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SAY IT WITH MUSIC

I HAVE elsewhere suggested that judges, when applying (and therefore interpreting) statutory or other legal rules, may be compared with musical performers when playing (and therefore interpreting) musical compositions; that, perforce, judges, like musical performers, are to some extent creative artists.¹ That comparison invites another, a comparison between criticism of the products of fine artists and criticism of judicial decisions. Such a discussion may seem to some persons to support the Englishman C. K. Allen's characterization of the ideas of some American lawyers as "jazz jurisprudence."² But I shall risk such name calling. For, even in England, jazz has influenced serious musical composers;³ and an English musical critic, after stating that "we must realize that the human mind reacts against the acceptance of new ideas," goes on to say: "When Monteverdi, over three hundred years ago published the System of Discords, the whole host of critics took up arms against him. Yet in time his theories became current practice, and were included in even the most academic text-books of composition These styles and developments have been absorbed into our musical vocabulary until by now they are meaningless conventionalities. As composers strive to penetrate unexplored fields of musical interpretation, they invariably encounter this conservative reaction against the unfamiliar."⁴

¹ Frank, *Words and Music*, 47 COL. L. REV. 1259 (1947).

² ALLEN, *LAW IN THE MAKING* 45 (3d ed. 1939).

³ Harris, *The Influence of Jazz on English Composers*, 2 PENGUIN MUSIC MAG. 25 (1946).

⁴ Herbage, *Brains Trust*, 1 PENGUIN MUSIC MAG. 75, 76 (1946).

If what I say is superficial, my anticipatory defense is that, in a sense, I am pioneering. For, although the nature of fine-art criticism, and of criticism of such criticism, has been explored for centuries,⁵ little similar exploration has been conducted in the realm of judicial decisions.

I shall here discuss but one phase of this broad subject: the criticism of trial-court decisions in cases involving oral testimony as to contested issues of fact. I limit the discussion to trial-court decisions in such cases because such decisions are of prime importance to most persons who litigate: the overwhelming majority of decisions are not appealed; the disputes in most of the relatively few appealed cases turn on such issues of fact, and the appellate courts accept the trial court's determination of the facts in a large percentage of such cases. I shall also, for convenience, confine my discussion largely to nonjury cases.

I. IMPORTANCE OF EVALUATION OF FACT-FINDING TO CRITICISM OF DECISIONS

According to the oversimplified conventional theory, a trial judge's decision not only should, but invariably does, result from the application of a substantive legal rule⁶ to the facts of the case. This theory may be crudely symbolized thus:⁷ if we call the rule R , the facts F , and the decision D , then $R \times F = D$. It seems to assure us that, if we know the judge's R and the F , we can critically examine his D . We may disagree with his D because we think (1) that his F is wrong (*i.e.*, his statement of the facts is mistaken), (2) that the R he used is an improper R , or (3) that he has incorrectly applied a proper R to facts which he correctly found (*i.e.*, he has erred in his logic).

Usually, appraisal of the trial judge's R is fairly easy; and, if we accept his F as correct, so, too, is an appraisal of his logic. Within the framework of the conventional theory, the major obstacle to criticism of his decision inheres in the difficulty of determining whether or not his F , his fact-finding or statement of the facts, is mistaken.

⁵ See, *e.g.*, KALLEN, *ART AND FREEDOM* (1942); McKeon, *The Philosophic Bases of Art and Criticism*, 41 *MOD. PHILOLOGY* 65 (1943).

⁶ I use "rule" in this paper to include rules, principles, and standards.

⁷ See FRANK, *IF MEN WERE ANGELS* 77 *et seq.* (1942); *In re Fried*, 161 F.2d 453, 464 (C. C. A. 2d 1947).

This difficulty is greatest when a trial judge tries a case in which, as to a pivotal issue of fact, the testimony is oral and in conflict. The trial judge can have no firsthand knowledge of the facts, since they happened out of his presence in the past. He must, therefore, function as a historian.⁸ To say that he "finds" the facts is to mislead; the facts, for him, are not "data," that is, "given," — are not waiting somewhere, ready-made, for him to discover. In a very real sense the facts are, for the judge, a matter of "opinion," not of "knowledge."⁹ His "findings" of fact necessarily derive from his appraisal of the stories the witnesses tell him about those past facts. The witnesses, in turn, being human, are fallible reporters: they may have mistakenly observed the events concerning which they testify; they may mistakenly recollect their observations; they may mistakenly (deliberately or unintentionally) report those recollections in court. The trial judge is but a witness of the words and conduct of the witnesses. He, also human, may be fallible in such witnessing. And when the witnesses tell him discrepant stories, he must, as best he can, surmise which (if any) of them honestly and accurately reported the facts.¹⁰ In

⁸ See *In re Fried*, 161 F.2d 453, 462 and n.21 (C. C. A. 2d 1947).

⁹ It is of interest that Plato, distinguishing between "knowledge" and "opinion," refers to the experience of judges. "When," says Socrates, "judges are justly persuaded about matters which you can only know by seeing them, and not in any other way, and when thus judging of them from reports they attain a true opinion about them, they judge without knowledge, and yet are rightly persuaded, if they have judged well. . . . And yet, . . . if true opinion . . . and knowledge are the same, the perfect judge could not have judged rightly without knowledge; and therefore I must infer that they are not the same." *THEAETETUS* 201-02.

Jowett, commenting on this passage, writes, "The correctness of such an opinion will be purely accidental . . . Plato would have done better if he had said that true opinion was a contradiction in terms." 4 *JOWETT, DIALOGUES OF PLATO* 151 (1892). See *FRANK, FATE AND FREEDOM* 174-87 (1945) (even for "exact" science, "facts" are not as "hard" as is often supposed).

¹⁰ Even the witnesses, at best, infer the actual facts, have but opinions about them: "A comparatively slight acquaintance with formal metaphysics is enough to assure us that the apparently simplest 'fact' is indeed a conclusion, involving in its affirmation an inference from certain impressions of the sense upon the assumption of a major premise, itself the creature of a past experience. . . . I call to witness here the common experience of every lawyer as to with how increasing rapidity one's questions approach the realm of 'opinions' and 'conclusions' as he approaches to the issue in dispute." L. Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 *HARV. L. REV.* 40, 50 n.1 (1901).

⁷ *WIGMORE, EVIDENCE* § 1919 (3d ed. 1940) notes that no distinction between "opinion" and "facts" is "scientifically possible," for "as soon as we come to analyze and define these terms . . . , we find that the distinction vanishes, that a flux

sum, his notion of the facts comes from his subjective, fallible reaction to the subjective, fallible reactions of the witness to the actual, objective facts.¹¹ Considering the multiple subjectivity of this process, it is misdescriptive to speak of the trial judge as "finding" the facts.

In making his guess as to the credibility of the several witnesses, the trial judge necessarily takes into account their demeanor — their gestures, their facial expressions, their intonations. Because these aspects of oral testimony vanish when the testimony is recorded on paper, in our legal system we wisely assign to the trial judge, as his peculiar and exclusive function, the ascertainment of the facts in cases where witnesses testify orally, and especially where the testimony is in conflict — as it is in most lawsuits. Since in such cases the determination of witnesses' credibility is thus left to the trial judge, his *F* lies beyond criticism if it represents a reasonable inference from a substantial part of the testimony, although other testimony, were it taken as true, would compel a contrary inference. To give a simple example: Mr. Angry sues Mr. Brash for assault; in court, one witness states under oath that, on a certain Thursday, he saw Brash hit Angry in the eye; two other witnesses testify that they were with Brash all that day and that no such encounter then occurred. If the trial judge "finds" the facts in accordance with the first witness' narrative, and if he correctly applies to that finding the proper substantive legal rule, no one is in a position to criticize his decision, for no one can say that he erred in believing the one witness and disbelieving the others. That disability affects all critics, including upper-court judges when asked, on an appeal, to criticize the trial judge's decision.

The trouble with the conventional theory is that it encourages the erroneous assumption that the *F*, in the $R \times F = D$ formula, is objective, whereas reflection shows that it is subjective, an *SF*.

ensues, and that nearly everything which we choose to call 'fact' either is or may be only 'opinion' or inference" For "lay witnesses, all matters of measure, identity, quality, and the like must be considered as no better than 'opinions'; and, after all, the question whether Doe struck Roe first, or vice versa, may become a mere matter of opinion. In short, the element of inference from observed data is one which plays a greater or less part in every witness' testimony . . ." See also WIGMORE, *PRINCIPLES OF JUDICIAL PROOF* 429 *et seq.*, 467, 473, 478 (1913).

¹¹ A trial judge may also be affected by his unconscious predilections for or against the parties to the suit and their lawyers.

The formula, then, should be revised to read: $R \times SF = D$. But who, except the judge himself, can pass on the accuracy of his SF , his subjective response to the testimony?

The difficulty of criticism often does not end there, since frequently, no one other than the trial judge himself knows either his R or his SF . In many jurisdictions — at least in some kinds of cases — a trial judge is not required to report anything but his laconic D ("Judgment for defendant," or "Judgment for plaintiff for \$5,000"). He need not state what his F was or the R he used. If he does not so state — and many a trial judge in such jurisdictions does not — his decision is beyond intelligent criticism by anyone but himself. No one knows in such a case what part of the testimony (if any) the judge really believed. Perhaps the part of the testimony he really believed, if taken as true, would not, under any acceptable legal rule, justify the judgment he entered. Moreover, since no one knows even the judge's SF , his R is also undiscoverable.¹² In these circumstances the bases for criticism are absent, for such criticism would call for knowledge of what the judge thinks were the facts of the case. Nevertheless, such a decision is deemed proper if a conjecture can be made which will logically support it, *i.e.*, if that decision would logically result from the application of (1) some impeccable legal rule to (2) facts which can be rationally inferred from some of the oral testimony of some of the witnesses (even if that testimony is controverted by that of other witnesses).¹³ This conjecture is always made if possible, *i.e.*, it is always assumed, if possible, that the trial judge's decision is correct.

II. INADEQUACY OF THE OPINION AS A BASIS FOR EVALUATION OF FACT-FINDING

Possibility of Deliberate or Unconscious Falsification of Findings. — To discover what the judge really thought were the facts, it would be necessary to ascertain what "went on in his mind." It is difficult to explore the mind of any man. In the case of a witness,

¹² On appeal from a decision in such a case, the upper court must surmise both the trial judge's R and his F . In such a case, the upper-court judges, even when they agree about their conclusion, may differ among themselves as to the R and the F . Cf. Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 664 (1932).

¹³ I assume that the trial judge made no important procedural errors during the trial.

cross-examination and other devices are available which may tend to show, partially at least, what the witness is thinking while on the witness stand or had previously thought. But it is not permissible to cross-examine a trial judge or to use other methods applicable to witnesses.¹⁴ How, then, can one "investigate his secret thought or intentions? He is the only master of them, and what he says must be conclusive, as there is nothing which can contradict or explain it."¹⁵

Because, for a variety of reasons, unexplained, inscrutable, decisions have been deemed undesirable, in some jurisdictions published explanations have been made mandatory, as, for instance, in the federal courts under the Rules of Civil Procedure, which require the trial judges to file special findings of fact in most civil cases. However, many federal district judges resent this requirement. An explanation of that resentment was given in a recent comment, by former Federal District Judge McLellan, on a new federal rule which provides that, if a defendant so requests, the trial judge must make special findings of fact in a criminal case tried without jury. Of that rule, Judge McLellan said: "We all know, don't we, that when we hear a criminal case tried we get convinced of the guilt of the defendant or we don't; and isn't it enough if we say guilty or not guilty, without going through the form of making special findings of fact designed by the judge — unconsciously, of course — to support the conclusions at which he has arrived."¹⁶ Judge McLellan thus expresses his belief that a trial judge's published explanation of his decision will not serve the purpose of disclosing the actual basis of the decision so as to expose it to effective criticism. His position recalls the story of Lord Mansfield's advice to a new trial judge that he should give his decisions omitting his reasons, since his decisions would probably be right but his reasons almost surely wrong.

Judge McLellan's contention may be amplified from a different point of view. Since the reported facts of a case do not consist of the objective events as they actually happened in the past, one might say that they consist of what the trial judge thinks hap-

¹⁴ Cf. *United States v. Morgan*, 313 U. S. 409, 422 (1940); *Chicago, B. & Q. Ry. v. Babcock*, 204 U. S. 585, 593 (1906); *Fayerweather v. Ritch*, 195 U. S. 276, 306-07 (1904).

¹⁵ *Duke of Buccleuch v. Metropolitan Board*, L. R. 5 H. L. 418, 434 (1872).

¹⁶ FEDERAL RULES OF CRIMINAL PROCEDURE 173 (Holtzoff ed. 1946).

pened. But that statement would be superficial: when the judge publishes his findings, we can never be sure that they report what he thinks were the facts. Those findings report merely what he *says* he thinks they were. And seldom, if ever, can we learn whether what he says on the subject of what he thinks matches what, in truth, he does think.

Roscoe Pound once wrote that often "courts . . . take the rules . . . as a general guide, determine what the equities of the cause demand, and contrive to . . . render a judgment accordingly, wrenching the law no more than is necessary." He added that juries frequently avail themselves of their "power to find the facts in such a way as to compel a different result from that which the legal rule strictly applied would require. . . . The judgment follows necessarily and mechanically from the facts upon the record. But the facts found were found in order to reach the result and are by no means necessarily the facts of the actual case."¹⁷ Pound more than implies that, not seldom, judges, when acting without benefit of juries, do likewise. Dickinson, although reluctantly, writes, "There can be no doubt that occasionally courts employ this power of finding facts to evade the necessity of applying a legal rule to a case to which it would otherwise be applicable" ¹⁸

¹⁷ POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 121, 133 (1922). This comment with respect to juries may be too sophisticated. See FRANK, IF MEN WERE ANGELS 85-87 (1942).

¹⁸ Dickinson, *Legal Rules*, 79 U. OF PA. L. REV. 833, 855 (1931). I have elsewhere written of an instance of this kind: "The writer will never forget one of his experiences as a young lawyer. He participated in a lawsuit, lasting a week, tried by an able judge without a jury, during the course of which, on every doubtful question concerning the admission or exclusion of evidence, the judge, to the writer's great indignation, ruled in favor of the other side. To the writer's surprise, a few weeks after the trial was ended, the judge decided the case in his client's favor, with strong findings of fact. A year later the writer met the judge who referred to the case, saying: 'You see, on the first day of the trial, I made up my mind that your client was a fine hard-working woman who oughtn't to lose all her property to the plaintiff who had plenty of money. The plaintiff was urging a rule of law which you thought was wrong. I thought it was legally right but very unjust. So I decided to lick him on the facts. And by giving him every break on law points during the trial, I made it impossible for him to reverse me on appeal, because I knew the upper courts would never upset my findings of fact.' That judicial conduct was not commendable. But the judge's story did open the writer's eyes to the way in which the power of a trial judge to find the facts can make his decision final, even if, had he correctly found the facts, it would have been reversible for error in the applied legal rule." FRANK, IF MEN WERE ANGELS 98-99 (1942).

I recently noted¹⁹ that since, when a trial judge's decision turns on his view of the credibility of witnesses, "his 'finding' of 'facts,' responsive to the testimony, is inherently subjective (*i.e.*, what he believes to be the facts is hidden from scrutiny by others), his concealed disregard of evidence is always a possibility. An upper court must accept that possibility, and must recognize, too, that such hidden misconduct by a trial judge lies beyond its control." I doubt whether many trial judges thus deliberately "fudge" or "force the balance"; this practice, when employed, is, I think, usually unconscious or only semiconscious. As, however, such findings are possible and are surely sometimes made, we can never be sure whether, when a trial judge publishes his findings, he is accurately reporting his true *SF*. To require a trial judge to report publicly what he "found" as the facts may, for this reason if no other, add little to our information about the way in which he reached his decision.

The Non-Analytical Character of the Decisional Process: The Gestalt. — I have probably amplified Judge McLellan's plaint to include more than he intended. Let me now adhere more literally to his thought. He voiced a sentiment often expressed by trial judges, but usually in private conversations. However, Judge Hutcheson, after years of service on the trial bench, publicly said that a judge "really decides by feeling, by hunching, and not by ratiocination," that the ratiocination appears only when he writes an opinion, which is but an apologia to "justify his decision to himself" and to "make it pass muster with his critics." This published justification (in the form of a reasoned $R \times F = D$) is *ex post facto*. According to Judge Hutcheson, often it is not the vital impulse inducing the decision.²⁰

Is Judge Hutcheson's description wholly mistaken? And is Judge McLellan's use of it wholly without warrant? I believe not. Pertinent here is *Gestalt* psychology, the main thesis of which is roughly this:²¹ all thinking is done in forms, patterns, configura-

¹⁹ *LaTouraine Coffee Co. v. Lorraine Coffee Co.*, 157 F.2d 115, 123-24 (C. C. A. 2d 1946) (dissenting opinion).

²⁰ Hutcheson, *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions*, 14 CORN. L. Q. 274 (1929).

²¹ See, e.g., Koffka, *Gestalt* in 6 ENCYC. SOC. SCI. 642 (1931); REICHENBACH, EXPERIENCE AND PREDICTION 100, 220, 221 (1938).

Akin to the *Gestalt* thesis are the theses of the "functional anthropologists," of those who study human behavior in terms of the "total situation," of the "institu-

tions. A human response to a situation is "whole." It is not made up of little bricks of sight, sound, taste, and touch. It is an organized entity which is greater than, and different from, the sum of what, on analysis, appear to be its parts. The gestaltist's favorite illustration is a melody: a melody does not result from the summation of its parts; thus to analyze a melody is to destroy it. It is a basic, primary unit. The melody, a pattern, determines the function of the notes, its parts; the notes, the parts, do not determine the melody. Just so, say the gestaltists, no analysis of a pattern of thought, of a response to a situation, can account for the pattern. Thus George, a natural scientist, recognizes the need of "contrapuntal thinking," a type of mental activity like that of the artist who can "pay infinite attention to detail without losing sight of the whole."²²

I do not suggest that anyone adopt completely this notion of the "whole." But it does illuminate, does tell us something of importance about men's reactions to experience. In particular, it sheds light on a trial judge's "hunching." The trial judge, we may say, experiences a *Gestalt*; that is why he has difficulty in reporting his experience analytically.²³ That is why, too, when he has heard oral testimony, his decision, even though supported by an opinion, may defy intelligent criticism. One recalls Kipling's lines: "There are nine-and-twenty ways of constructing tribal lays, and every single one of them is right."

Inexpressibility of the Decisional Process. — Some seventeen years ago, I wrote: "The decision of a judge after trying a case is the product of a unique experience."²⁴ To justify that remark, let me now approach the subject of judicial fact-finding from a different angle. This approach involves a consideration of logic as applied to decisions, a consideration of the assumption that, when a trial judge files a written opinion or publishes his *R* and his *F*, he reveals the logic, or illogic, of his decision for observation by critics. Let us examine that assumption.

tional" economists, and of those who advocate "the functional approach" to the judicial process. See, e.g., BENEDICT, *PATTERNS OF CULTURE* (Penguin ed. 1946); RICE, *METHODS IN SOCIAL SCIENCE* 55, 549, 553-54 (1931); Ogden, *Structural Psychology and the Psychology of Gestalt* in *id.* at 109, 113-17.

²² GEORGE, *THE SCIENTIST IN ACTION* 120 *et seq.* (1936).

²³ See my dissenting opinion in *Old Colony Bondholders v. New York, N. H. & H. R. R.*, 161 F.2d 413, 449-50 (C. C. A. 2d 1947).

²⁴ FRANK, *LAW AND THE MODERN MIND* 149 (1930).

Relatively recent studies of logic have emphasized its inseparable connection with language. Perhaps the most perfect products of logic are the physical sciences, aided by mathematics — which is, itself, a highly developed language and which, in its “pure” form, is today generally regarded as another name for logic.²⁵ Stressing language as the source of logic, certain thinkers, sometimes called “logical positivists” or “scientific positivists,” maintain that, in effect, “What can I know?” means, “What can I intelligently ask?” They assert that the answer is this: I can intelligently *ask* whatever questions language clearly expresses; I can *know* (at least potentially, or in theory) what experiment — verification — will reply to such queries. Whatever under no circumstances could be thus stated and be thus verified or refuted, is a “pseudo-proposition.” It is not true or false. It is unthinkable, “meaningless.” Of course, say these “positivists,” men do utter unthinkables; but those utterances are not rational. They express “mere” emotions, feelings, like tears, laughter, or profanity. Feelings, therefore, have only subordinate importance, are but the irrational reactions of that pitiable creature, man.

Susanne Langer, in her stimulating book, *Philosophy in a New Key*, criticizes the logical positivists. She points to an important defect of language: Words “have a linear, discrete, successive form; they are strung together like beads on a rosary; beyond the very limited meanings of inflections . . . we cannot talk in simultaneous bunches of names.” This fact gives a peculiar character to logic, *i.e.*, “discursive” reasoning. “Language has a form which requires us to string out our ideas, even though the objects rest one within the other” as “pieces of clothing that are actually worn over one another have to be strung side by side on the clothesline.” Only thoughts which can be arranged in this peculiar order can be spoken at all; any idea which does not lend itself to this “projection” is ineffable. This “restriction on discourse sets bounds to the complexity of speakable ideas. An idea that contains too many minute yet closely related parts, too many relations within relations, cannot be ‘projected’ into discursive form; it is too subtle for speech. A language-bound theory of mind, therefore, rules it out of the domain of understanding and the sphere of knowledge.”²⁶

²⁵ Cf. RADIN, *LAW AS LOGIC AND EXPERIENCE I et seq.* (1940).

²⁶ LANGER, *PHILOSOPHY IN A NEW KEY* 65-66, 75 (Penguin ed. 1948).

Professor Langer maintains that the logical positivists go astray because they disregard this inherent weakness of language. On that account, they mistakenly depict human rationality as a "tiny grammar-bound island in the middle of feeling expressed by sheer babble," and deny reality to feelings. "Everybody knows that language is a very poor medium for expressing our emotional nature. It merely names certain vaguely and crudely conceived states, but fails miserably in any attempt to convey the ever-moving patterns, the ambivalences and intricacies of inner experience, the interplay of feelings with thoughts and impressions, memories and echoes of memories . . . all turned into emotional stuff." Much that we call "intuitive knowledge" is "itself perfectly rational, but not to be conceived through language."²⁷ Professor Langer (to sketch her views rapidly and skimpily) asserts that language, which inadequately communicates feelings, is not our only medium of articulation, not our sole means of symbolizing our responses to experience. Notable for their invention of non-logical forms to symbolize feelings are the fine arts. They use "wordless symbolism, which is non-discursive and untranslatable, . . . and cannot directly convey generalities." Their "symbolic elements . . . are understood only through the meaning of the whole, through their relations within the total structure." Such symbolizing is as rational as that of language. Our feelings, which dwell "on the deeper level of insight," can be

²⁷ *Id.* at 80-82. Cf. DEWEY, *PHILOSOPHY AND CIVILIZATION* 100-02 (1931); CASSIRER, *LANGUAGE AND MYTH* (Langer trans. 1924); ORTEGA, *CONCORD AND LIBERTY* 61-63 (Weyl trans. 1946).

The thesis of the logical positivists which Professor Langer criticizes is closely related to another thesis which runs as follows: only that which is "public" has "reality"; and the "public" (*i.e.*, the "objective") consists exclusively of that which can be communicated, without any possibility of misunderstanding, by and to persons fully acquainted with the medium of communication. All that which is not "public" is "private" (*i.e.*, "subjective"). Since feelings are private (*i.e.*, not thus communicable) they lack "reality." For an articulation of this thesis (which had been indicated by Plato), see, *e.g.*, HOGBEN, *THE NATURE OF LIVING MATTER* 30, 221, 246-48, 260-61, 270 (1931). It has been criticized severely. See Wallas, *The Idol of the Laboratory* in CALVERTON, *THE MAKING OF SOCIETY* 764, 767-74 (1937); cf. Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 233, 249-56 (1931), especially n.46; Zell v. American Seating Co., 138 F.2d 641, 646 n.20b (C. C. A. 2d 1943).

The "public-private" dichotomy is akin to the differentiation between "primary" and "secondary" qualities, with the latter regarded as "subjective" and therefore "unreal." See criticism in FRANK, *FATE AND FREEDOM* 87-105 (1945).

known through "wordless knowledge" expressed in "non-discursive forms" — as, for instance, in music.²⁸

Return now to the trial judge who has heard conflicting oral testimony on a pivotal issue, and you will perhaps the better understand his difficulty when he tries to articulate the bases of his "hunch," to state logically in words — *i.e.*, by "discursive" reasoning — why he decided as he did; his decisional process, like the artistic process, involves feelings that words cannot ensnare. A large component of a trial judge's reaction is "emotion." That is why we hear often of the judge's "intuition."²⁹ Holmes, referring to the decision of an administrative agency, said it expressed "an intuition of experience which outruns analyses and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."³⁰ That comment applies as well to the decisions of a trial judge. He cannot, with entire adequacy, formulate in logical, lingual, form, his reaction to the conflicting testimony at a trial. His response to that testimony is, in part, "wordless knowledge." To be completely articulate, to communicate that response satisfactorily, he would be obliged — as a once popular song put it — to "say it with music."³¹ For his emotion-toned experience is contrapuntal.³²

Since the trial judge is not, then, engaged in a wholly logical enterprise, the effort to squeeze his "hunch," his wordless ration-

²⁸ LANGER, *op. cit. supra* note 26, at 198, 214-15.

²⁹ See, e.g., *Picard v. United Aircraft Corp.*, 128 F.2d 632, 639 (C. C. A. 2d 1942); *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 220-21 (C. C. A. 2d 1942).

³⁰ *Chicago, B. & Q. Ry. v. Babcock*, 204 U. S. 585, 598 (1907).

³¹ Victor Hugo said: "Music expresses that which cannot be said, and on which it is impossible to remain silent."

³² All other difficulties aside, the clothesline quality of language puts a writer at a disadvantage as compared with a composer of a symphony, for the latter can deal with several themes at once, whereas a writer can express only one idea at a time. See FRANK, *IF MEN WERE ANGELS* ix (1942). Since the language of the Hopi Indians, as Whorf depicts it, does not have this "clothesline" character, it may be that some of the difficulty to which Professor Langer refers does not inhere in language as such. In other words, Professor Langer in her stress on this defect of language may be overgeneralizing, relying too much on the nature of a limited group of languages. Perhaps Hopi trial judges can better explain their decisions than can ours. See Whorf, *Relation of Habitual Thought and Behavior to Language* in LANGUAGE, CULTURE AND PERSONALITY 75 (Spier, Hallowell, and Newman ed. 1941); Whorf, *Science and Linguistics* in HAYAKAWA, LANGUAGE IN ACTION 302 (1940); cf. FRANK, FATE AND FREEDOM 313 (1945).

ality, into a logical verbal form must distort it, deform it. His ineffable intuition cannot be wholly set down in an *R* and an *F*. There are overtones inexpressible in words.³³ He has come upon non-logical truth. One may doubt whether, even if he resorted to music or poetry, he could make himself thoroughly understood by others, when one considers the many discrepant interpretations of artistic compositions and performances.³⁴ When he tries really to express his composite response by a finding of fact (an *F*) and a legal rule (an *R*), he may well feel that the result is a misrepresentation of his actual experience in the decisional process. Accordingly, he may, not unreasonably, resent criticism of his decision when that criticism rests on that misrepresentative analysis.

III. THE PROBLEM OF CRITICISM RESTATED

Subjectivity in the Fact-Finding Process. — Frequently (although without resort to the word "*Gestalt*") something like the *Gestalt* aspect of an artist's efforts has been stressed by those who declare the futility of criticism of artistic products. For instance, recently the novelist, E. M. Forster, writing "especially of music,"³⁵ asserted the existence of "a gulf between artist . . . and critic." When a critic approaches a work of art, "two uni-

³³ "It is not a good thing to consider arguments from the point of view of how they can be stated rather than from the point of view of whether they are sound or not. There is a danger even in logic in human affairs. The practical problems of humanity are not solved . . . by neatly framed codes. I think there is a proneness in the legal mind to prefer formulas to facts and to place too much reliance on the power of words." McMILLAN, *LAW AND OTHER THINGS* 255 (1937).

³⁴ "It is unquestionable that the actual experiences, which even good critics undergo when reading, as we say, *the same poem*, differ very widely. In spite of certain conventions, which endeavour to conceal these inevitable discrepancies for social purposes, there can be no doubt that the experiences of readers in connection with particular poems are rarely similar. This is unavoidable. . . . But no one in a position to judge, who has, for example, some experience of the teaching of English, will maintain that Shakespeare's appeal, to take the chief instance, is homogeneous. Different people read and go to see the same play for utterly different reasons. Where two people applaud we tend to assume, in spite of our better knowledge, that their experiences have been the same: the experience of the first would often be nauseous to the second, if by accident they were exchanged, and the first would be left helpless, lost and bewildered." RICHARDS, *PRINCIPLES OF LITERARY CRITICISM* 115, 212 (4th ed. 1930).

³⁵ Forster, *On Criticism in the Arts, Especially Music*, Harper's Mag., July, 1947, pp. 9, 12 *et seq.*

verses have not even collided, they have [merely] been juxtaposed." For the critic to claim that he "actually entered into [the artist's] state" is "presumptuous." If a "critic comes along and tells [the artist] what is right and wrong" about "his product, [the artist] has a feeling of irrelevance." For there is "a basic difference between the critical and creative states of mind." Why? Because the artist "lets down as it were a bucket into his subconscious. . . . When the process is over, . . . looking back on it, he will wonder how on earth he did it. . . . There is . . . [a] connection between the subconscious and the conscious, which has to be effected before the work of art can be born, and there is the surprise of the creator at his own creation."³⁶ It follows that "the critical state is grotesquely remote from the state responsible for the work it affects to expound. It does not let buckets down into the subconscious."

A trial judge's composite response to conflicting oral testimony has something of this opaque quality.³⁷ For he, too, has "let down a bucket into his subconscious." Bok, one of our most gifted trial judges, recently said: "Each case [was] a work of art, so far as possible, and not an act of grace or a scientific demonstration. . . . It is here, at the point of the greatest judging, that the law can cease to be a matter of rule and compensation and reach the realm of the intangibles: gentleness of heart, with clarity of mind and the quiet salt of faith. . . . The Law suffers from being thought as of an intellectual profession. It is intellectual, of course. . . . But it is not scientific in the sense of a science whose rules are impersonal and beyond the reach of human emotions or behavior. Emotion and behavior are the raw materials from which the law

³⁶ This is an old idea. As to the "hunch" element in all sorts of thinking, including that of scientists and mathematicians, see, e.g., BELL, *MEN OF MATHEMATICS* 547-52 (1937); CAIRNS, *THEORY OF LEGAL SCIENCE* 57-60 (1941); LEUBA, *PSYCHOLOGY OF RELIGIOUS MYSTICISM* 240 (1925); LEWIS, *THE ANATOMY OF SCIENCE* 90 *et seq.* (1926); PORTERFIELD, *CREATIVE FACTORS IN SCIENTIFIC RESEARCH* 97 *et seq.* (1941); WALLAS, *THE ART OF THOUGHT* 80 *et seq.* (1926); Skidmore v. Baltimore & Ohio R. R., 167 F.2d 54, 69 n.37a (C. C. A. 2d 1948).

³⁷ There are, of course, differences between the fine-artist and the judge-artist. The former is free to deal with his material as he pleases. No matter how much he deliberately or inadvertently distorts it, no one can complain. Whether or not his published expression deviates from what he meant to express is no one's business but his own. Seldom can the critic discover any such deviation. It is in this last respect that the trial judge's decision closely resembles the fine-artist's product. See discussion of Spingarn, p. 939 *infra*.

is distilled in one way or another. . . . There is no plea to be made except to keep the law personal."³⁸

Probably, many of the experiences of every man are unique; even when an experience appears to recur, often it is with some slightly novel difference.³⁹ "We do not fall in love twice in the same way," says Sullivan. "Even boredom has its shades."⁴⁰ To criticize effectively a trial judge's decision we should, then, in many cases have to relive his unique experience. That we cannot do. Empathy can carry us only a part of the way into the emotional reactions of another person.⁴¹ As I suggested in 1930, the ultimately important influences in the decisions of a trial judge "are the most obscure, and are the least easily discoverable — by anyone but the judge himself. They are tied up with the intimate experiences which no biographer, however sedulous, is likely to

³⁸ BOK, I TOO, NICODEMUS 319-30 (1946). I would add, parenthetically, that it is unfortunate that Bok used the ambiguous word "law," since thereby he may evoke needless objections to his remarks. As to the desirability of avoiding, when possible, the ambiguous word "law," see FRANK, IF MEN WERE ANGELS 279-84 (1942).

As to the inescapable pressures for, and need of, "individualization" of cases, see FRANK, LAW AND THE MODERN MIND (1930) *passim*, and especially 138 *et seq.*, 149 *et seq.*, 170 *et seq.* See Wigmore, *A Program for the Trial of a Jury Trial*, 12 J. AM. JUD. SOC'Y 166, 170 (1929): "Law and Justice are from time to time inevitably in conflict. That is because law is a general rule . . . while justice is the fairness of this precise case under *all* its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed on *average* results, law and justice . . . often do not coincide. Everybody knows this, and can supply instances. But the trouble is that *law cannot concede it*. Law—the rule—*must* be enforced—the exact terms of the rule, justice or no justice. . . . So that the judge *must* apply the law as he finds it, alike for all. . . . But, this being so, the repeated instances of hardship and injustice that are bound to occur in the judge's rulings will in the long run injure that . . . public confidence in justice, and bring odium on the law. We want justice, and we think we are going to get it through 'the law,' and when we do not, we blame 'the law.'"

³⁹ Bridgman, an eminent mathematical philosopher, writes: "Situations do not exactly recur; experience is lived through only once, and the matrix in which any situation is embedded and which constitutes an inseparable part of the situation itself is always changing and never recurs." Quoted by SONDELL, ARE YOU TELLING THEM? 25 (1947).

⁴⁰ SULLIVAN, BEETHOVEN 35 (1944). "To define [a poem] as the artist's experience . . . will not do . . . since nobody but the artist has that experience." RICHARDS, PRINCIPLES OF LITERARY CRITICISM 226 (4th ed. 1930).

⁴¹ See KALLEN, ART AND FREEDOM I, 16-17 (1942); Zilsel, *Problems of Empiricism* in 2 INT'L ENCYC. OF UNIFIED SCI. No. 8 at 53, 80-81 (1941); Frank, *A Sketch of an Influence* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 189, 237-39 (Sayre ed. 1947).

ferret out, and the emotional significance of which no one but the judge, or a psychologist in the closest contact with him, could comprehend. What we may hope someday to get from our judges are detailed autobiographies containing the sort of material that is recounted in the autobiographical novel; or opinions annotated, by the judge who writes them, with elaborate explorations of the background factors in his personal experience which swayed him in reaching his conclusions. For in the last push, a judge's decisions are the outcome of his entire life-history."⁴² And, of course, this life history can never be duplicated by the critic.

It is reassuring to have my thesis confirmed by Judge Bok, who, in a semi-autobiographical novel, says of the "average" trial judge: "His friends, his family life, his vacations, his religion — a little of these must be known in order to feel the integrity of experience of which his work is the outward expression. But there still remains the mystery of each man's personality, and it defies analysis."⁴³

To avoid misunderstanding, I must say emphatically that when I speak of the obscure influences — reflecting the trial judge's life history — which affect his decisions, I refer primarily to his biases and predilections not with respect to the rules (the *R*'s) but with respect to the witnesses. I mean the trial judge's plus or minus reactions to women, or red-headed women, or spinsters, or to bearded men, or men with squints or nervous mannerisms, or to Catholics, or Masons, or Republicans, or labor leaders, when any such persons testify. Those prejudices are usually deeply

⁴² FRANK, *LAW AND THE MODERN MIND* 114-15 (1930). "What we call the 'facts' of a case constitute, often, the most important ingredient of the trial judge's decision. But when the testimony is in conflict — as it is in thousands of cases — the 'facts' of a law suit consist of the judge's belief as to what those facts are. That belief results from the impact on the judge of the words, gestures, postures, and grimaces of the witnesses. His reaction — inherently and inescapably subjective — is a composite of the way in which his personal predilections and prejudices are stimulated by the sights and sounds emanating from the witnesses. Now those personal attitudes of the judge reflect the subtlest influences of his experience and of the manner in which he has moulded them into what we describe, loosely, as his 'personality.' Where he was born and educated, his parents, the persons he has met, his teachers and companions, the woman he married, the books and articles he has read — these and multitudinous other factors, undiscoverable for the most part by any outsider, affect his notion of the 'facts.'" Frank, *A Sketch of an Influence in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 189, 235 (Sayre ed. 1947).

⁴³ Bok, *I Too, NICODEMUS* 3-4 (1946).

buried, unknown to others, often unknown to the judge himself.

It is no answer that, in certain kinds of thinking, the predilections of a thinker lack significance to anyone interested in the validity of his conclusion. Perhaps one may properly assert that the "personal history of Gauss is entirely irrelevant to the question of the adequacy of his proof that every equation has a root; and the inadequacy of Galileo's theory of the tides is independent of the personal motives which led Galileo to hold it."⁴⁴ But that cannot be said of the trial judge's decision after a trial, when the oral testimony was in conflict. For one premise of his reasoning — the fact premise — may be at the mercy of his biases, biases of a kind usually immune from scrutiny.⁴⁵ He is, so to speak, like one of Leibniz's windowless monads: his experience is not fully penetrable by any human being.

Underestimation by Legal Thinkers of Subjective Influences on Decisions. — With the exception of Austin, most legal thinkers, until recently, brushed aside such influences;⁴⁶ and those who did not do so failed to observe the effects of such factors on trial-court decisions. Austin, in discussing the "motives" which induce the making of legal rules, whether by a legislature or a judge, included such matters as the blandishments of an emperor's wife.⁴⁷ Gray rejected consideration of such "motives," calling them "illegitimate." He wrote: "Of course, the motives of a judge's opinion may be almost anything — a bribe, a woman's blandishments, the desire to favor the administration or his political party, or to gain popular favor or influence; but those are not sources which jurisprudence can recognize as legitimate."⁴⁸ Holmes, earlier, had admitted the existence of "singular motives" for a judge's decision, such as a doctrine of political economy, a woman's "blandishments," political aspirations, or the gout. But he said that such motives should not be considered because they

⁴⁴ COHEN AND NAGEL, *AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD* 380 (1934).

⁴⁵ For an elaboration of this thesis, see Frank, *What Courts Do in Fact*, 26 *ILL. L. REV.* 645, 658-62 (1932).

⁴⁶ See Frank, *Are Judges Human?*, 80 *U. OF PA. L. REV.* 233, 260-61 (1931).

⁴⁷ 2 AUSTIN, *JURISPRUDENCE* 554, 560-64 (4th ed., Campbell, 1873). Austin, however, had little interest in trial-court decisions. He was interested primarily in the legal rules.

⁴⁸ See GRAY, *THE NATURE AND SOURCES OF THE LAW* 191, 200, 213, 222-30, 236, 257, 266-69, 273-76 (2d ed., Gray, 1921).

cannot "be relied upon as likely in the generality of cases to prevail" and therefore do not "afford a ground for prediction" of decisions.⁴⁹ Goitein, defining "law" as the "sum of the influences that determine decisions in courts of justice," seems to exclude all but "legitimate" influences.⁵⁰

The school of "sociological jurisprudence" wisely noted the effects of the social, economic, and political views of judges. But because that school primarily studied the legal rules, and, therefore, the published opinions of upper courts, it disregarded, for the most part, the less obvious components of judges' attitudes.⁵¹ Cardozo was less restricted. He wrote: "Deep below consciousness are other forces, the likes and 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."⁵² However, as Cardozo had little interest in trial-court fact-finding, because he believed it did not affect "jurisprudence," he never discussed the impact of such influences on trial judges' findings of fact.⁵³ Yet the way those influences affect trial judges has far more significance for most litigants than the way they affect upper-court judges, because, for reasons previously canvassed, trial-court decisions usually have finality.

Professor Frankfurter (now Mr. Justice Frankfurter), writing of the interpretation by Supreme Court justices of the broad terms of the Constitution, said "that each Justice is impelled to depend upon his own controlling conceptions, which are in turn bound by his experience and imagination, his hopes and fears, his faith and doubts." After noting the need of "rare intellectual disinterestedness and penetration, lest limitations in personal experience and imagination operate as limitations of the Constitu-

⁴⁹ Holmes, Book Notice, 6 AM. L. REV. 723 (1872), reprinted in 44 HARV. L. REV. 788, 790 (1931). Holmes did not elsewhere repeat these ideas. His later writings indicate that he may have abandoned them. Cf. HOLMES, *THE COMMON LAW* 1, 5, 35-36 (1881).

⁵⁰ Goitein, *Jurisprudence* in 13 ENCYC. BRIT. 197 (14th ed. 1936).

⁵¹ For elaboration of this criticism of "sociological jurisprudence," see FRANK, *LAW AND THE MODERN MIND* 104-16 (1930); cf. *id.* at 268 n.† for criticism of Dickinson in this respect; see also as to Dickinson, Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 233, 250-52 (1931).

⁵² CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167-68 (1921).

⁵³ For criticism of Cardozo on this score, see FRANK, *IF MEN WERE ANGELS* 285-94 (1942).

tion," he remarked, "The familiar and unconscious play an enormous role in the exercise of the judicial process, particularly where it closely touches contemporary economic and social problems." And, quoting Lord Justice Scrutton's comment that "It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class," he added, "This psychological factor is, of course, of infinitely greater significance where a court possesses the powers of our Supreme Court."⁵⁴ With deference, I disagree. As the "unconscious" factors operative when Supreme Court justices confront economic and social problems lurk fairly close to the surface of consciousness, they are not too difficult for third persons to discern, and should be fairly easy for the justices themselves to bring to consciousness and within the range of self-control. But the same cannot be said of many of the "unconscious" factors operative in a trial judge when he confronts divers sorts of witnesses.⁵⁵

Explanation in the Preoccupation of Such Thinkers with Substantive Rules.— Spingarn regards as the sole function of the critic of poetry a critical understanding of the poet's aim: the critic should "re-dream the poet's dream," should ask, "What has the poet tried to express and how has he expressed it?"⁵⁶ Assuming it to be possible to answer that question with respect to poetry, often it is not possible to answer a similar question with respect to the trial judge who decides a case involving a credibility issue: because of the inaccessibility of what the trial judge has tried to express, his critic cannot "re-dream" the judge's "dream." Although some persons contend that no objective aesthetic standards exist, that contention is too sweeping. There are minimal

⁵⁴ Frankfurter, *Mr. Justice Holmes and the Constitution* in MR. JUSTICE HOLMES 46, 52, 60, 231 (Frankfurter ed. 1931).

⁵⁵ Here it is essential to differentiate the kind of "facts" I have been discussing (*i.e.*, inferences from oral testimony) and another kind which may be labeled "background facts" or "social and economic facts"—the kind dealt with in the so-called "Brandeis briefs." Frequently, the courts take judicial notice of that second species of facts (although sometimes such facts may be introduced as evidence in the trial court). With respect to background facts, many of which are in the form of statistics, the element of subjectivity has far less import, although it is a mistake to believe that even such facts are always completely objective. See discussion of statistical data in Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303, 1334-35 (1947).

⁵⁶ Spingarn, *The New Criticism* in CRITICISM IN AMERICA 9, 14 (1924).

uniformities in human nature,⁵⁷ and, in any given culture at any given time, minimal cultural uniformities; these uniformities yield an irreducible minimum of artistic norms. For similar reasons, there is an irreducible minimum of moral norms.⁵⁸ Those moral norms (group ideals and values) express themselves, to some extent, in the substantive legal rules. In that sense, we can attain objectivity in criticism of the *R*'s which the courts employ, and therefore of upper-court opinions, which concern themselves chiefly with the *R*'s.

But similar objectivity is not possible in criticism of most trial-court decisions. As we have seen, when a trial judge hears oral testimony, his decision results from a reaction to the witnesses, and that reaction is a composite which derives from all kinds of obscure, inarticulated, attitudes and prejudices. If articulated, these attitudes and prejudices would spell out, as the judge's, personal moral norms which might be aberrant from the accepted moral views of the community. Such hidden, personal, moral norms are idiosyncratic. They vary from judge to judge. Decisions which stem from such varying concealed moral attitudes are little likely to express uniform social ideals. Since they lack uniformity, objective criticism of the resultant decisions is seldom attainable.⁵⁹

⁵⁷ As to the relatively small quantity of such uniformities, see, e.g., FRANK, FATE AND FREEDOM 139, 199 (1945).

⁵⁸ Those who utilize the notion of the Time Spirit or that of the "climate of opinion" are likely to overestimate the quantum and efficacy of such cultural uniformities. See FRANK, FATE AND FREEDOM 76-84 (1945); Frank, *A Sketch of an Influence* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 189, 217-18 (Sayre ed. 1947).

⁵⁹ This conclusion, as I have elsewhere suggested, plays hob with "natural law" in the judicial process. See Frank, *A Sketch of an Influence* in *id.* at 189, 235.

Speaking for our court, I recently indicated as follows how community attitudes in part spell themselves into decisions but how they may fail to do so in respect of trial judges' reactions to testimony: "Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. . . . every human society has a multitude of established attitudes, unquestioned postulates. Cosmically, they may seem parochial prejudices, but many of them represent the community's most cherished values and ideals. Such social pre-conceptions, the 'value judgments' which members of any given society take for granted and use as the unspoken axioms of thinking, find their way into that society's legal sys-

In studying objectivity and subjectivity, we still have much to learn from Francis Bacon, a powerful, original thinker and himself a lawyer and judge. He described four types of obstacles to man's search for truth: (1) There are the Idols of the Tribe, errors "imposed upon the understanding" which are "common to human nature," *i.e.*, to mankind as such. They are "innate," "inherent in the very nature" of the human intellect. (2) The Idols of the Cave are errors due to "the nature of each individual man." They, too, are intrinsic. They "take their rise in the peculiar constitution, mental or bodily, of each individual; and also in education, habit and accident." Bacon includes the books a man has read and the persons he admires. (3) The Idols of The Market Place are extrinsic errors due to language, what today we call semantic errors. (4) Also extrinsic are the Idols of The Theater, errors caused by false theories and dogmas. As on the stage, stories are invented, "more as one would wish them to be than true stories."

To achieve complete objectivity, we would have to eliminate all these four kinds of subjectivity. The first kind, the product of mankind's finiteness, is inescapable; in this sense, as Bacon suggests, men are uniformly "mad" (or, as Santayana says, victims of "normal madness"⁶⁰). The third and fourth kind (*i.e.*, semantic and philosophic errors) are less stubborn.

The second kind, the Idols of the Cave, individual, peculiar quirks, are the least obvious — even to the judge himself, although each judge can do something, through cultivated self-awareness, to modify and restrain those quirks. It is this kind of

tem, become what has been termed 'the valuation system of the law.' The judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system (although, of course, he has the right, at times, to urge that some of them be modified or abandoned). The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes. In addition to those acquired social value judgments, every judge, however, unavoidably has many idiosyncratic 'leanings of the mind,' uniquely personal prejudices, which may interfere with his fairness at a trial. He may be stimulated by unconscious sympathies for, or antipathies to, some of the witnesses, lawyers or parties in a case before him. . . . Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine." *In re* J. P. Linahan, 138 F.2d 650, 651-53 (C. C. A. 2d 1943).

⁶⁰ SANTAYANA, *DIALOGUES IN LIMBO* 36-57 (1925).

subjectivity which I stress in this paper, and this kind of subjectivity which has been ignored by the legal thinkers who minimize the difficulties of criticism.

Such thinkers overlook the distinction between the more or less "objective" character of the norms embodied in the legal rules and the "subjective" character of the trial judge's response to oral testimony. They are thinking of upper-court opinions in cases in which those courts accept as their *F* the explicit findings of the trial courts. In any such upper-court decision, the *F* is given, and the critic therefore need ask merely whether the appellate court in its opinion (1) used a proper *R* and (2) logically applied it to the given *F*. Subjectivity and the gestalt factor often have *relatively* little effect on such an opinion.

Indeed, neglect of trial courts and fixation of attention on the substantive legal rules may induce forgetfulness of the problems I have been discussing. For many substantive rules purport to exclude the troublesome element of subjectivity. Typical is the "objective" theory or doctrine of contract formation, now widely in vogue, according to which the actual intention of the parties to a contract becomes irrelevant, and the intention must be ascertained solely from the objective expression of their intention.⁶¹

But that exclusion of subjectivity is often illusory. For the "objective" theory does not shut out oral testimony. Such testimony, for instance, has to be introduced to prove the objective intention to enter into an oral contract. If the alleged contract is written, oral testimony will be received which tends to show that neither party had an intention to make a contract (*i.e.*, that the writing was meant to be a joke or sham) or that the writing does not set forth the entire agreement; such testimony will also be received in support of the defense of forgery, or fraud, or duress, or performance, or release, or of divers other defenses.⁶² Whenever a crucial issue in a case requires the trial court to admit oral testimony, there enter, necessarily, the subjective reactions of the witnesses (in their observation of the past events, in their memory of that observation, and in their narration of that memory). There also enter, necessarily, the subjective responses of the trial judge (or jury) to the witnesses. We ask the trial

⁶¹ See *Ricketts v. Pennsylvania R. R.*, 153, F.2d 757, 761 *et seq.* (C. C. A. 2d 1946) (concurring opinion).

⁶² See Corbin, *The Parol Evidence Rule*, 53 *YALE L. J.* 603 (1944).

judge to discover an objective intention — through his own subjective processes.⁶³ In other words, a substantive rule, even if it sets an objective test, should become operative only if the facts to which that rule pertains have been “procedurally established”;⁶⁴ and the procedural establishment of facts by oral testimony opens the door to subjective factors.⁶⁵ Only if one locks oneself up in an unreal, substantive-rule, legal world will one believe that subjectivity can be avoided.

Hexner is typical of those critics who restrict their criticisms to the legal rules applied by the courts. Calling subjectivity “intra-subjectivity,” and objectivity “inter-subjectivity,” he writes that “a legal rule is essentially an *inter*-subjective (social) act contrasting with both the *intra*-subjective acts (not yet expressed *in* the external world) and pure monologues (not yet expressed *to* the external world), which are expressed but not knowable to other persons.”⁶⁶ But Hexner has not considered (1) how thoroughly “intra-subjective” are a trial judge’s reactions to oral testimony, and (2) how, gestalt-like, the rules and the “facts” interact in such a judge’s thinking.

Subjectivity in Historical Criticism. — The trial judge as historian has one distinct advantage over professional writers of history. Usually the judge sees and hears most of the witnesses from whose testimony he tries to learn the fragment of the past which concerns him, while usually the historian’s witnesses are in

⁶³ See *Zell v. American Seating Co.*, 138 F.2d 641, 647 (C. C. A. 2d 1943): “We can largely rid ourselves of concern with the subjective reactions of the parties; when, however, we test their public behavior by inquiring how it appears to the ‘reasonable man,’ we must recognize, unless we wish to fool ourselves, that although one area of subjectivity has been conquered, another remains unsubdued. For instance, under the parol evidence rule, the standard of interpretation of a written contract is usually ‘the meaning that would be attached to’ it ‘by a *reasonably intelligent person* acquainted with all operative usages and knowing all the circumstances prior to, and contemporaneous with, the making’ of the contract, ‘other than oral statements by the parties of what they intended it to mean.’ We say that ‘the objective viewpoint of a third person is used.’ But where do we find that ‘objective’ third person? We ask judges or juries to discover that ‘objective viewpoint’ — through their own subjective processes. Being but human, their beliefs cannot be objectified, in the sense of being standardized.”

⁶⁴ See *In re Fried*, 161 F.2d 453, 463 (C. C. A. 2d 1947).

⁶⁵ It is of interest that the “reasonable man” test stems from “natural law” concepts. See *Beidler & Bookmyer v. Universal Ins. Co.*, 134 F.2d 828, 830 n.7 (C. C. A. 2d 1943).

⁶⁶ HEXNER, *STUDIES IN LEGAL TERMINOLOGY* 44-45 (1947).

the grave. On the other hand, the judge has but a limited amount of time for investigation and is restricted by rules of evidence, while the historian can spend most of his life exploring the segment of the past which interests him, and is hampered by no evidentiary rules. Nevertheless, because of the marked resemblance between the function of the trial judge and that of the history-writer, it becomes pertinent here to consider what some historians have said of the subjective element in the work of the historian.⁶⁷

The historian's job, we are told, is to study "events not accessible to . . . observation, and to study those events inferentially, arguing to them from something else which is accessible . . . to observation . . ." *i.e.*, the evidence. For he "is not an eye-witness of the facts he desires to know . . ." His "only possible knowledge is mediate or inferential or indirect, never empirical." He must endeavor to "re-enact the past in his own mind."⁶⁸ In this endeavor, he performs two tasks: (1) He first critically examines the evidence, attempting to determine which (if any) of his witnesses made reliable reports. To discover the real meanings which lie behind a witness' words, the historian must try to identify himself with the witness, to relive the witness' life. The witness' "personality intervenes between" the historian and "the facts."⁶⁹ This task leaves "a very large role to the tact, finesse, and intuition" of the historian, involves an evaluation of credibility which is largely "subjective."⁷⁰ For the historian does not passively accept testimony but interprets it, and the criterion in his critical interpretation "is the historian himself."⁷¹ (2) Having evaluated the credibility of the testimony, the historian must construct a narrative of the past events. This narrative "is at once a synthesis and a hypothesis. It is a synthesis inasmuch as it combines the mass of known facts in an account of the whole; it is a hypothesis inasmuch as the relations that it establishes between the facts are neither evidence nor verifiable by themselves. . . . Everything then depends . . . upon the degree of the creative imagination of the historian and upon his general con-

⁶⁷ For a more detailed discussion, see FRANK, *FATE AND FREEDOM* 11-14, 18-41 (1945).

⁶⁸ COLLINGWOOD, *THE IDEA OF HISTORY* 251-52, 282 (KNOX ed. 1946).

⁶⁹ Pirenne, *What are Historians Trying To Do?* in RICE, *METHODS IN SOCIAL SCIENCE* 435, 437-39 (1931).

⁷⁰ *Id.* at 439.

⁷¹ See COLLINGWOOD, *op. cit. supra* note 68, at 138.

ception of human affairs.”⁷² The historian “imagines the past.” His picture of the past is a “web of imaginative construction stretched between certain fixed points” provided by his critical judgment of his witnesses’ testimony.⁷³ Here, obviously, subjectivity enters.

“The human actions which [historians] study cannot appear the same to different historians. It needs only a moment of reflection to understand that two historians using the same material will not treat it in an identical fashion, primarily because the creative imagination which permits them to single the factors of movements out of chaos varies, but also because they do not have the same ideas as to the relative importance of the motives which determine men’s conduct. They [divers historians] will inevitably write accounts which will contrast as do their personalities. . . . Thus, historical syntheses depend to a very large degree not only upon the personality of their authors but upon all the social, religious, or natural, environments which surround them. It follows, therefore, that each historian will establish . . . relationships determined by the convictions, the movements, and the prejudices, that have molded his point of view.” These elements shape his peculiar “conjectural reconstitution of the past.”⁷⁴ Must we not say the same of the trial judge?

Of course, the historian, like the trial judge, may have before him evidence the authenticity of which is indubitably clear. Thus he may have no possible doubt of the words of a particular treaty or that Lincoln issued his emancipation proclamation on a certain day. But, when it comes to a determination of the causal relations of any such facts to other facts, each historian must often draw on his “constructive imagination.” Wherefore historians often disagree about such matters — just as two trial judges often disagree about the facts of a case.⁷⁵

⁷² Pirenne, *supra* note 69, at 435, 441.

⁷³ COLLINGWOOD, *op. cit. supra* note 68, at 242.

⁷⁴ Pirenne, *supra* note 69, at 433-34. Collingwood, by ingenious semantics, tries to show that the historian’s subjectivity can translate itself into a kind of objectivity. See COLLINGWOOD, *op. cit. supra* note 68, at 292 *et seq.* But see the comments of his editor, Knox, in the Preface. *Id.* at xiv.

⁷⁵ Such differences occur even when upper-court judges pass directly on a printed record of testimony. See, e.g., *United States v. Shipp*, 214 U. S. 386 (1909); *Bushey v. Hedger Corp.*, 167 F.2d 9 (C. C. A. 2d 1948); FRANK, *IF MEN WERE ANGELS* 78-80 (1942). Consider here the subtle implications of the following: “By objectivity I mean that quality of a rule of law which enables it to be applied to similar

Those who like to speak of "legal science" or the "science of law" should read the comments of the more sophisticated historians on the difference between history-writing and the performances of physical scientists. "No skilled physicist or chemist," writes the historian Johnson, "would wittingly leave his experiment in the hands of an untrained observer. He chooses his assistants with the same care that he gives to his apparatus. But the historian must take whom and what the gods vouchsafe. The chief witness to certain historical events may be an ignorant yokel or a thoroughly unreliable character whose partisanship is a matter of notoriety. It not infrequently happens that an historical scholar finds himself in precisely the predicament of a physicist who should be called away from his experiment and have to trust to the casual observations of an ignorant and unskilled caretaker of the laboratory. But again the analogy fails, for the physicist can usually repeat the interrupted test."⁷⁶ "Facts which we do not see," say the historians Langlois and Seignobos, "described in language which does not permit us to represent them in our minds with exactness, form the data of history."⁷⁷ "The conditions indispensable to all really scientific knowledge — calculation and measurement — are," writes Pirenne,⁷⁸ "completely lacking in this field." History, he maintains, is at best but "a subjective science."⁷⁹ It would seem wiser to call it a "subjective art." And so, too, of the work of the trial judge: it is a subjective art.

situations with similar results regardless of the identity of the judges who apply it." Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L. J. 571, 572 n.5 (1948).

⁷⁶ See JOHNSON, *THE HISTORIAN AND HISTORICAL EVIDENCE* 46-47 (1928).

⁷⁷ LANGLOIS AND SEIGNOBOS, *INTRODUCTION TO THE STUDY OF HISTORY* 68 (Berry trans. 1898).

⁷⁸ Pirenne, *supra* note 69, at 443.

⁷⁹ See Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303, 1332 (1947): "True, as the better educated 20th century man knows the physical sciences now show up as far less exact than they seemed to all but a few thinkers during the preceding three centuries. Nor can it be gainsaid that the practitioners of those sciences successfully utilize 'ideal' concepts (e.g., 'frictionless engines') which involve notions such as 'other things being equal.' It might therefore be suggested that the difference between physics, on the one hand, and the 'social sciences' (including 'law') on the other, is merely one of degree. That is a tricky suggestion, because of the width of the degree. It is said that the difference between a difference of kind and a difference of degree is not itself a difference of kind but one of degree — a 'violent' one, however. The difference here under discussion is peculiarly 'violent.'"

See also *id.* at 1333-34 as to the difference between (1) physical sciences and (2)

One of Maine's sagacious utterances helps to bring this out. He pointed to the absence of any rules to guide 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 witnesses to the inference that those statements are true, that judicial inquiries generally break down." It "is the rarest and highest personal accomplishment of a judge to make allowance for the ignorance or 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 of operation peculiar to itself, and almost undefinable."⁸⁰

Interactions of Rules and "Facts." — Moreover, effective criticism of a trial judge's decision is hindered by a circumstance which does not hinder criticism of a historian's writings. The judge, unlike the historian, is supposed to use substantive legal rules, *R*'s, in contriving his decision. Consequently, there may occur, in his mental processes, interactions of the *R*'s and the *F*, interactions which may be exquisitely complicated in many obscure ways. I shall here note but one of those ways.

As previously stated, it is a wise and accepted principle that a trial judge's finding of the facts should be affected not merely by the words of the witnesses but by their manner of testifying. Suppose, then, that, when listening to the testimony, the judge thinks a particular formulation of a particular rule will govern the case. That rule will serve as his attention-guide, *i.e.*, it will focus his attention sharply on those witnesses who testify with respect to matters specifically germane to his version of that rule. But suppose that, when the trial is over, and the judge comes to his decision, he concludes that his earlier formulation of that rule was wrong. He cannot now vividly recall the demeanor of those witnesses whose testimony is relevant to what he now considers the correct formulation of the proper rule.⁸¹ As a result, he may

the "scientific spirit" which should imbue lawyers, judges, historians, and the so-called "social scientists." As to "subjectivity" in the physical sciences, see FRANK, *FATE AND FREEDOM 180-84*, 312-15 (1945).

⁸⁰ MAINE, *The Theory of Evidence* in *VILLAGE COMMUNITIES* 295, 317-18 (1876).

⁸¹ Consider here the situation when, after all the testimony is in, the plaintiff amends his complaint to conform to the proof, thus introducing new *R*'s or new aspects of the *R*'s.

well find the facts erroneously. Yet neither he nor any critic is able to know whether or not he did thus err.

The interaction of rules and "facts" may have some paradoxical results, baffling to both the trial judge and his critics: a trial judge may want to decide in favor of one of the parties, say the plaintiff. However, it may happen that, if the judge applies to the facts — as he believes them to be — what he considers the correct, well-settled, legal rule, he cannot logically justify such a decision. Sometimes, thus circumstanced, a trial judge, as we saw, will "force the balance," *i.e.*, he will deform his real view of the facts and so state them in his findings that, applying what he considers the correct rule, he thinks he can make his decision seem justifiable. If he has heard and seen the witnesses, his reported finding of the facts will usually be accepted on appeal by the appellate court. But if that court concludes that he applied an incorrect legal rule, it will itself apply what it considers the correct rule to the facts so found by him, and, reversing his decision, it will decide the case for the defendant. Now it may well be that, had the trial judge found the facts in accordance with his true view of them, and, accordingly, decided for the defendant, the upper court, disagreeing with the trial judge about the correct rule, would have reversed him; it would thus render the decision for the plaintiff which the trial judge had thought desirable but which, due to his incorrect notion of the applicable legal rule, he had felt unable to render on the basis of his honest view of the facts.

Reformulation of the Theory of Decision. — The presence of what, by way of shorthand, I have labeled the gestalt factor is alone enough to expose the misleading oversimplification of the conventional theory that a trial judge's decision results from the "application" of a legal rule (or rules) to the "facts" of the case. For note the word "application," and consider the following: suppose that a trial judge has a strong unconscious animus against, or liking for, Catholics or Italians, and that such a predilection influences his attitude towards important witnesses who testify at a trial — and thus influences his decision. Would it be helpful to say that his decision resulted from the "application" of that bias? ⁸² A more dispassionate description would be this: that

⁸² Such a statement might often be justified with respect to a jury's verdict. See *Skidmore v. Baltimore & Ohio R. R.*, 167 F.2d 54. (C. C. A. 2d 1948).

bias was one among many stimuli which helped to bring about the decision. Similarly, one should say that the legal rule is but one of a multitude of such stimuli.⁸³

The traditional formulation being inadequate, especially with reference to trial courts, one might, for the benefit of those who like mathematical-looking formulas, suggest, as a substitute, $S \times P = D$, when S represents the stimuli, internal and external, affecting the judge, and P the judge's "personality." The inadequacy of such a schematization, however, is too obvious to necessitate discussion,⁸⁴ although that schema does serve to highlight, among other things, the consequences of the judge's attention, or lack of attention, while the witnesses testify.⁸⁵

IV. PROPOSALS FOR CONTROL OF SUBJECTIVITY IN FACT-FINDING

Requirement of Special Findings of Fact. — Despite the futility of the attempt to use the written opinion as a basis for evaluation of trial-court fact-finding, I think it highly desirable to require trial judges — as well as administrative agencies⁸⁶ — to make

⁸³ Cf. Keyser, *A Study of Legal Science*, 38 YALE L. J. 413 (1929).

⁸⁴ "Break down S , and you will find a horde of conflicting stimuli, some of them being 'social forces,' some of them being the . . . 'rules and principles,' some of them being undiscoverable. Break down P , and you will find a mass of 'subjective,' unascertainable factors. And there will be no irreducibles behind either the label S or the label P ." Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 761, 775-76 (1932).

⁸⁵ "What affects the attention given by the judge or jury to the testimony? Kimball Young enumerates the following features of external stimuli which influence the attention of any observer: intensity, novelty, configuration, mode of presentation, size, change or monotony, repetition, definiteness. The 'internal' stimuli he catalogues as follows: physiological (hunger, thirst . . . fatigue, illness, weariness); . . . aims (purpose, ideals); attitudes (likes, dislikes, loves, hatreds, anxieties, avoidances). What Hans Gross says of the mistake of witnesses is worth quoting here: 'The numberless errors in perceptions derived from the senses, the faults of culture, mood of the moment, health, passionate excitement, environment, all these things have so great an effect that we scarcely ever receive two quite similar accounts of one thing; and between what people really experience and what they confidently assert, we find only error heaped upon error.'" FRANK, IF MEN WERE ANGELS 72-73 (1942).

I must add that my use in this paper of the words "stimuli" and "reactions" indicates no belief whatever in "behaviorism" or in any other form of determinism. See FRANK, FATE AND FREEDOM (1945) *passim*; Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 233, 243-48 (1931).

⁸⁶ I have heard some federal district judges express, almost in the same breath, (1) objections to required trial-court fact-findings and (2) their contempt for the alleged sloppy work of administrative agencies. But the courts can learn much

special findings of fact. The usual argument for such a requirement — that it aids the appellate courts — seems to me to be far less cogent than the argument that the breaking down of his decisional process into two parts — the rule and the “facts” — compels the trial judge carefully to examine his decision. “For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty. Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.”⁸⁷ A trial judge, every now and then, thus discovers that his initially contemplated decision will not jell, and is obliged to decide otherwise.

It is no sufficient rejoinder that the judge’s decision has its roots in a non-logical hunch. Logic need not be the enemy of hunching. Most of the conclusions men reach in their daily lives are similarly hunch-products, originally arrived at in non-logical ways; yet we do not deny that frequently the correctness of many of these conclusions can profitably be tested by logical analysis. That a conclusion is prior in time to the logical reasoning which justifies it may make that reasoning seem artificial, but does not necessarily render that reasoning fallacious or useless. Even physicists and mathematicians frequently use logically-tested hunches.⁸⁸ “Of course, the mere fact that the reason given for an act or a judgment is *ex post facto* does not invalidate that reason. Jones may hit Smith . . . or make love to a girl, or explore the Arctic without reflecting on his conduct. When asked to . . . justify his acts, he may give excellent reasons which are entirely satisfactory.”⁸⁹ That is, despite the fact that he did not act on the basis of logically-tested reasoning, his conduct may, on analysis, show up as having been logically justifiable. When any man tries to determine whether his appraisal of persons or events is sound, he tests it by seeing whether it is a legitimate inference from his data and from some generally accepted principle or assumption.⁹⁰

from those agencies about fact-finding. See FRANK, *IF MEN WERE ANGELS* 122-28 (1942).

⁸⁷ See *United States v. Forness*, 125 F.2d 928, 942 (C. C. A. 2d 1942); Otis, *Improvements in Statements of Findings of Fact and Conclusions of Law*, 1 F. R. D. 83, 87 (1940).

⁸⁸ See note 36 *supra*.

⁸⁹ Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 654 n.20 (1932).

⁹⁰ “The process of judging, so the psychologists tell us, seldom begins with prem-

So it may be with a trial judge's decision: he may first arrive at it intuitively and, then only, work backward to a major "rule" premise and a minor "fact" premise which show whether or not that decision is logically defective.⁹¹ In so working, the judge is doing nothing improper or unusual. The chronological priority of his hunch does not mean that his subsequent logical analysis is valueless. It may have an artificial appearance. But such an appearance does not detract from the worth of such *ex post facto* analyses in other fields. If one chooses, loosely, to call that hunch-testing process "rationalization," then, in that sense, most logical rationality involves some "rationalization."⁹²

Logic, said Balfour, "never aids the work of thought; it only acts as its auditor and accountant general." That is too limited a statement of the role of logic.⁹³ But even if logic's role were solely that of "auditing," it would be immensely valuable. As F. C. S. Schiller said,⁹⁴ "to put an argument in syllogistic form is to strip it bare for logical inspection. We can then see where its weak point must lie, if it has any, and consider whether there is reason to believe that it is actually . . . weak at these points. We thereby learn where and for what the argument should be tested further."⁹⁵ That a trial judge should make special findings

ises from which a conclusion . . . is worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot, to his satisfaction, find proper arguments to link up his conclusions with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another." FRANK, *LAW AND THE MODERN MIND* 100 (1930).

⁹¹ There is the story of the old lady, accused of being illogical, who, when she was told what "logic" was supposed to be, exclaimed, "Logic! What nonsense! How can I tell what I think until I know what I say?"

⁹² See my dissenting opinion in *Old Colony Bondholders v. New York, N. H. & H. R. R.*, 161 F.2d 413, 431, 450 n.82 (C. C. A. 2d 1947).

Here we may gain instruction from what scientists have said about the use of hunches. Typically, the great chemist, Kekulé, talking of the "inspirational" source of some of his scientific discoveries, remarked: "Let us learn to dream, gentlemen. Then perhaps we shall find the truth . . . but let us beware of publishing our dreams before they have been put to the proof by the waking understanding." Quoted by LEUBA, *PSYCHOLOGY OF RELIGIOUS MYSTICISM* 242 (1925); see note 36 *supra*.

⁹³ See Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 *CORN. L. Q.* 568 (1932).

⁹⁴ See FRANK, *LAW AND THE MODERN MIND* 131 n.3 (1930).

⁹⁵ To preclude misunderstanding, I hastily add that I am not here discussing the use of logic in testing the legal rules. For a suggestive discussion of that immense subject, see Hoernlé, *Book Review*, 31 *HARV. L. REV.* 807, 808-10 (1918).

of fact is therefore of importance, since his doing so is essential to his own logical assaying of his decision.⁹⁶ In sum, because of the inescapable and un-get-at-able subjectivity of his reactions, and because of the gestalt factor, his published report will leave an unbridged gap between him and his critics; yet findings of fact will act as a check on that subjectivity.

Nevertheless, to require the trial judge to make and publish his findings of fact will yield no panacea where, because of a conflict in the oral testimony, the credibility of the several witnesses becomes crucial. Frustration of the purpose of the requirement occurs where, as too often happens, the judge uncritically adopts the findings drafted by the lawyer for the winning side. For then the judge may ostensibly find some facts of which, although they are based on some testimony, the judge never thought, and which, had he done his own job, he would not have included; in that event, his finding does not represent any real inference he drew from the evidence — does not reflect his own actual thought concerning the witnesses' credibility.⁹⁷ With conscientious trial judges, however, that difficulty is not insurmountable. But a graver difficulty remains: the facts, as "found," can never be known to be the same as the actual past facts — as what (adapting Kant's phrase) may be termed the "facts in themselves." How closely the judge's "findings" approximate those actual facts he can never be sure — nor can anyone else.

Reduction of Inflexibility in Substantive Law. — The plea (typified by that of Judge McLellan) for retention of what is in effect the *Gestalt* in trial-court decisions may be translated as an insistence on the need for the individualization of cases.⁹⁸ Many of our existing substantive legal rules call for the neglect of the unique features of individual lawsuits, a neglect which often deeply offends the "sense of justice."⁹⁹ Rules of that sort, which,

⁹⁶ A related problem arises concerning special verdicts as contrasted with general verdicts: A special verdict may exclude any *Gestalt*, since neither the judge nor jury is responsible for a composite decision. See *Skidmore v. Baltimore & Ohio R. R.*, 167 F.2d 54 (C. C. A. 2d 1948).

⁹⁷ For judicial criticism of such findings, see *The Severance*, 152 F.2d 916, 919 (C. C. A. 4th 1945); *City of New York v. McLain Lines*, 147 F.2d 393 (C. C. A. 2d 1945); *United States v. Forness*, 125 F.2d 928, 942 (C. C. A. 2d 1942).

⁹⁸ See note 38 *supra*.

⁹⁹ See, e.g., Wigmore, *A Program for the Trial of a Jury Trial*, 12 J. AM. JUD. Soc'y 166 (1929), quoted *supra* note 38.

were they applied as they are theoretically supposed to be, would yield results felt to be unjust, lead to oblique ways of circumventing the rules — general verdicts by juries, or decisions by trial judges unaccompanied by findings of fact, or the twisting of such findings so that they misreport the “facts.”¹⁰⁰ In other words, the discretion which such rules purport to exclude is shifted, in a concealed manner, to some other component of the decisional process.¹⁰¹ Since the desire for individualization is obviously irrepressible and since these oblique methods of achieving it are disingenuous and otherwise undesirable,¹⁰² a wiser course would be to revise many of such rigid rules so that they will permit open-and-above-board discretion. Wigmore has shown that a workable and orderly legal system has existed which candidly empowered courts to recognize uniqueness in all cases.¹⁰³ We ought carefully to study that system and to consider substantial modifications of our own, instead of adhering to our present misleading and somewhat hypocritical practice of sanctioning furtive, unavowed, exercises of discretion.

Our system attains a greater measure of legal certainty in terms of the rules, but a certainty which, in truth, is mostly an illusion. We delude ourselves when we say¹⁰⁴ that, in cases which relate to commercial transactions or dealings in “property,” we avoid individualization and discretion through rigid and definite legal rules. For, in any such case, either party can inject an issue of fact involving an evaluation of witness’ credibility — with all its attendant uncertainties.¹⁰⁵ The discrepancy between the pretended certainty supplied by precise legal rules and the actual unpredictability of many future decisions baffles the laymen who, consequently, have no adequate understanding of an important part of our government — a highly undesirable condition in a democracy.

¹⁰⁰ See, e.g., *ibid.*; Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18-19 (1910); FRANK, *LAW AND THE MODERN MIND* 173-74 (1930); *Skidmore v. Baltimore & Ohio R. R.*, 167 F.2d 54 (C. C. A. 2d 1948).

¹⁰¹ See, e.g., Frank, *Words and Music*, 47 COL. L. REV. 1259, 1273 *et seq.* (1947).

¹⁰² See, e.g., *Skidmore v. Baltimore & Ohio R. R.*, 167 F.2d 54 (C. C. A. 2d 1948); *cf. Ricketts v. Pennsylvania R. R.*, 153 F.2d 757, 768-69 (C. C. A. 2d 1946).

¹⁰³ Wigmore, *The Legal System of Old Japan*, 4 GREEN BAG 403, 404 (1892).

¹⁰⁴ See Pound, *The Theory of Judicial Decisions*, 36 HARV. L. REV. 940, 957 *et seq.* (1923); POUND, *INTERPRETATIONS OF LEGAL HISTORY* 154 (1923); POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 142 *et seq.* (1922).

¹⁰⁵ See FRANK, *IF MEN WERE ANGELS* 99-101 (1942).

Improvement of Trial-Court Techniques.— Trial-court fact-finding is one of the most vital aspects of courthouse government. Yet it is the least studied, and, therefore, the most inefficient. This state of affairs should demand the eager attention of all lawyers who prize justice and detest injustice. For, because of avoidable misfindings of fact, every year, men who shouldn't be are hanged, or go to jail, or lose their savings or livelihood, and have their families ruined.¹⁰⁶

To acquire absolutely reliable knowledge of the objective past facts of cases is beyond human power. Yet, although those facts can only be approximated, we should strive to have that approximation asymptotic. Of course, we must rely on probabilities. But there are degrees of probability. The facts as "found" are inherently guessey; but we need not be content with the present guessing techniques of our trial courts. Everything feasible should be done so that the probability of accuracy in discovering the true facts of cases will be as high as is possible. That trial-court fact-finding can never be completely objective, that unavoidably it involves conjectures, that it is but one element in a *Gestalt* — all this does not at all compel the conclusion that the traditional fact-finding methods are not capable of marked improvement.¹⁰⁷ Today, to a shocking and needless extent, they are tragically bad.

That condition cannot be ascribed to our trial judges. Among them are some of the ablest and most conscientious public servants. But their tasks are far more baffling than those of upper-court judges. The trial judges have received no special training for their unique tasks; and they did not devise our antiquated modes of trying lawsuits. With all the present hindrances to the "procedural establishment" of the facts, the chances are large that often the trial courts will fall far short of finding the true facts. Little wonder that Judge Learned Hand once observed, "I must say that, as a litigant, I should dread a law-suit beyond almost anything short of sickness and death."¹⁰⁸

Trial-court fact-finding is defective in part for reasons I have not discussed above and which I shall but briefly mention here. Some of the evidence bearing on the actual facts never comes to light in the courtroom; the exclusionary rules may bar some of

¹⁰⁶ See *In re Fried*, 161 F.2d 453, 464 n.33 (C. C. A. 2d 1947).

¹⁰⁷ See FRANK, *IF MEN WERE ANGELS* 134-39 (1942).

¹⁰⁸ L. HAND, *The Deficiencies of Trials to Reach the Heart of the Matter* in 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).

the evidence. Other evidence may be unavailable: witnesses of the past events are dead or cannot be found; important documents have been destroyed or lost. One of the parties cannot afford to hire investigators to discover, or expert witnesses to interpret, the evidence. Juries are unskilled and often prejudiced fact-finders.

Improvement should, I think, include at least the following: (1) We should give special education to lawyers who are to function as trial judges. Each future trial judge should be schooled, among other things, in (a) a knowledge of his own biases and prejudices with respect to prospective witnesses,¹⁰⁹ and (b) the best available psychological techniques. (2) Without surrendering the values of our present adversary procedure, the government should assume a larger measure of responsibility in ensuring that all practically available important evidence is presented to our trial courts; for liberal "discovery" rules will not suffice to meet the problem of the litigant unable to pay for pre-trial investigation or to hire experts. Without some such reform, we shall not really begin to live up to the basic democratic ideal of "equality before the law," since, as matters now stand, those litigants who have inadequate funds often unfairly lose lawsuits because they cannot afford to pay for justice in our courts.¹¹⁰ (3) Perhaps we should provide talking movies of trials; if carefully made, such recordings would perhaps render it possible at times to evaluate the trial judge's views as to the credibility of witnesses.¹¹¹ (4) The special verdict should generally be employed, especially in civil cases.¹¹² (5) We might well have school-training for prospective jurors.¹¹³

The working out of the details of such reforms and the inven-

¹⁰⁹ Cf. Frank, *Scientific Spirit and Economic Dogmatism* in SCIENCE FOR DEMOCRACY II, 20-21 (Nathanson ed. 1946).

¹¹⁰ See Frank, *White Collar Justice*, Sat. Eve. Post, July 17, 1943, p. 22; FRANK, IF MEN WERE ANGELS 122-27 (1942); United States v. St. Pierre, 132 F.2d 837, 849 n.40 (C. C. A. 2d 1942) (dissenting opinion); *In re Fried*, 161 F.2d 453, 464 (C. C. A. 2d 1947); WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 95-98, 206-07, 213-14, 457 (1929).

¹¹¹ See my dissenting opinion in United States v. Rubenstein, 151 F.2d 915, 921 n.6 (C. C. A. 2d 1945).

¹¹² See *Skidmore v. Baltimore & Ohio R. R.*, 167 F.2d 54 (C. C. A. 2d 1948). Special juries might be helpful if selected, as they often were in fourteenth-century England, from men having peculiar knowledge of the class of facts involved. See L. Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 41-42 (1901).

¹¹³ See Galston, *Civil Jury Trials and Tribulations*, 29 A. B. A. J. 195, 197 (1943).

tion of others call for the intensive efforts of our keenest minds. But little help along those lines has come from the great majority of law-school teachers, thanks to their lack of interest in trial courts and fact-finding, and their obsessive interest in the substantive legal rules and upper courts.¹¹⁴ Even the procedural reformers have confined their praiseworthy efforts almost entirely to those phases of trial-court processes which manifest themselves in judicial opinions in terms of procedural rules.

The importance of the legal rules cannot be denied. They express policies (*i.e.*, ethical attitudes, social value judgments).¹¹⁵ In respect of such policies, the law-school professors, by their often brilliant studies of the substantive rules, have given the courts assistance of incalculable worth. Yet all the efforts devoted to the rule-embodied policies mean little in courthouses¹¹⁶ except in so far as they eventuate in specific decisions.¹¹⁷ The best-contrived policies, expressed in those rules, are wrecked on misfindings of facts in trials of specific cases. For a policy is not actually applied, does not actually work, if applied to facts which in truth never happened — as, for instance, when a man is convicted of a murder he did not commit.¹¹⁸

I have elsewhere suggested that many of the legal thinkers who avert their gaze from trial-court life, taking refuge in a legal world made up exclusively of legal rules, do so out of a desire to escape recognition of what are to them the emotionally disturbing uncertainties of trials; and that those thinkers are dominated by an attitude emotionally akin to that which gave rise to that belief in magic that produced the ordeals.¹¹⁹ Professor Max Rheinstein,

¹¹⁴ See Frank, Book Review, 56 *YALE L. J.* 589, 594 (1947); FRANK, *IF MEN WERE ANGELS* 106-08 (1942); Frank, *A Plea for Lawyer-Schools*, 56 *YALE L. J.* 1303 (1947).

¹¹⁵ See Frank, *A Plea for Lawyer-Schools*, 56 *YALE L. J.* 1303, 1324 (1947).

¹¹⁶ They may yield something in their effects on the habits of the community. The anthropological study of the interaction of legal rules and social habits is another immense subject which I cannot here discuss, but which I do not overlook. See FRANK, *IF MEN WERE ANGELS* 103-04 (1942). I have dealt with the subject more in detail in some unpublished lectures at the New School of Social Research, 1946-47. Cf. Frank, *A Plea for Lawyer-Schools*, 56 *YALE L. J.* 1303, 1324 (1947).

¹¹⁷ Herbage says that "music does not exist until it is performed." Herbage, *Brains Trust*, 1 *PENGUIN MUSIC MAG.* 75 (1946).

¹¹⁸ See *In re Fried*, 161 F.2d 453, 462-64 (C. C. A. 2d 1947).

¹¹⁹ See FRANK, *IF MEN WERE ANGELS* 114-18 (1942).

in a recent letter to me, offered a supplemental explanation. "To me," he wrote, "the reason seems to be rooted in history. In Rome, 'legal' activities were divided up among three groups of men; the juriconsults; the orators; and practical politicians, statesmen, and, during the late empire, bureaucratic officials. The juriconsults busied themselves exclusively with the rules of law; the practical administration of justice remained outside of their field. Yet, their work has become the foundation of all legal science ever since, not only in the countries of the so-called Civil Law but also in the Common Law orbit. The style of Common Law legal science was determined when Bracton started out to collect, arrange, and expound the rules of the Common Law of his time in the very style of the Roman classics and the *corpus juris*. All the law books since his time down to Halsbury, Williston, or the *Restatement*, have adhered to the pattern thus determined. Legal education built upon these books has been equally limited; from Pavia and Bologna to Harvard, law schools have regarded it as their task to impart to their students a knowledge of the rules of law and hardly anything else. Of course, for practical work in the administration of justice such a training is far from being complete."

Rheinstein, commenting on my notions of a revised law-school curriculum, says that I am calling for the development of the "science of administration of justice." Change the word "science" to "art," and I agree. Instruction in such an art would include firsthand observation of all that courts, administrative agencies, and legislatures actually do. Such instruction would serve two purposes. First, it would aim to equip future lawyers to cope with courthouse realities, no matter how ugly and socially detrimental some of those realities are; for a lawyer cannot competently represent his clients if he is ignorant of the devices which his adversaries may utilize on behalf of their clients.¹²⁰ Second, such instruction would stimulate the contrivance of specific practical means by which existing trial-court techniques can be improved, in order that justice may be judicially administered more in accord with democratic ideals.

Jerome Frank.

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¹²⁰ Cf. ARISTOTLE, RHETORIC bk. I, c. I, 1355b.