sense that they are predestined—

²³ See *United States v. Murphy*, 82 Fed. 893, 899 (D. Del. 1897); *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551, 557 (1897); *Blair v. Maxbass Security Bank*, 44 N. D. 12, 176 N. W. 98, 100 (1919); cf. *Wayman v. Southard*, 10 Wheat. 1, 27 (U. S. 1825).

Some persons seem to think Cardozo invented the phrase. These citations show that he did not. Nor did he originate its use to denote the function of judging. In that respect, he had been anticipated by Wigmore who, in 1917, thus employed it. Wigmore distinctly spoke of the "judicial process." See WIGMORE, *Editorial Preface to THE SCIENCE OF LEGAL METHOD* (1917). He described it (xxviii) as "the process . . . of deciding, by an agent of state power, a controversy existing between two individuals (or the State and the individual) by rational (not merely personal) considerations, purporting to rest on justice and law (*i.e.*, the community's general sense of order)."

Anyone acquainted with Wigmore's *PRINCIPLES OF JUDICIAL PROOF* (1913) does not need to be told that, in such official dispute-deciding, he included all that Cardozo excluded. *Had Cardozo followed Wigmore's lead, his books would not have been subject to the criticisms made in this paper.*

Pound, writing in 1917 of "the judicial process of finding the law," came closer to Cardozo's definition. See Pound, *Courts and Legislation*, in *THE SCIENCE OF LEGAL METHOD* 202, 223 (1917). Pound says (208): "Judicial decision of a controversy, *the facts being found*, has been said to invoke three steps: (1) finding the rule to be applied, (2) interpreting the rule, (3) applying the rule to the cause." The words I have italicized (*i.e.*, "the facts being found") refer to an element in decision-making which Cardozo fails to analyze.

²⁴ Occasionally an upper court receives evidence not received in the trial court, or the upper court acts as a trial court, *e.g.*, when a case is within the original jurisdiction of the United States Supreme Court. But virtually never does the upper court listen to witnesses; if the evidence is oral testimony, it is heard by a master or referee and reported, in a transcript, to the upper court.

It is notable that, when an upper court thus becomes a direct fact-finder, the judges of the court may flatly disagree with one another as to the facts. See *United States v. Shipp*, 214 U. S. 386 (1909).

their fate established by inevitable laws that follow them from birth to death."²⁵ Substitute "upper court" for "court" in that sentence, and it is perhaps not too wide of the mark. It cannot possibly stand up, however, as a characterization of our entire court system. In most instances, when a case has already been decided by a trial court, a capable lawyer can accurately predict what, if an appeal is taken, will be the decision of the upper court. But (for reasons I shall presently canvass) no such easy prediction can be made of most trial-court decisions. Cardozo, by restricting the judicial process to appellate courts, presented a picture of the workings of our court system as, in the main, just, reliable, and steady. That highly inaccurate picture afforded smug satisfaction to much of the legal profession. For, if Cardozo was correct, the judicial process needed comparatively little improvement.

Now the truth is that, for most persons who become involved in litigation, what trial courts do has far more significance than has the performance of upper courts. For not only is the overwhelming majority of decisions not appealed, but in most of the relatively few that are appealed—probably not more than 6 per cent annually—the appellate courts accept as final the trial-court findings of fact.²⁶ This they do because of a circumstance which accounts for and derives from a unique characteristic of our trial courts: a jury, or a trial judge in a non-jury case, can observe the demeanor of the orally testifying witnesses. The appellate judges cannot. Observation of witnesses' deportment is by no means an infallible method of determining the accuracy of their testimony; but, no better method having been devised, such observation of witnesses, whenever it is possible, is generally deemed essential in our legal system. Judge Learned Hand summarized views often previously expressed by our courts when he said that "that complex of sight and sound, from which we make our conclusions in a courtroom, is in large part eviscerated when reduced to the printed word." As Wigmore put it, "The witness' demeanor . . . is always assumed to be in evidence." A "stenographic transcript," wrote Judge Ulman, ". . . fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the mere words signify. The best and most nearly accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried."^{26a}

It follows that the decisions of trial courts—in which courts alone can the witnesses be seen and heard—determine the fate of, say, 98 per cent of all litigated cases. That 98 per cent Cardozo usually disregarded. For him, a 2 per cent tail wagged a 98 per cent dog. It was as if a meteorologist had founded his studies of weather solely on weather conditions at the equator, or as if a physician had insisted that human health must be studied exclusively in terms of the health of twenty-year-old males. Cardozo, generalizing from wholly insufficient material, was guilty of an unwarranted extrapolation. He basically erred in considering the "facts" of cases as "data," as "given" to the courts. That

²⁵ THE GROWTH OF THE LAW 60.

²⁶ This is usually true where the testimony is oral, no procedural errors occurred at the trial, and the findings are rationally inferable from *some* of the evidence. Such is the general rule in the federal courts. Slight divergences exist in some jurisdictions, as, for instance, in New York where the appellate courts have a limited power to review the facts. The highest New York court, in which Cardozo sat for years, exercises that review power sparingly. See Cohen, *The Reluctance of the New York Court of Appeals to Review Facts*, 44 COL. L. REV. 352 (1944).

For discussions of appellate-court attitudes towards trial-court fact-finding, see, e.g., POUND, APPELLATE PROCEDURE IN CIVIL CASES 5-6, 28 (1941); Clark and Stone, *Review of Findings of Fact*, 4 U. OF CHI. L. REV. 190 (1937); Clark, *The New Illinois Practice Act*, 1 U. OF CHI. L. REV. 209 (1933); ORFIELD, CRIMINAL APPEALS IN AMERICA, c. 4 (1939).

^{26a} For Judge Hand's statement, see *Peterson Lighterage & T. Corp. v. New York Central R. R.*, 126 F. 2d 992, 996 (C. C. A. 2d 1942); for Wigmore, see JOHN H. WIGMORE, EVIDENCE §946 (3d ed. 1940); for Ulman, see JOSEPH N. ULMAN, THE JUDGE TAKES THE STAND 267 (1933).

is true, on the whole, in the appellate phase of that process. It is emphatically not true in its trial phase. The "facts" of cases (as I shall try to show) are not the facts as they actually occurred, not things which exist outside of court. They are usually processed by the trial courts, are their peculiar products. As Judge Olson recently said, "trials are commonly called law suits, but it often seems they might better be called fact suits."^{26b}

Upper courts concern themselves chiefly with the legal rules and principles. So, too, did Cardozo in his books. As a consequence, for him the judicial process signified little more than the application to facts, already "found," of (1) established rules and principles, or (in occasional "exceptional cases") of (2) new rules and principles brought into being through the "creative" activities of the courts. The same was true of Cardozo's conception of "jurisprudence." His definitions of "law"—composed in part of ingredients taken from Holmes²⁷ and from Pollock and Maitland²⁸—included non-legal materials, but did so only in so far as they contributed to such legal concepts or generalizations: "We shall unite in viewing as law," he wrote, "that body of principle and dogma which with a reasonable measure of probability may be predicted as *the* basis for judgment in pending or future controversies."²⁹ I underscore "the," as it highlights Cardozo's perspective: The "body of principle and dogma," he is saying in effect, should alone be regarded as "the basis of judgment." Nothing is said to indicate that the ascertainment of the facts of a lawsuit also enters into the making of a judgment, so that to predict future judgments one must be able to predict what facts will be ascertained in future cases.

What I am driving at grows clearer in his other definitions: "A principle or rule of conduct so established with reasonable certainty that it *will be enforced by the courts* if its authority is challenged, is . . . a principle or rule of law."³⁰ Subsequently he expanded this statement into a general definition of "law." After noting that "that word stands for a good many notions," he added: "I find lying around loose, and ready to be embodied into a judgment according to some process of selection to be practiced by a judge, a vast conglomeration of principles and rules and usages and moralities. If these are so established as to justify a prediction with reasonable certainty that *they will have the backing of the courts* in the event that their authority is challenged, I say that they are law. . . ."³¹ It would waste time to argue whether these definitions of the hopelessly ambiguous word "law" are preferable to one of a dozen or more others.³² But it is distinctly worth while to point out that his definitions contain phrases which Cardozo never bothered to explain although they shriek for elucidation. I refer to the phrases, "*will be enforced by the courts*," and "*will have the backing of the courts*." If you peer behind those words, you will be gazing at an immense legal jungle (partly explored by Wigmore, in his *Principles of Judicial Proof*, and by others in books written for practicing trial lawyers),³³ a jungle Cardozo disdained to enter—the jungle of trials and trial-court fact-finding.

^{26b} Olson, *Observations from a Trial Bench*, 22 WASH. L. REV. 67, 69 (1947).

²⁷ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in HOLMES, COLLECTED LEGAL PAPERS 167, 172-174 (1920). Cardozo quotes the passage: GROWTH OF THE LAW 44-45.

²⁸ I POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, Introduction xxv (2d ed. 1899).

²⁹ THE GROWTH OF THE LAW 44.

³⁰ THE GROWTH OF THE LAW 52 (emphasis added).

³¹ *Jurisprudence*, An Address before the New York State Bar Association, January 22, 1932, printed in this volume p. 7, at p. 18 (emphasis added).

³² That the word "law" is so ambiguous that disputes about its meaning end in futility, see Frank, *Are Judges Human?* 80 U. OF PA. L. REV. 17, 45 (1931); FRANK, IF MEN WERE ANGELS 279-284 (1942).

³³ See, e.g., HARRIS, HINTS ON ADVOCACY (Am. ed. 1892); H. W. TAFT, WITNESSES IN COURT (1934); GOLDSTEIN, TRIAL TECHNIQUE (1935); MOORE, FACTS (1898).

Without trial-court fact-finding, judicial "enforcement" of the legal rules³⁴ seldom gets under way. For a court "enforces" or "backs up" a rule only if the court, in some specific lawsuit, holds that the facts which invoke that rule are the facts of that specific case.³⁵ If, and only if, the court so holds, does it apply that rule to those facts. It follows that a rule is not "enforced" unless a trial court has "found" or purports to have "found" the pertinent facts, *i.e.*, those facts to which the rule applies.³⁶ It also follows that, in almost any particular case—and therefore in almost all cases—trial-court fact-finding is fully as vital as any legal rule. To the human beings whose specific lawsuits the courts decide; the determinations of the facts have the utmost significance. If the facts are found against a party, he loses. The facts of a case, as found, furnish the ticket to the decision.³⁷ "No tickce, no washee." For a legal rule is only a conditional statement. It says, "If the facts are thus and so, then these legal consequences ensue."

One would suppose, then, that a study purporting to cover the judicial process, a treatise on "jurisprudence," would include an extensive discussion of the methods of trial-court fact-finding and of the influences that affect it; would explain the multitude of factors involved in it; would emphasize its ineradicable chanciness and uncertainty in most cases, due to the unavoidable fallibility of witnesses, jurors, and trial judges.

Cardozo, however, ignored those topics, and without apologies.³⁸ This is the more remarkable since, in the single brief passage in which he mentions the function of facts in litigation, he acknowledges their undeniable significance: "In what I have said," he wrote in 1924,³⁹ "I have thrown, perhaps too much into the background and the shadow the cases where the controversy turns not upon the rule of law, but upon its application to the facts. Those cases, after all, make up the bulk of business of the courts. They are important for the litigants concerned in them. They call for intelligence and patience and reasonable discernment on the part of judges who must decide them.⁴⁰ But they leave jurisprudence where it stood before." A few lines later, he says that "jurisprudence remains untouched, regardless of the outcome" of such cases.

Truly, an astonishing attitude. "Jurisprudence," as Cardozo envisions it, stands aloof from those decisions, "important to litigants," which, according to Cardozo himself, "make

³⁴ For convenience, I shall, from now on, use "rule" to include a principle, a standard, a custom, a usage, or a "morality" which a court enforces.

³⁵ Of course, sometimes the parties stipulate the facts or one party admits that the facts are as stated by his adversary.

³⁶ When I say "purports to find," I refer to a complicated subject:

1. Juries usually return general verdicts which do not reveal what facts were found. Trial judges, sitting without juries, are permitted in some jurisdictions to render judgments without special findings or opinions; such judgments include the equivalent of general verdicts.

2. Even when special findings are supplied by a jury or trial judge, they merely supply a statement of belief as to what the facts are; this statement may not correctly report the actual belief.

Consequently, a trial court may seem to be, or be said to be, enforcing a rule when in truth it is not doing so.

These complications, which render my comments on "findings" in the text over-simplifications, are discussed in some detail in Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645 (1932), and, more tersely, in FRANK, IF MEN WERE ANGELS 269-271 (1942), and Frank, *A Plea For Lawyer-Schools*, 56 YALE L. J. 1303, 1307 n. 7 (1947).

³⁷ Warning: See the preceding footnote.

³⁸ Warning: The fact-finding here discussed, which relates to the particular past events that are the subject of a dispute in a trial, is of course distinct from that fact-finding which relates to "background" or "social and economic facts" of the kind to which Brandeis gave prominence in his famous briefs and judicial opinions. In the latter kind of fact-finding Cardozo had a vivid interest. See, *e.g.*, THE GROWTH OF THE LAW 117, 241. That even such fact-finding is not free of subjectivity, see Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303, 1334-1335 (1947).

³⁹ THE JUDICIAL PROCESS 163.

⁴⁰ Jury cases are not mentioned.

up the bulk of the business of the courts." Why this snobbish aloofness on the part of "jurisprudence" when so much is at stake for our citizens? Because, in Cardozo's view, "jurisprudence" is indifferent to anything other than the legal generalizations, the legal rules and principles. Since the "judicial process," for Cardozo, is substantially co-extensive with "jurisprudence," his exposition of the nature of that process likewise cold-shoulders, as unworthy of consideration, the "bulk of the business of the courts."

Having thus artificially circumscribed the judicial process (by admittedly excluding from it the bulk of judicial business), Cardozo reaches a conclusion as to its workings which necessarily is artificial but which affords him much comfort: since (1) but a small percentage of the legal rules lack certainty, and (2) certainty in the judicial process means certainty in rules, it is demonstrable (according to Cardozo's reasoning) that (3) the extent of uncertainty in the judicial process is small. This conclusion (which is correct in respect of appellate courts but otherwise false) has a logical corollary; *i.e.*, experienced, able lawyers, Cardozo implies, can usually predict court decisions with accuracy: he declared that most rules, even those which allow courts some discretion, "have such an element of certainty that, in a vast majority of instances, prediction ceases to be hazardous for the trained and expert judgment."⁴¹ In other words (so Cardozo apparently maintains) competent lawyers can predict the outcome of most lawsuits before trial.

Not only that. "Law," as Cardozo defines it, shows up as largely stable, since "law" consists of the rules. Here, apparently, is cheer for the layman, since, says Cardozo, the "law" will, on the whole, conform to the layman's "reasonable expectations."⁴²

The fatal vulnerability of that thesis,—*i.e.*, that legal certainty and the predictability of decisions are measurable by, and correspond to, the certainty of the rules—can be made clear by exposing the error in one of Cardozo's remarks about facts. After noting that the issues in most lawsuits relate "not to the law, but to the facts," he adds: "In countless litigations, the law is so clear that the judges have no discretion." *But trial courts—juries or trial judges trying cases without juries—have an amazing discretion in finding the facts.*⁴³ When, as happens in most trials, the testimony is oral and the several witnesses disagree concerning the facts, the trial court's discretion in the determination of the facts—based on a selection of some of the witnesses as credible and others as not—usually is utterly uncontrollable. Indeed, the jury system has often been praised just because juries, through general-verdict fact-finding, have a virtually unregulated power

⁴¹ *Jurisprudence*, *supra* note 16, at 22.

⁴² *Id.* at 29. See also *THE GROWTH OF THE LAW* 102, where Cardozo, with apparent approval, quotes Pound's statement: "The law enforces the reasonable expectations arising out of conduct, relations and situations."

⁴³ See FRANK, *IF MEN WERE ANGELS* 91-92 (1942); Frank, *Words and Music*, 47 *COL. L. REV.* 1259, 1273-1274 (1947); WIGMORE, *EVIDENCE* §2032, 244-245 (3d ed. 1940); Millar, in ENGLEMAN, *HISTORY OF CONTINENTAL CIVIL PROCEDURE* 44 (1927).

In *Nash v. Fries*, 129 Wis. 120, 108 N. W. 210, 211 (1906), the court said that "by many authorities, the word 'discretion' is properly enough used to express that judicial judgment in discriminating as to weight and cogency between different witnesses . . . which must be exercised in reaching any conclusion of fact from evidence."

In *Woey Ho v. United States*, 109 Fed. 888, 890 (C. C. A. 9th 1901), the court said: "The question whether a witness is credible must ordinarily be determined by the tribunal before whom the witness appears, and in the decision of which that tribunal must necessarily be vested with a very wide discretion."

Cf. *Weiler v. United States*, 323 U. S. 606, 608 (1945): "In gauging the truth of conflicting evidence, a jury has no simple formulation of weights and measures upon which to rely. The touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity. Triers of fact in our tribunals are, with rare exceptions, free in the exercise of their honest judgment to prefer the testimony of a single witness to that of many."

Cf. ARISTOTLE, *RHETORIC*, Bk. I, c. 1, 1354b.

to nullify the legal rules;⁴⁴ and much the same power is possessed by a trial judge who sits without a jury.⁴⁵

The exercise of this discretion will often paralyze prediction. In the first place, witnesses, being human, are humanly fallible. No one has discovered or invented any instrument or objective method by which a jury or trial judge can pick out those of the witnesses, if any, who accurately observed the facts in dispute, accurately remembered what they observed, and accurately (without bias or prejudice or perjury) report in court their memories of what they observed.⁴⁶ Conventional jurisprudence, in turning its back on that difficulty, relies on an implicit postulate or axiom—the Truth-Will-Out Axiom, *i.e.*, that bias, mistakes and perjury are infrequent, abnormal, and that, when they occur in litigation, they are usually uncovered, so that they have slight effects on the outcome of lawsuits. That axiom, completely out of line with observable trial courtroom realities, should be repudiated.⁴⁷ Once it is repudiated, it becomes obvious that, in the

⁴⁴ See, *e.g.*, WIGMORE, *A Program For the Trial of a Jury Trial*, 12 AM. J. SOC'Y 166 (1929); see also discussion in FRANK, *IF MEN WERE ANGELS* 80-88 (1942); Pound, *Law In Books and Law in Action*, 44 AM. L. REV. 12, 18-19 (1910).

⁴⁵ See FRANK, *IF MEN WERE ANGELS* 97-99 (1942); Frank, *Words and Music*, 47 COL. L. REV. 1259, 1275 (1947); see also *La Touraine Coffee Co. v. Lorraine Coffee Co.*, 157 F. 2d 115, 123-124 (dissenting opinion, C. C. A. 2d 1946).

⁴⁶ The fallibility of testimony and the difficulty of selecting honest, accurate testimony, are notorious. Here are a few remarks on the subject, chosen at random:

"From my experience as a man, a lawyer, a prosecuting attorney, and a judge, I am compelled to say that the most uncertain thing I know of is human testimony." CARTER, *THE OLD COURT HOUSE* 144 (1890).

"Thus with the best intentions at the outset, and knowing matters of importance to the cause, a nervous, apprehensive witness may retire suspected of the grossest perjury, and without relating a single matter as it occurred." ROBINSON, *FORENSIC ORATORY* 126 (1893).

"The liar . . . is far less dangerous than the honest but mistaken witness who draws upon his imagination. It is difficult to determine in the case of an honestly intentioned witness how much of his evidence should be discarded as unreliable, and how much accepted as true. . . . A distinguished lawyer testifying in a recent case was so careful to qualify every bit of his evidence that the jury took the word of a perjured loafer and a street-walker in preference." TRAIN, *PRISONER AT THE BAR* 228, 236 (2d ed. 1908).

"And so counsel and court find it necessary through examination and instruction to induce a witness to abandon for an hour or two his habitual method of thought and expression, and conform to the rigid ceremonialism of court procedure. It is not strange that frequently truthful witnesses are as a result misunderstood, that they nervously react in such a way as to create the impression that they are either evading or intentionally falsifying. It is interesting to account for some of the things that witnesses do under such circumstances. An honest witness testifies on direct examination. He answers questions promptly and candidly and makes a good impression. On cross-examination his attitude changes. He suspects that traps are being laid for him. He hesitates; he ponders the answer to a simple question; he seems to 'spar' for time by asking that questions be repeated; perhaps he protests that counsel is not fair; he may even appeal to the court for protection. Altogether, the contrast with his attitude on direct examination is obvious; and he creates the impression that he is evading or withholding. . . . The testimony of few witnesses is in accord in all particulars with statements of other witnesses previously examined. The questions asked by counsel, particularly on cross-examination, the nervousness or perhaps irritation incident to their novel situation and heightened by the austerity of the judge, the mental confusion resulting from an admission of error, extorted on cross-examination, even though it affects a matter of minor importance—such things as these often lead to changes in the testimony of a witness and may affect his credibility. It is not honesty alone, but the ability to withstand the effects of such influences that make a 'good witness.'" TAFT, *WITNESSES IN COURT* 20, 28 (1934).

"It would be correct, I think, to say that no witness can be expected to be more than 60% correct, even if perfectly honest and free from preconception." Eggleston, *Legal Development in a Modern Community*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 167, 182 (1947).

⁴⁷ For this axiom I have suggested elsewhere the substitution of the following: "Perjury, bias and mistakes in testimony are a normal part of many lawsuits. The true facts of a case are often not apprehended by judge or jury if the case is hotly contested and questions of fact are in issue. Fear of

selection of portions of the testimony on which to rely, the jury or trial judge must make a guess. In this guessey choice, on which fact-finding is constructed, there inheres much inscrutable, un-get-at-able subjectivity: Not only are the reactions of the witnesses, to the past events about which they testify, shot through with subjectivity. So, also, are the reactions of juries or trial judges to the witnesses. For the juries and trial judges are themselves but fallible witnesses of the witnesses.⁴⁸ Thus fact-finding encounters multiple subjectivity.

The truth, neglected by Cardozo & Co., is that the facts in dispute in a lawsuit are past events which do not walk into the courtroom; that those actual past "objective" events can be ascertained, at best, only through subjective reactions to the testifying witnesses' subjective reactions; and that, therefore, to speak of "finding" the "facts" is indescriptive.⁴⁹ Therefore, my description of the nature of a legal rule needs revision: a legal rule means, "If the jury or trial judge (expressly or impliedly) says that it believes the facts are thus and so, and if there is some substantial evidence to justify that statement of belief, then these legal consequences ensue."

No third person can tell whether such statements correctly report the beliefs of the juries or trial judges (*i.e.*, whether the statements match their private beliefs); for it is not permitted to examine or cross-examine juries and judges.⁵⁰ But even if any such statement did correctly report such belief, no appellate judges could probe the belief to determine whether it matched the actual past facts, the "facts in themselves." For no one

prosecution for perjury has small effect for several reasons: (a) Few persons are indicted for perjury; few perjurers can be convicted if indicted; and fewer still are convicted. (b) Perjurers are often heedless of possible future consequences. (c) Much false testimony is not the result of deliberate lying which would either justify or make possible conviction for perjury. Coaching of witnesses by crooked lawyers is often successful. Inadvertent coaching of witnesses by honest lawyers often occurs; it is an unavoidable result of the fact that witnesses, when interrogated by a lawyer in advance of trial, become aware or what the lawyer wants, if possible, to prove. A lawyer, before the trial begins, is often not aware of all the facts of his client's case. And even if he does know all the true facts, he does not know what liars, biased witnesses or mistaken witnesses will testify for the other side. And he cannot know whether false or mistaken testimony will be believed by the judge or jury. Wherefore, he cannot predict the outcome of any lawsuit before it has begun because he does not know what the testimony will be and what effect it will have. For perjured, biased or mistaken testimony often persuades judges and juries." Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORN. L. Q. 568, 588 (1932).

See that same article for several other axioms or postulates, implicit in conventional legal thinking, which should be discarded because contrary to easily observable courtroom conditions.

⁴⁸ For more ample discussion, see FRANK, LAW AND THE MODERN MIND 107-108 (1930); Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645 (1932); FRANK, IF MEN WERE ANGELS 72, 270-271 (1942); Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303, 1307-1310 (1947); Frank, *Words and Music* 47 COL. L. REV. 1259, 1273-1276 (1947).

⁴⁹ That a trial court is like a historian attempting to "reconstruct" the past, and that, like every historian, it engages in a conjectural undertaking, see *In re Fried*, 161 F. 2d 453, 462 and n. 21 (C. C. A. 2d 1947).

⁵⁰ "Now remember that the judge's statement that the facts of the case are Q, R, and S means only that he thinks that the facts are Q, R and S. But how are we to know whether he is reporting correctly what he thinks the facts are? We can determine the truth of his statement [of what he thinks] only by knowing what actually went on in his mind. But it is very difficult to determine what goes on in the mind of any man. In the case of a witness on the witness-stand, cross-examination and other devices are available which may tend to show the witness' lack of veracity or inaccuracies, and may bring to light what the witness is really thinking or really thought. But cross-examination of judges is not permitted. If, then, (1) the judge's statement of 'the facts' of a 'contested' case is a statement of what the judge thinks and (2) that statement cannot be challenged, it follows that it is only through a knowledge of the judge's 'character' or 'personality' that one can obtain criteria for determining the correctness of his conclusion. And, unfortunately, that kind of knowledge is seldom available." Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645, 660-662 (1926) (see also 651 and 782-784); FRANK, IF MEN WERE ANGELS 269-271 (1942).

can formulate, in the form of rules, the bases of such a belief. The belief is "unruly," one might say. Long ago, Sir Henry Maine, in a passage which has largely escaped attention, pointed to the delicate task of a trial judge "in drawing inferences from the assertion of a witness to the existence of the facts asserted by him. It is in the passage from the statements of the witness to the inference that those statements are true, that judicial inquiries break down." It "is the rarest and highest personal accomplishment of a judge to make allowance for the ignorance and timidity of witnesses, and to see through the confident and plausible liar. Nor can any general rules be laid down for the acquisition of this power, which has methods peculiar to itself, and almost undefinable."⁵¹ Wherefore, as there is no yardstick for measuring the accuracy of a trial court's finding of facts in a case where the testimony is oral and credibility is in issue, often the discretion used in reaching that finding cannot be controlled.⁵²

You will search in vain in Cardozo's discourses on the judicial process for any mention of the huge measure of discretion vested in juries and trial judges with respect to the facts. (Indeed, nowhere did he refer to juries.) He wrote as if discretion in the judicial process consisted solely of discretion inhering in the rules or in the selection of rules. That perhaps explains why it never occurred to him to note that it is peculiarly true of jurymen and trial judges—when reacting at trials to witnesses who testify orally—that they are affected by "forces" which lie "deep below consciousness," the "likes and dislikes, the predilections and the prejudices, the complex of emotions and habits and convictions." In the upper courts, as Cardozo noted, those "forces" sometimes somewhat influence the choice of rules. In the trial courts, those "forces" influence, often immeasurably, the choice of facts which is within the wide discretion of jurors and trial judges.⁵³

Since that choice is a guess, frequently induced by inscrutable factors, the lawyer, trying to predict a decision, engages in a baffling undertaking: he is trying to predict what facts will be "found," and therefore guessing the future guess of a jury or trial judge. Moreover, before a case is tried, the lawyer's guess often must be about the future guess of a jury, or trial judge, as yet unknown to the lawyer.⁵⁴ Necessarily, such a guess is wobbly. It would be wobbly even if all the legal rules and principles were as precise as a table of logarithms, as fixed as the North Star.

How true that is becomes obvious when one considers that in the great majority of suits (*e.g.*, negligence actions and the like) both sides agree as to the applicable rules, the disputes relating to the facts alone. In the light of such cases, it passes understand-

⁵¹ MAINE, *The Theory of Evidence*, in *VILLAGE COMMUNITIES* 295, 317-318 (1872).

⁵² See dissenting opinion in *La Touraine Coffee Co. v. Lorraine Coffee Co.*, 157 F. 2d 115, 123-124 (C. C. A. 2d 1946), to the effect that, when a decision turns on the credibility of witnesses, a trial judge's finding of fact "is inherently subjective (*i.e.*, what he believes to be the facts is hidden from the scrutiny of others), his concealed disregard of evidence is [therefore] always a possibility. An upper court must always accept that possibility, and must recognize, too, that such hidden misconduct by a trial judge lies beyond its control."

⁵³ See more detailed discussion in *In re J. P. Linahan, Inc.*, 138 F. 2d 650, 651-652 (C. C. A. 2d 1943).

Indeed, so important are these inscrutable "forces" that it might well be argued that it is less accurate to say that a decision results from the "application" of a rule to the "facts" than to say the following: A decision results from the effect of the stimuli on the personality of the trial judge or the personalities of the jurors; among the stimuli are the legal rules, but there are many others, including the prejudices (largely unconscious) of the judge or jurors for or against the several witnesses and the lawyers.

⁵⁴ For fuller discussion, see Frank, *Are Judges Human?* 80 U. OF PA. L. REV. 17, 28, 35-36, 47, 240-241 (and n. 16b) (1931); FRANK, *IF MEN WERE ANGELS* c. 7 (1942).

See also FRANK, *LAW AND THE MODERN MIND* 109-112, 116, 134, 149-151, 152 n., 170-185, 302, 309 (1930).

ing that many distinguished legal thinkers,⁵⁵ who are rule-obsessed (*i.e.*, who want to believe that decisions are readily foreseeable whenever the pertinent rules are precise), absurdly prattle that clear and definite rules prevent much litigation because (so say these thinkers) most men will not be so foolish as to begin suits in which the relevant rules have such definiteness. Nor can it be ignored that no legal rule, no matter how exact, precludes the injection, by one of the parties to a suit, of an issue of fact which throws open the doors to the reception of oral testimony,⁵⁶ and thus to a choice of the "facts" by a trial judge or jury.

These choices of the "facts," resulting from the exercise of the trial courts' guessey discretion, may "leave jurisprudence untouched," but, if so, they leave it looking pretty lifeless, indeed inhuman. The legal rules and principles, the sole foundation of that artificial, ghostly, Cardozian jurisprudence, are stable for the most part, as Cardozo correctly maintains; and, often, predictions of what rules and principles the courts will employ can be fairly exact. Trained lawyers, for example, know the "jurisprudence" relevant to murder trials or automobile accident trials, and can prophesy, with a high degree of reliability, what rules will be applied in such litigation. But what of it? The layman wants to know whether those rules will be applied to the actual facts. If, in a murder case, the correct rule is applied to the wrong facts, an innocent man will be killed by the state.⁵⁷ If a trial court, by believing a perjured witness, decides that a deed is a mortgage, the court's legal rule may be impeccable, but the wrong litigant will win.

If, as Cardozo suggests, it be the function of the courts to ensure that, in general, decisions conform to the layman's "reasonable expectations," will a layman consider that a court has discharged its obligations if the legal rules thus conform but, because of an error in fact-finding, the decision in his case does not? As I have said elsewhere: "When the actual facts of a case are not ascertained by a court, its decision may be completely erroneous while yet appearing to be correct. It matters little to a citizen, when he wrongfully loses a lawsuit, whether the decision is the product of the application of the 'wrong' legal rule to the 'right' facts, or the product of the application of the 'right' legal rule to the 'wrong' facts. It is a basic tenet of our theory of justice that cases which are substantially alike should, usually, be decided the same way—according to the same legal rules—and that cases which are substantially different should be decided differently—according to different legal rules. Defects in the ascertainment of the actual facts may result, therefore, in a denial of justice. Because of such defects, cases which, in truth, are very different may seem to the courts to be virtually identical and are decided identically. To the extent, then, that removable defects in fact-finding are not eliminated, proper and practicable individualization of cases does not occur, and avoidable injustice is done."⁵⁸

When one discusses legal certainty and predictability, is it not misleading to discuss merely the certainty of the rules and of predictions as to what rules courts will employ, while refusing to talk of decisions? If a man, defeated in a suit because of a mistake of the trial court about the facts, goes to jail or the electric chair, or loses his business, will it solace him to learn that there was no possible doubt concerning the applicable legal principle?

Usually a client wants his lawyer to prophesy a specific decision relating to a matter in which that particular client has a specific interest. The likelihood that the lawyer

⁵⁵ See, *e.g.*, Kantorowicz, *Some Rationalism About Realism*, 43 *YALE L. J.* 1240, 1241 (1934); Dickinson, *Legal Rules*, 79 *U. OF PA. L. REV.* 833, 846-847 (1931).

⁵⁶ See Corbin, *The Parol Evidence Rule*, 53 *YALE L. J.* 603 (1944).

See Frank, *A Plea For Lawyer-Schools*, 56 *YALE L. J.* 1303, 1330 (1947), to the effect that the leaky character of the parol evidence rule leaves legal draftsmanship likewise leaky.

⁵⁷ BORCHARD, *CONVICING THE INNOCENT* (1932).

⁵⁸ FRANK, *IF MEN WERE ANGELS* 109 (1942).

will successfully predict such a decision will vary with the stage at which he is asked for his opinion:⁵⁹

1. When the client, having just signed a contract, asks what are his rights thereunder, at that time neither the client nor the other party to the contract has as yet taken any steps under the contract. The lawyer's prediction at this stage must include a hazardous guess as to what each of the parties will do or not do in the future. The prediction must frequently be so full of if's as to be of little practical value.
2. After events have occurred which give rise to threatened litigation, the client may inquire concerning the outcome of the suit, if one should be brought.
 - a. Before the lawyer has interviewed prospective witnesses, his guess is on a shaky foundation.
 - b. After interviewing them, his guess is less shaky. But, unless the facts are certain to be agreed upon, the guess is still dubious, if the lawyer does not know what judge will try the case; it is more so, if there may be a jury trial, since the lawyer cannot know what persons will compose the jury.
3. After the trial, but before decision, the lawyer's prophecy may be better. For he is now estimating the reaction to the testimony of a known trial judge or a known jury. Yet, if the testimony was oral, that guessing is frequently not too easy.
4. After trial and judgment by the trial court, the guess relates to the outcome of an appeal, should one be taken. It therefore usually relates solely to the rules the upper court will apply to the facts already "found" by the trial judge or jury. At this stage, a competent, trained lawyer can often predict with accuracy. Only this last prediction situation, no others, does Cardozo discuss.

Surely his discussion is altogether too restricted. And surely those interested in the judicial process ought not to disregard such factors, producing uncertainties in decisions, as, *inter alia*, the following: perjured witnesses, coached witnesses, biased witnesses, witnesses mistaken in their observation of the facts as to which they testify or in their memory of their observations, missing or dead witnesses, missing or destroyed documents, crooked lawyers,⁶⁰ stupid lawyers, stupid jurors, prejudiced jurors, inattentive jurors, trial judges who are stupid or bigoted or biased or "fixed" or inattentive to the testimony. Nor ought humane men ignore the fact that a party may lose a suit he should win because, in preparation for trial, he cannot afford to hire a detective, an engineer, an accountant, or a handwriting expert.⁶¹ Are we, judges and lawyers, to give no heed to such matters and, because of such heedlessness, to do nothing to improve, so far as practicable, the methods of fact-finding in trial courts?⁶²

III

None of these matters did Cardozo deign to consider in these books. In banishing such matters from the province of "jurisprudence," and, correlatively, in excluding them from the judicial process, he did a marked social disservice. For if they are thus ostracized, if eminent judges—setting an example to the bar—will not soil their hands with them, but regard them as legal bastards beyond the pale of proper professional notice, who will attend to them?

⁵⁹ For fuller discussion of predictions at various stages, see FRANK, *IF MEN WERE ANGELS* 73-74, 75-77, 290-293 (1942); Frank, *What Courts Do In Fact*, 26 *ILL. L. REV.* 645, 647, 649-650 (1932); Frank, *Are Judges Human?* 80 *U. OF PA. L. REV.* 46-47, 233-234 (1931).

⁶⁰ Cf. ROVERE, *HOWE & HUMMEL* (1947).

⁶¹ See Frank, *White Collar Justice*, *Saturday Evening Post*, July 17, 1943, p. 72; Frank, *Book Review*, 56 *YALE L. J.* 589 (1947); *United States v. St. Pierre*, 132 *F. 2d* 837, 849 n. 40 (C. C. A. 2d 1942, dissenting opinion).

⁶² *Ibid.*

Someone may say in Cardozo's defense that he followed an established tradition, since few books or articles on jurisprudence had mentioned the vagaries of trials and the obstacles to prediction inhering in fact-finding.⁶³ But, alas, Cardozo lent his imposing authority to the strengthening of that tradition.⁶⁴ Worse, in 1932, in his last published address on the subject,⁶⁵ he severely criticized those writers who, about that time, were calling attention to the grave deficiencies and unfortunate consequences of that tradition. He ascribed to these writers "anarchical professions," expressions manifesting "a petulant contempt" of "order and certainty and rational coherence," an attempted "degradation of the principles, rules and concepts," "a tendency to exaggerate the indeterminacy . . . or chance element" in the decisions of cases, and an advocacy of the position that "conformity and order are to be spurned by the judge as no longer goods at all." He wholly disregarded the fact that several of those he thus criticized were trying to describe, not to praise, the current workings of the trial courts, that their purpose was to show that the description of the judicial process in conventional books on jurisprudence had grossly exaggerated the extent of legal certainty and had led to gross over-estimations of the capacity of lawyers to predict many decisions in particular lawsuits, because, no matter how certain most of the rules and principles might be, the fact-determinations in many lawsuits could not be foretold. He erroneously asserted that these writers regarded as desirable the amount of existing legal imprecision they described. He took their descriptions of existing conditions as manifestations of their aims and desires, of their ideals, their program. When they said, "This is the way things are," in effect he read them as saying, "This is the way things ought to be, the way we want them to be."

I shall dwell on this startling misreading, because it is the key to an understanding of Cardozo's attitude. At first glance, his strictures may appear to have been provoked by his irritation that the descriptions these writers gave of courthouse ways were strikingly at odds with his own relatively tranquil picture of the judicial process. I think, however, that the explanation is more complicated and runs thus: In this 1932 paper, he criticized all those persons unfortunately called "legal realists" but who might better have been labeled adherents of "constructive legal skepticism."⁶⁶ Although they had in common a skeptical attitude towards traditional jurisprudence, by no means did they constitute a homogeneous movement, since they disagreed sharply with one another.⁶⁷ Nevertheless, they may be roughly divided into two groups:

⁶³ The same holds of most such books published subsequently. See, e.g., such otherwise excellent volumes as PATTERSON, *AN INTRODUCTION TO JURISPRUDENCE* (2d ed. 1946); FRIEDMAN, *LEGAL THEORY* (1944). See also Frank, Book Review, 59 *HARV. L. REV.* 1004, 1010-1011 (1946).

Two trial judges, in post-Cardozian books not classified as "jurisprudence," have made admirable departures from conventional theorizing. See ULMAN, *A JUDGE TAKES THE STAND* (1933); BOK, *BACKBONE OF THE HERRING* (1941); BOK, I, 700, *NICODEMUS* (1946).

Of pre-Cardozian jurisprudential writings, those of Maine are conspicuous for their recognition of the wayward elements in trials. See MAINE, *EARLY HISTORY OF INSTITUTIONS* 48-50 (1875); quoted in FRANK, *IF MEN WERE ANGELS* 116-117 (1942); MAINE, *The Theory of Evidence*, in *VILLAGE COMMUNITIES* 295 (1872).

Pound had occasionally recognized those elements, but, in his curious way, he often wrote as if they did not exist or had very limited effects. As to Pound in this respect, see FRANK, *IF MEN WERE ANGELS* 63-64, 341-345 (1942).

⁶⁴ The more to be deplored because his two books, *THE NATURE OF THE JUDICIAL PROCESS* and *THE GROWTH OF THE LAW*, consist of lectures delivered at law schools; and in most of the schools that tradition has a stubborn grip. See, Frank, *A Plea For Lawyer-Schools*, 56 *YALE L. J.* 1303 (1947).

⁶⁵ *Jurisprudence*, an Address before the New York State Bar Ass'n, January, 1932, published in the present volume at 7-46.

⁶⁶ See Frank, *Are Judges Human?* 80 *U. OF PA. L. REV.* 233, 258 and n. 69 (1931); FRANK, *IF MEN WERE ANGELS* 276 (1942).

⁶⁷ See Frank, *Are Judges Human?* 263-264; Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 *CORN. L. Q.* 568, 578-579 (1932); Llewellyn, *Some Realism About Realism*, 44 *HARV. L. REV.* 1222, 1235 (1931); Frank, *A Plea For Lawyer-Schools*, 56 *YALE L. J.* 1303, 1321-1322, 1327-1328 (re Llewellyn) (1947).

1. The first and larger group (of whom Llewellyn is representative) may conveniently be labeled "rule-skeptics." They resembled Cardozo in that they had little or no interest in trial courts, but riveted their attention largely on appellate courts and on the nature and uses of the legal rules.⁶⁸ Some (not all) of this group (Oliphant being the most conspicuous here) espoused the fatuous notions of "behavioristic psychology."⁶⁹ Some (not all) of these "rule-skeptics" went somewhat further than Cardozo as to the extent of the existent and desirable power of judges to alter the legal rules.

2. The second and smaller group may conveniently be labeled the "fact-skeptics."⁷⁰ They importantly diverged not only from conventional jurisprudence but also from the "rule-skeptics." So far as appellate courts and the legal rules are concerned, the views of the "fact-skeptics" as to existent and desirable legal certainty approximated the views of Cardozo, Pound, and many others not categorized as "realists."⁷¹ The "fact-skeptics" divergence sprang from their prime interest in the trial courts. Tracing the major cause of legal uncertainty to trial uncertainties, and claiming that the resultant legal uncertainty was far more extensive than most legal scholars (including the "rule-skeptics") admitted, the "fact-skeptics" urged students of our legal system to abandon an obsessively exclusive concentration on the rules.

Cardozo, in his 1932 paper, did not differentiate between the "rule-skeptics" and the "fact-skeptics." Someone might conceivably think that he deemed the "fact-skeptics" not worthy of his attention. But several times he cited the writings of at least one of them, and singled out those writings for special censure. It occasions surprise, therefore, that he said nothing responsive to the features of those writings which distinguished the views of the "fact-skeptics" from his own—the stress on the facts of cases, on juries, on trial judges, on conflicts in testimony, on the difficulties of lawyers trying to prophesy decisions in lawsuits turning on disputed fact-issues, on the frequent inability of citizens to rely on decisions because of the unknowability of future fact-findings. In this paper, Cardozo uttered not one syllable about those subjects. Why, even when specifically criticising the "fact-skeptics," he maintained such silence, I can only explain as follows: so ingrained had become his habit of assuming that legal uncertainty stemmed exclusively from rule-uncertainty, that, when the "fact-skeptics" spoke of legal uncertainty, he jumped to the conclusion that they, too, must mean solely rule-uncertainty. Wherefore, he was deaf to their reiterated assertions that they had chiefly in mind the uncertainties resulting from the contingencies which affect findings of fact.⁷²

For instance, they had said that anyone who visited trial courts would see that the outcome of most trials was chancy because of the numerous chance circumstances influencing fact-determinations; that description Cardozo translated as an expression of a preference for "the random or chance element as a good in itself . . . exceeding in value the elements of certainty and order and rational coherence." Again, as a part of their description, they had made the statement that, as trial courts have immense discretion in finding the facts of cases, those courts *can*, and sometimes do, nullify rules by deliberately

⁶⁸ See Frank, *A Plea For Lawyer-Schools*, 56 YALE L. J. 1303, 1328 (1947).

⁶⁹ Deriding "behaviorism," I criticized them in *Are Judges Human?* 80 U. OF PA. L. REV. 243-248 (1931).

⁷⁰ It included Leon Green, Thurman Arnold, myself, and, to some extent, William O. Douglas and Max Radin.

These persons certainly did not agree in all respects with one another.

⁷¹ For data supporting this statement, see FRANK, *IF MEN WERE ANGELS* 301-307 (1942).

⁷² If the reader doubts this statement, I suggest that he skim Frank, *Are Judges Human?* 80 U. OF PA. L. REV. 35, 46-48, 233, 235, 237, 240-241 (and n. 16b), 242 (1931). I mention that article in particular because Cardozo cited it in his 1932 address, and referred to me as "the most thorough-going" of the "realists."

or inadvertently finding the wrong facts. Cardozo interpreted that descriptive statement as disclosing a desire that a judge *should have* the power to overturn or nullify any legal rule he disliked. The "fact skeptics" had maintained that *stare decisis* often yields a certainty that is only an illusion, not primarily because of the instability of the rules, but because—even if all the rules were indubitably clear and fixed, and even if always the courts slavishly adhered to the precedents—the facts found by trial courts would frequently be unforeseeable. This, Cardozo charged, was an expression of a disdain for precedents, of a program for wiping out *stare decisis*.

In short, he did his utmost to bring into disrepute these efforts, based on observations of trial courts, to revise the traditional, misleading description of the judicial process.⁷³ He stood steadfastly by his implicit position that that process and jurisprudence begin and end in the upper courts.

You see the tragic consequences of such a position: if, at any time, the legal rules and principles of a legal system are in pretty good shape, then (according to Cardozo), so also is the judicial process of that system, regardless of whether the decisions of the courts are needlessly unfair or unjust. *By shrinking the scope of the judicial process, by resisting those who would have it mean the administration of justice in all the courts, Cardozo blocked inquiry into the actual performances of courthouse government.*

Our greatest judge, Learned Hand, after a long period of service on a trial bench, remarked in 1926: "I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."⁷⁴ Cardozo took no note of that remark. If he had, it might have given him pause; for he knew that Judge Hand, in so reporting conditions in our trial courts, was not maintaining the desirability of those conditions or expressing "a petulant contempt" of "order and certainty and rational coherence." Consider this statement by Cardozo: "I sometimes think that we worry overmuch about the enduring consequences of our errors. They may work a little confusion for a time. In the end, they will be modified or corrected or their teachings ignored. The future takes care of such things."⁷⁵ Apply that statement to an error about the facts in a trial, as a result of which a man loses his life's savings or is hanged.⁷⁶ Did Cardozo mean that "the future takes care of such things?" Of course not. He was not thinking of trials and trial-court decisions but of the legal rules. His was a Hamlet-less Hamlet.

The clue to Cardozo's impatience with those who sought to include descriptions of trial-court operations in the description of the judicial process appears in several passages in his books. "Judgments themselves," he wrote, "have importance for the student so far, and so far only, as they permit a reasonable prediction that like judgments will be

⁷³ For a more detailed discussion, in this vein, of Cardozo's views, see FRANK, *IF MEN WERE ANGELS* 288-294 (1942); cf. 297-307.

⁷⁴ Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).

"With regard to the trial of pure questions of fact, I am of opinion that the results are . . . much a matter of chance." Sir William Eggleston, *Legal Development in a Modern Community*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 167, 188 (1947). Sir William Eggleston is the present Australian Ambassador to the United States.

⁷⁵ *THE NATURE OF THE JUDICIAL PROCESS* 183.

⁷⁶ See BORCHARD, *CONVICING THE INNOCENT* (1932) Preface: "A district attorney . . . a few years ago is reported to have said, 'Innocent men are never convicted. Don't worry about it, it never happens in the world.' The present volume of sixty-five cases, which have been collected from a much larger number, is a refutation of this supposition. . . . In several of the cases, the convicted prisoner, later proved innocent, was saved from hanging or electrocution by a hair's-breadth. Only by rare good fortune were some of the sentences of hanging or electrocution commuted to life imprisonment . . . so that the error could still be corrected. How many wrongfully convicted persons have actually been executed, it is impossible to say."

rendered if like situations repeat themselves. . . . When the uniformities are sufficiently constant to be the subject of prediction with reasonable certainty, we say that law exists."⁷⁷ Cardozo sought solely uniformities, knowing that, if un-uniformities also exist, the predictor is in trouble; but since in most trial-court fact-finding, much of un-uniformity is present, that trouble often arises. In another passage, he said: "One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness."⁷⁸ Yet decisions based on jury verdicts notoriously lack uniformity and impartiality, are replete with prejudice and fitfulness. You see why Cardozo failed to discuss them. Again, he said, "The eccentricities of judges balance one another."⁷⁹ So they often do in appellate courts composed of several judges. But the same cannot be said of the divers trial judges and juries when, in separate courtrooms, they hear witnesses and find facts. As I have noted elsewhere, "There is no standardization of judges and jurors so that all of them will be sure to react in identical fashion to any given body of conflicting testimony. Judges and juries vary in their respective intelligence, perceptiveness, attentiveness and other mental and emotional characteristics which are operative while they are listening to, and observing, witnesses."⁸⁰ From all such disturbing thoughts Cardozo screened himself, by rejecting consideration of *nisi prius* courts. One cannot believe that he would have written as he did if he had had several years of experience as a trial judge. He had a blind spot. He suffered from an occupational disease to which upper-court judges are susceptible—appellate-court-itis. (That is why, one surmises, his jurisprudence omits, among other things, what might be termed "juriesprudence.")

At one point, for a moment, he almost gives the show away. He quotes Haldane's comment that his own philosophic interest in principles had been valuable to him in his practice at the bar. "It did not help in the work of cross-examination," Haldane says in these quoted comments. "I was never good at that, nor in the conduct of *nisi prius* cases. But it was invaluable in the preparation for the presentation of great questions to the Supreme Tribunals, where the judges were keen about principles and were looking out for help from the advocate."⁸¹ That hint Cardozo did not follow up. It cannot be overlooked that never does he cast a glance at the many books on trial techniques, "hints to advocates," and such. He cites Wigmore's *Evidence*, but not Wigmore's *Principles of Judicial Proof* (1st ed. 1913) which contains a wealth of detail about vicissitudes of trials. Perhaps the secret of Cardozo's avoidance of such books is that, as Morgan suggests, they should not be read "by those who want to believe, and want others to believe, that a lawsuit is a proceeding for the discovery of truth by rational processes."⁸² It is worthy of remark that Chief Justice Taft, doubtless more conservative in most respects than Cardozo, did interest himself in the deficiencies of trial courts, did try to better the litigating chances in those courts of the underprivileged.⁸³ What explains this difference between those two men? Probably the fact that Taft, from personal experience, knew more about the lower courts.

⁷⁷ THE GROWTH OF THE LAW 38-39.

⁷⁹ *Id.* at 177.

⁸¹ *Jurisprudence* 30-31.

⁷⁸ THE NATURE OF THE JUDICIAL PROCESS 112.

⁸⁰ FRANK, IF MEN WERE ANGELS 78 (1942).

⁸² Book Review, 49 HARV. L. REV. 1387, 1389 (1936). There Morgan, reviewing Goldstein's *Trial Technique* (1935), said: "Intended as a lawyer's book, it will in all probability be read only by lawyers and those who would be lawyers. And fervent prayers that the book be read by no others should be raised by those who want to believe, and want others to believe, that a law suit is a proceeding for the discovery of truth by rational processes. . . . If only a reviewer could assert that this book is a guide not to the palaces of justice but to the red-light district of the law! But a decent respect for the truth compels the admission that Mr. Goldstein has told his story truly."

⁸³ See WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 33, 206 n. 493, 591 (1929).

In the kind of courtroom where Cardozo spent most of his professional life, the atmosphere is serene—stratospheric. There, lawyers alone address the court; and they must do so with decorum, in an orderly, dignified manner. Not so in the trial courtroom. Absent there the stratospheric hush. It is, as Wigmore notes, "a place of surging emotions, distracting episodes, and sensational surprises." The drama there, full of interruptions, is turbently enacted by flesh-and-blood witnesses and lawyers. In the upper court the clashes between witnesses and counsel appear only in reposeful printed pages. Little wonder if a judge, after many years in such a serene court, grows forgetful of the unserenity characteristic of trials, develops a myopia which limits his range of vision.

Relevant here is the attitude of persons accustomed to years of near-sightedness. "When," we are told, "finally they decide for themselves that they ought to wear glasses, they are often disappointed. . . . The following conversation is fairly common: Patient: 'Doctor, I think these glasses are wrong. I can't wear them.' Doctor: 'You seem to be able to see quite clearly with them. What is wrong?' Patient: 'I can't bear it. They make all my friends look so ugly. They have spots on their faces and their collars are dirty, and all the houses look so untidy and old. I don't like it. I don't want to see all that detail.' All one can say is that it is a pity such a patient was allowed to grow up so out of touch with reality, as this attitude of not wanting to see what is ugly may extend to one's attitude towards life and lead to a shelving of responsibility."⁸⁴ This attitude of not wanting to see reality produces "shortsighted policies."⁸⁵ So, I think, with Cardozo. He exploited his prestige to block a movement aimed at preventing the legal profession from shelving its responsibility for conditions in the trial courts. That was indeed shortsighted policy. He had a "want to believe" and "a want to have others believe" that, on the whole, our courts employ thoroughly rational procedures. He treated his "want," his wish, as if it were a statement of existing courthouse realities. In other words, often when he said, "This is the way things are," he should have said, "This is the way things ought to be." Suppose, now, that he had so recognized, that, correcting his shortsightedness, he had perceived that his purported description of the judicial process was but a want, a wish, an ideal, an objective to be achieved by that process. What then? Then he would have converted his wishful thinking into "thinkful wishing."⁸⁶ Then he would have felt eager to investigate our entire court system, including our trial courts, to ascertain how far it fell short of his ideal. Having ascertained, as he would have, its obvious shortcomings, he—a moralist and keen for justice—would have made detailed suggestions to bring that system closer into line with his aspirations.⁸⁷

The perspective which Cardozo's attitude obscured, I recently summarized in an opinion⁸⁸ as follows: "The 'substantive' legal rules, civil or criminal, embody social policies ('social value judgments'). To enforce, and thus give effect to, such policies is considered one of the principal duties of the courts. They discharge that duty, however, not at wholesale but at retail, by applying those rules in specific lawsuits to the particular

⁸⁴ MANN AND PIRIE, *THE SCIENCE OF SEEING* 160-161 (1946).

⁸⁵ *Ibid.*

⁸⁶ For more detailed discussions of the use of ideals as postulates, of "wish postulates" and "thinkful wishing," see Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 *CORN. L. Q.* 568 (1932); FRANK, *IF MEN WERE ANGELS* 191, 364-365 (1942); FRANK, *FATE AND FREEDOM* 216-217 (1945) (*cf.* 298-308); Frank, *A Plea For Lawyer-Schools*, 56 *YALE L. J.* 1303, 1338 (1947); Frank, *Scientific Spirit and Economic Dogmatism*, in the volume *SCIENCE FOR DEMOCRACY* 11, 13, 17 (1946).

⁸⁷ Cardozo did manifest a lively interest in reform of some of the rules of procedure and evidence (See, e.g., *THE NATURE OF THE JUDICIAL PROCESS* 156; *A Ministry of Justice*, reprinted in this volume, 357, 365). But again it was an interest in rules, not in the actual workings of the trial courts. See my comments on the "procedural reformer" in Frank, *A Plea For Lawyer-Schools*, 56 *YALE L. J.* 1303, 1327 (1947).

⁸⁸ *In re Fried*, 161 F. 2d 453, 462-464 (C. C. A. 2d 1947).

facts of those respective suits as 'found' by the courts. As a 'substantive' rule merely declares that specified legal consequences will be attached to a specified state of facts, the rule should be operative only in particular instances where those facts actually occurred. Accordingly, the social policy embodied in any such rule is not actually enforced when, in deciding a case, a court, through misapprehension of what actually occurred, applies that rule to facts which in truth never existed. The whole job then miscarries: Mistakenly to apply a rule to non-existent facts—to facts mistakenly 'found'—is no less unjust, no less a defective operation of judicial administration, than to apply an erroneous 'substantive' legal rule to the actual facts. Either way, the policy expressed in the correct rule is frustrated. An error in 'finding' the facts thus yields what might be called 'injustice according to law.' The facts involved in any case are past facts. They do not walk into the courtroom. Judicial fact-finding, a human process by which a man or some men attempt to reconstruct a segment of an 'objective' past, is necessarily fallible. For it is a job of history-writing, and, like all history-writing, inescapably involves 'subjective' factors and encounters other obstacles sometimes insurmountable. But courts cannot shirk that job. . . . Unfortunately, the major efforts of those who have tried to improve our legal system have been devoted either to improvements in other phases of 'procedure' or in the 'substantive' legal rules. Those improvements will be needlessly nullified just to the extent that the fact-finding process remains insufficiently scrutinized and, consequently, needlessly defective. Fact-finding is today the soft spot in the administration of justice. In considerable measure that is true because the reformers have largely disregarded the actual fact-finding methods used by the trial courts which, as they are the chief fact-finders, and for other reasons, constitute the most important part of our judicial system; even the procedural reformers have restricted their attention chiefly to those phases of trial court 'procedure' which manifest themselves in upper-court, and occasional trial-court, opinions. It has been too little noticed that a 'substantive legal right'—an 'interest' said to be 'legally protected' by a 'substantive' legal rule—has no practical value when a court by mistakenly mis-finding the facts—because of missing witnesses or documents, or because it believes the testimony of witnesses who in truth are inaccurate, etc.—decides that the claimant has no such 'right' or 'interest.' Doubtless, for analytic purposes, there is often much utility in formally differentiating between 'substantive' and 'procedural' rights (or 'primary' and 'secondary,' or 'antecedent' and 'remedial,' or 'telic' and 'instrumental' rights). Once, however, it is stated, in terms of this formal analysis, that a judicial decision is the 'result of the application of the [substantive] rule of law to the *facts procedurally established*,' it becomes clear that a mistaken 'procedural establishment' of the facts destroys, for court-room purposes, the asserted 'substantive right,' from which it follows that, so far as courts are concerned, the effective assertion of any 'substantive right' depends entirely on the claimant's ability to maintain his so-called 'procedural right.' The Roman lawyers perhaps sensed this truth when they spoke of the 'procedural consumption' of a 'right of action' by which it was transformed into a 'right to judgment.' In other words, for practical court purposes, no 'substantive' right exists—whether it be a right asserted by a private person or by the government in its role of vindicator of a 'substantive' criminal rule—unless a court gives an enforceable judgment in favor of the alleged right-holder; and, ordinarily, a court will not give such a judgment, even when it uses a seemingly 'correct' rule, if it goes wrong on the facts. Of course, similarly a mistake in fact-finding may cause an erroneous judgment adverse to one who defends against an asserted claim. This, perhaps, appears more clearly if we crudely schematize the formal theory of the decisional process (i.e., the theory that a judicial decision or judgment is the product of a 'substantive' legal rule applied to the facts of the case) by saying: $R \times F = D$ —when R is the rule, F the facts, and D the

decision or judgment. On that basis, an erroneous F will lead to an erroneous D. As the F consists of the trial court's belief as to what were the actual past facts, the F, and therefore the D, will be erroneous if the court reaches its F by reliance on inaccurate evidence.

"No matter, then, how excellent the 'substantive' legal rules (the R's) and the social policies they embody, specific decisions will go astray, absent competent fact-finding. (Holmes, J., once said that 'the only use of the forms is to present their contents, just as the only use of a pot is to present the beer. . . , and infinite meditation upon the pot will never give you the beer.'). All of which, I think, goes to show that our trial courts should assume a larger responsibility for the ascertainment, as near as may be, of the actual facts of litigated disputes."

IV

In an address in 1931, Cardozo spoke of "the myths that gather around institutions," saying that often such "myths are really the main thing," and "greater than the reality."⁸⁹ Maybe those observations were revelatory. For, in all his writings, Cardozo helped to perpetuate what I would call the Upper-Court Myth, the myth that upper-court opinions are "the main thing" in courthouse government. That myth I think deplorable. It bestows upon us appellate judges too much public kudos.⁹⁰ It obscures the transcendent importance of trial courts, and the fact that trial judges encounter far greater difficulties than we do. In part, those difficulties inhere in the character of their job; in part they derive from our antiquated trial procedures. To improve the administration of justice we need, at a minimum, to overhaul our jury system; to revise our evidence rules; to give special training for the trial bench; to augment (without displacing the essential aspects of the adversary procedure) the responsibility of government for insuring that all important and practically available evidence is presented in trials.⁹¹ Those and other im-

⁸⁹ *Faith and a Doubting World*, published in the present volume, 99, 104-105.

⁹⁰ "Rule-worship . . . conceals the prime importance of adequate fact-finding. It causes us to underrate the trial judge, to place too much reliance on and give too much kudos to the upper-court judge. A shift in perspective here may well lead to augmenting the dignity of lower-court judges, to changes in their method of selection and to liberating them from what may some day seem to be unwise interferences by appellate judges." Frank, *Are Judges Human?* 80 U. OF PA. L. REV. 242 (1931). See also GREEN, *JUDGE AND JURY* 394 (1931).

Judge Bok wrote recently: "The best legal brains should be magistrates . . . since they are closest to people's problems and have to deal with them raw; the next best should be in the trial courts; and any young essay writers just out of law-school would do as appellate judges, since it requires only technicians to provide a system of stare decisis and the street would ultimately adapt the law to itself anyway." Bok, I, 100, *NICODEMUS* 321 (1946).

It is of interest here that Cardozo highly esteemed the criticisms of opinions published in the law reviews. (See *GROWTH OF THE LAW* 11-13.) For many such criticisms are the products of "young essay writers just out of law-school" or still in school. Doubtless those essays have proved invaluable to lawyers and judges—with respect to the rule-aspect of the judicial process. But it tends to show Cardozo's indifference to the fact-finding job that he wrote, "More and more we are looking to the scholar in the study, to the jurist rather than to the judge or lawyer, for inspiration and for guidance." *GROWTH OF THE LAW* 11.

⁹¹ See Frank, *White Collar Justice*, *Saturday Evening Post*, July 17, 1943, p. 72; *United States v. St. Pierre*, 132 F. 2d 837, 849 n. 40 (C. C. A. 2d 1942, dissenting opinion).

I trust no one will think I am fatuous enough to believe that courthouse government will ever be perfect. But recognition of the unattainability of perfection is no excuse for not striving for improvement. See FRANK, Introduction to PAUL, *STUDIES IN TAXATION* 5 (1937); *United States v. Forness*, 125 F. 2d 928, 942-943 (C. C. A. 2d 1942); *In re Fried*, 161 F. 2d 453 (C. C. A. 2d 1947); FRANK, *IF MEN WERE ANGELS* 136-139 (1942); Frank, *A Plea For Lawyer-Schools*, 56 *YALE L. J.* 1303, 1327, 1339 (1947); FRANK, *FATE AND FREEDOM* 337 (1945).

Among the apparently ineradicable difficulties is a factor that deserves much study—what may be called the "gestalt" factor in the decisional process of trial courts. See my dissenting opinion in

provements will not be achieved as long as judges of great eminence, like Cardozo, continue to induce belief in the Upper-Court Myth.

It is high time that we apply to that myth all the skills of what Samuel Butler called the Art of Covery. "This," he said, "is as important . . . as Discovery. Surely the glory of finally getting rid of and burying a . . . troublesome matter should be as great as that of making an important discovery."⁹²

Old Colony Bondholders v. New York N. H. & H. R. R., 161 F. 2d 413, 431, 449, 450 (C. C. A. 2d 1947); *In re Fried*, 161 F. 2d 452, 463 n. 28 (C. C. A. 2d 1947). I hope soon to explore that theme elsewhere.

⁹²THE NOTE-BOOKS OF SAMUEL BUTLER 180 (1917).