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

I.

JOHN DEWEY is rightly hailed today as America's most influential philosopher.¹ Whether or not one agrees with critics who say that he has overstressed the practical,² I believe it undeniable that his thinking about thinking has had immensely valuable effects on thinking in many fields. His outstanding thesis, to state it crudely, has been that all generalizations—all theories, principles, rules—should be tested by observing how they work in practice. Leading

The following pages contain a stimulating article by Judge Jerome Frank of the United States Court of Appeals. Judge Frank, while admittedly not a Thomist, has, nevertheless, often proclaimed his deep interest in, and sympathy for, the fundamental moral postulates of Scholastic Natural Law. Those members of the various schools of Jurisprudence who, while not rejecting the principles of justice as the basis for legal order, do wish to see them applied to concrete cases rather than hang impotent in a vacuum, may find that Judge Frank's article suggests at least one mutual meeting ground for them. Certainly all those lawyers and philosophers who wish to show, or have it be shown, that moral principles have significance beyond the preserves of the academician will welcome this attempt by Judge Frank to focus attention on the fact-finding processes of our judicial system.—The editors.

*In part, this paper includes some matter already treated in my book, FRANK, COURTS ON TRIAL (1949). But here I have enlarged on themes which there I dealt with merely in passing, *i.e.*, the unpragmatic attitude of some of the legal Deweyites, the pragmatic attributes of Aristotle, and Dewey's deficiencies as a legal pragmatist.

¹ The following remarks were made on the occasion of Dewey's ninetieth birthday: "His pre-eminence among American philosophers," writes Ralph Barton Perry, "is undisputed even by those who, believing that he is often an exponent

legal thinkers in particular have often quoted with approval his theory about the relations of theory and practice. Those thinkers, in turn, have influenced many other legal thinkers who have exploited Dewey's insights, often without acknowledgement or knowledge of their debt to him.

Now in our judicial system, we allot to our trial courts the greater part of the job of putting to practical use the legal generalizations—i.e., the legal rules and principles. For in perhaps more than ninety per cent of all lawsuits, the trial court decisions are not appealed; and, of the few appealed trial court decisions, probably the majority are affirmed. Therefore, if (as I shall try to show) the trial courts differ, and must differ, most substantially from the upper courts in the ways in which they practically operate the legal generalizations—the legal rules and principles—the following, to anyone who even half-agrees with Dewey, is an almost certain result: A person who has not observed, or otherwise learned a good deal about, trials and trial courts will be ignorant concerning much of the practical operations of those legal rules and principles; he will, accordingly, have a considerable fund of ignorance concerning those rules and principles.

Ironically, Dewey's own acquaintance with our judicial system was obtained from men who had little or no knowledge of trial court activities, or who, in their writings, disregarded those activities. It is equally ironic that most (not all) of the legal thinkers whom Dewey has influenced have similarly lacked knowledge of or interest in trial court doings. As a consequence, among legal thinkers, Dewey's

of error, have difficulty in accounting for him." "And whatever may be the criticism of his pragmatism," says President Seymour of Yale, "he is recognized even by his opponents as America's greatest living philosopher." Meiklejohn comments: "Mr. Dewey is, in my opinion, the most influential thinker of our time and our nation. . . ." See *New Republic*, Oct. 17, 1949, pp. 11, 16, 22.

² I happen to believe that those critics have been unfair to Dewey, that they have read some of his statements out of context, and that they have identified Dewey with some of his more glib, dogmatic disciples.

pragmatic counsels have been acclaimed chiefly by those who, for the most part, have not heeded those counsels, and who, accordingly, have been guilty of the very kind of errors—resulting from a snobbish shunning of much of the practical—which, in other fields, Dewey has tirelessly exposed. I refer to such lawyer-disciples of Dewey as Walter Wheeler Cook, Karl Llewellyn, Edwin Patterson and Benjamin Cardozo.

II.

Before discussing their views, it will be helpful to note some of Dewey's statements about the relations of theory and practice. Many such statements occur in his book, *The Quest for Certainty*.³ There he deplors "the disesteem in which the idea of practice has been held," the "depreciation of action," the "disrepute which has attended . . . everything associated with practice," the "disparaging view of practice and the exalted view of knowledge apart from action." He aims at the "destruction of the barriers which have divided theory and practice." He says:⁴

The active power of ideas is a reality, but ideas and idealisms have an operative force in concrete experienced situations; their worth has to be tested by the specified consequences of their operation . . . Ideas and idealisms are in themselves hypotheses not finalities. Being connected with operations to be performed, they are tested by the consequences of those operations, not by what exists prior to them. . . .

Ideas that are plans of operations to be performed, are integral factors in actions which change the face of the world. Idealistic philosophies have not been wrong in attaching vast importance and power to ideas. But in isolating their function and their test from action, they failed to grasp the point and place where ideas have a constructive office. A genuine idealism and one compatible with science will emerge as soon as philosophy accepts the teaching of science that ideas are statements not of what is or has been but of acts to be performed. For then mankind will learn that, intellectually (that is, save for the esthetic enjoyment they afford, which

³ DEWEY, *THE QUEST FOR CERTAINTY* (1929).

⁴ *Id.* at 167, 138, 279-80, 281, 284.

is of course a true value), ideas are worthless except as they pass into actions which rearrange and reconstruct in some way, be it little or large, the world in which we live. To magnify thought and ideas for their own sake apart from what they do (except, once more, esthetically) is to refuse to learn the lesson of the most authentic kind of knowledge—the experimental—and it is to reject the idealism which involves responsibility. To praise thinking above action because there is so much ill-considered action in the world is to help maintain the kind of a world in which action occurs for narrow and transient purposes. To seek after ideas and to cling to them as means of conducting operations, as factors in practical arts, is to participate in creating a world in which the springs of thinking will be clear and over-flowing. . . .

It is impossible to form a just estimate of the paralysis of effort that has been produced by indifference to means. Logically, it is truistic that lack of consideration for means signifies that so-called ends are not taken seriously. It is as if one professed devotion to painting pictures conjoined with contempt for canvas, brush and paints; or love of music on condition that no instruments, whether the voice or something external, be used to make sounds. The good workman in the arts is known by his respect for his tools and by his interest in perfecting his technique. The glorification in the arts of ends at the expense of means would be taken to be a sign of complete insincerity or even insanity. Ends separated from means are either sentimental indulgences or if they happen to exist are merely accidental. The ineffectiveness in action of "ideals" is due precisely to the supposition that means and ends are not on exactly the same level with respect to the attention and care they demand.

It is, however, much easier to point out the formal contradiction implied in ideals that are professed without equal regard for the instruments and techniques of their realization, than it is to appreciate the concrete ways in which belief in their separation has found its way into life and borne corrupt and poisonous fruits. The separation marks the form in which the traditional divorce of theory and practice has expressed itself in actual life. It accounts for the relative impotency of arts concerned with enduring human welfare. Sentimental attachment and subjective eulogy take the place of action. . . .

Theory separated from concrete doing and making is empty and futile; practice then becomes an immediate seizure of opportunities and enjoyments which conditions afford with-

out the direction which theory—knowledge and ideas—has power to supply. The problem of the relation of theory and practice is not a problem of theory alone; it is that, but it is also the most practical problem of life. For it is the question of how intelligence may inform action, and how action may bear the fruit of increased insight into meaning: a clear view of the values that are worth while and of the means by which they are to be made secure in experienced objects. Construction of ideals in general and their sentimental glorification are easy; the responsibilities both of studious thought and of action are shirked. . . .

The primary problem for thinking which lays claim to be philosophic in its breadth and depth is to assist in bringing about a reconstruction of all beliefs rooted in a basic separation of knowledge and action; to develop a system of operative ideas congruous with present knowledge and with present facilities of control over natural events and energies . . . But while the solution cannot be found in “thought” alone, it can be furthered by thinking which is operative—which frames and defines ideas in terms of what may be done. . . .

In *Essays in Experimental Logic*, Dewey wrote: ⁵

Science has advanced in its methods in just the degree in which it has ceased to assume that prior realities and prior meanings retain fixedly and finally, when entering into reflective situations, the characters they had prior to this entrance, and in which it has realized that their very presence within the knowledge situation signifies that they have to be re-defined and revalued from the standpoint of the new situation.

Finally, in a specific discussion of the “logic of judicial decisions,” Dewey scored the “failure to recognize that general legal rules and principles are working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations. . . .” ⁶ He urged the courts to “trust to an experimental logic” in which “general principles emerge as statements of generic ways in which it has been found helpful to treat concrete cases.” He agreed with Holmes whose position he summed up as a protest against the sort of legal logic which adhered to “formal con-

⁵ DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC* 244 (1916).

⁶ Dewey, *Logical Method and Law*, 10 *CORN. L. Q.* 17, 26 (1924).

sistency, consistency of concepts with one another, irrespective of the consequences of their application to concrete matters-of-fact."

Now let us turn to some of Dewey's leading legal disciples and see how they have dealt with his ideas of theory and practice.

III.

Some Notable Legal Deweyites

1. *Professor Walter Wheeler Cook:*

In 1933, Cook published a brilliant article⁷ containing ideas which still have important repercussions. There Cook, a propos of legal rules, said, quoting Dewey,⁸ that:⁹

. . . whatever else they may be, generalizations are not "fixed rules for deciding doubtful cases, but instrumentalities for their investigation, methods by which the net value of past experience is rendered available for present scrutiny of new perplexities . . . they are hypotheses to be tested and revised by their further working . . . To call a generalization a tool is not to say it is useless; the contrary is patently the case. A tool is something to use. Hence it is something to be improved by noting how it works."

Cook, in that article, set out to show how courts "work" such legal tools, i.e., how they use legal rules in applying them to the facts of particular lawsuits. But he wrote as if those rules worked in the same way in upper and lower courts. To be sure, at one point,¹⁰ he frankly indicated in a footnote that there was a significant difference but that he had deliberately ignored it. This footnote appears in the following context: Cook had defined a "legal right" as but a prophecy that, if a person claims that another person should act in a certain way, and "if the one claiming the 'right' appeals in the proper way to the proper officials . . .

⁷ Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L. J. 333 (1933).

⁸ DEWEY, HUMAN NATURE AND CONDUCT 240, 245 (1922).

⁹ Cook, *supra* note 7, at 358.

¹⁰ *Id.* at 348.

these officials will bring the public force to bear upon the defendant.”¹¹ To that statement, Cook appended this footnote: “Of course, all statements as short as this oversimplify and tend to ignore the fact that if the case is contested one can never be sure, for example, what verdict the jury may bring in, etc. For the purposes of the present paper, this always present uncertainty is not of importance.”¹² Yet in no other of his writings did Cook discuss that “always present uncertainty”—an uncertainty which inheres in most trials and which is a result of a virtually unique function of trial courts, whether or not there is trial by jury.

The Trial Court's Unique Function:

For a trial court, as its name implies, conducts trials of lawsuits; an upper court does not. At most trials, witnesses appear in the trial courtroom and orally tell their stories; and usually the stories told by some of the witnesses contradict those told by some of the other witnesses. Scarcely ever do witnesses appear before, and narrate their tales to, an upper court. A trial court, by accepting as true one or other of the witnesses' stories, must determine the “facts,” as best it can, i.e., must determine what were the events—as they actually happened in the past—which gave rise to the suit. What legal rule should properly be applied in deciding the controversy ordinarily depends upon the “facts” as they are, in that and no other way, determined by the trial court.

The Trial Court's "Sovereignty":

That phase of “fact-finding”—that phase which pertains to passing upon the credibility (reliability) of oral testimony—is almost always outside the province of an upper court. Why? Because the observed demeanor of witnesses is

¹¹ Cook was here expanding Holmes' well-known definition of a “legal right.”

¹² I incline to believe that some correspondence, in 1932, between Cook and me about his and my previous writings explained the inclusion of this footnote: It was, I think, Cook's concession to my criticism.

thought (and with some reason) to supply invaluable clues to their credibility.¹³ I recently said, speaking for our court, that:¹⁴

. . . the demeanor of an orally-testifying witness is "always assumed to be in evidence." It is "wordless language." The liar's story may seem uncontradicted to one who merely reads it, yet it may be "contradicted" in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which "cold print does not preserve" and which constitute "lost evidence" so far as an upper court is concerned. For such a court, it has been said, even if it were called a "rehearing court," is not a "reseeing court." Only were we to have "talking movies" of trials could it be otherwise . . . Without doubt, the result of our procedure is to vest the trial judge with immense power not subject to correction even if misused: His estimate of an orally-testifying witness' credibility may stem from the trial judge's application of an absurd rule-of-thumb, such as that when a witness wipes his hands during his testimony, unquestionably he is lying;¹⁵ but, unless the judge reveals of record that he used such an irrational test of credibility, an upper court can do nothing to correct his error. We thus have what Tourtoulon called the "sovereignty" of the trial judge.¹⁶

Fact Discretion:

Another name for the trial court's "sovereignty" is "discretion." However, altogether too many legal thinkers¹⁷ write as if there existed no judicial discretion other than rule-discretion, i.e., the wide scope allowed to a judge by

¹³ Those clues, as the psychologists have demonstrated, are by no means infallible. However, with our present trial techniques, they do throw more light on credibility than the words of witnesses as they appear in print or writing.

¹⁴ *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F. (2d) 77, 80 (2d Cir. 1949).

¹⁵ See *Quercia v. United States*, 289 U. S. 466, 468, 53 S. Ct. 790, 77 L. Ed. 1321 (1932).

¹⁶ See TOURTOULON, *PHILOSOPHY IN THE DEVELOPMENT OF LAW* 396 (Read's trans. 1922).

There is much less of such "sovereignty" when none of the testimony is oral or when documentary evidence is such as to render the oral testimony patently incredible. Cf. *United States v. United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1949).

¹⁷ Cardozo is typical. See Frank, *Cardozo and The Upper-Court Myth*, 13 *LAW & CONTEMP. PROB.* 369, 377-78 (1948); FRANK, *COURTS ON TRIAL* 56-58 (1949).

some flexible substantive rules in applying those rules to particular facts. But the trial court has another kind of discretion—fact-discretion—which exists no matter how inflexible the applicable substantive rules appear to be, i.e., the power to choose which witnesses' stories are to be accepted as correct.¹⁸ Usually such fact-discretion, when the testimony is oral and in conflict, is virtually absolute, largely uncontrollable by upper courts.

This virtually uncontrollable fact-discretion it is that renders the trial courts the most important and powerful part of the judicial system, generally far more important and powerful than the upper courts: This fact-discretion of the trial court provides the principal explanation of the fewness of appeals from trial court decisions; it also explains the large number of affirmances of appealed decisions.

The "Always Present Uncertainty":

Not only is this trial court "sovereignty" largely beyond control, but its exercise by a trial court in any particular lawsuit, before that suit is begun or tried, is ordinarily not foreseeable. As a consequence, this "sovereignty"—not any lack of exactness or stability in the legal rules—is responsible for the greater part of legal uncertainty, i.e., the inability to predict the decisions of the great majority of lawsuits not yet begun, or, if begun, not yet tried. For, in the great majority of such suits, the testimony will be oral and conflicting. Often, too, it is unknown what trial judge or jurors will hear the witnesses; the trial court's reaction to the oral testimony (and the accompanying demeanor of the witnesses) is then especially difficult to guess.¹⁹ But, even when it is known who will be the trial judge or the jurors, a prophesy of the future response of that trial judge, or those jurors, to witnesses he or they have not yet seen

¹⁸ See references cited *supra* note 17.

¹⁹ Even after the testimony is heard, that reaction is usually by no means predictable.

and heard is obviously dubious. Here, then, is the source of that "always present uncertainty" at which Cook cast merely a footnoted side-glance.

It should be noted that this uncertainty—a trial court (not an upper court) uncertainty—is present not only (as Cook implied) when a case is to be tried by a jury, but also when it is to be tried by a trial judge sitting without a jury. I think it most important to make this point for the reason that, like Cook, many legal writers ascribe most of litigation-uncertainty to the jury.

Cook on the "New Situation":

Cook's disregard of this "always present uncertainty," his relegation of it to a footnote, led him in his 1933 article to set forth a thesis which underlies all his writings: Referring to the proper logical use of rules and principles, he said that "...life is continually developing and presenting *new and unexpected situations*, and that these cannot just off-hand be treated as 'nothing but particular instances of defined classes.'" ²⁰ Then Cook significantly added: ²¹

If all that is meant [by the quoted phrase] . . . is that *many of the cases which present themselves to a trial judge are so much like other cases already passed upon that they are disposed of in a more or less routine way without much thought*, the present writer has no disposition to disagree. But *cases of this kind do not require reflective thinking; they are disposed of by habit*. And of course by far the larger proportion of situations to which the answer seems clear never go to court at all *unless the "facts" are in dispute*. (Emphasis supplied.)

You see what that means: Cook maintained that, absent a "new and unexpected situation," the existence of a dispute about the facts does not prevent the disposition of a case "in a more or less routine way without much thought."

²⁰ Cook, *supra* note 7, at 358. Emphasis supplied. Here he was quoting Adler, *Law and The Modern Mind: A Symposium*, 31 *Col. L. Rev.* 82, 106 (1931).

²¹ Cook, *supra* note 7, at 358 n.86.

Someone may object that that statement was rather casually made, and therefore does not reflect Cook's considered position. But he had previously, in a considered manner, elaborated just that position in several other papers. Thus in 1927, he wrote:²²

This past behavior of the judges can be described in terms of certain generalizations which we call rules and principles of law. If now the *given situation* appears to the court as new, i.e., as one which calls for reflective thinking, the lawyer ought to know . . . that his case is "new" because these rules and principles do not as yet cover the situation. If they did, the case would be disposed of . . . automatically. (Emphasis supplied.)

Again in one of Cook's last papers, published in 1943,²³ in which once more he quoted Dewey,²⁴ he said that "previously worked-out generalizations—rules and principles—" cannot "be automatically applied by mere logic to 'new' situations," but that they do "enable us to dispose of routine cases which do not require thought." He continued, "And, fortunately, most situations with which we deal throughout life do not present 'new' combinations; they can be disposed of by mere habit." A "system of rules and principles . . ." can be expected "to produce 'certainty' and 'predictability' of decisions . . . in routine cases that fit into the existing pattern without any real thought." They "will give us the answer to the vast bulk of human transactions; only a small number will present new and unusual aspects."

Cook's carefully considered view, then, comes to this: The great majority of lawsuits "fit into existing patterns without real thought."²⁵ Only when, very occasionally, a suit

²² Cook, *Scientific Method and the Law*, 13 A. B. A. J. 303, 308 (1927). I should add that Cook, unfortunately, tended at times to talk the language of "behavioristic" psychology, as to which see FRANK, COURTS ON TRIAL 159-61 (1949).

²³ Cook, *An Unpublished Chapter*, 37 ILL. L. REV. 418 (1943). See also Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L. J. 457, 486-87 (1924).

²⁴ DEWEY, HUMAN NATURE AND CONDUCT 244-45 (1922).

²⁵ Cook, *An Unpublished Chapter*, 37 ILL. L. REV. 418 (1943).

presents a "situation" which is "new and unusual," in terms of accepted legal rules—either because no rule covers it or because new social conditions, or altered views of policy, successfully press for a change in an old rule—does a trial judge (according to Cook) need to resort to "reflective thinking." Other cases, where solely "the 'facts' are in dispute," and which present no rule-novelty, "are disposed of in a more or less routine way" ("automatically"), by "habit." In other words, legal uncertainty, says Cook, stems almost entirely from those few unusual cases. There is such uncertainty only because those cases involve "new and unexpected situations" which do not nicely fit into these rules. *Decisions, then, Cook would have it, can easily be predicted in any case where the sole dispute is as to the existence of certain facts.*

Had Cook been a consistent pragmatist, intent on basing his theories on observation of actualities, he would have visited trial courts to see whether, in cases where the facts alone are in dispute, future trial court decisions can be easily foretold. He would then have discovered the following: In most cases which "go to court," there is disagreement, not concerning the applicable legal rules but only concerning the facts. Ordinarily, that fact-disagreement means that, as I have said, the oral testimony of the several witnesses is in conflict, so that the trial court—a trial judge (in a jury-less case) or a jury—must (as, for instance, in the two Alger Hiss trials) determine which part of the conflicting testimony should be accepted as reliable. This ascertainment (or so-called "finding") of the facts, if properly performed, is by no means "routine," a mere matter of "habit." Properly performed, it calls for much "thinking." When Cook states the contrary, he displays a surprising belief that only if the "thinking" relates to rules and principles does it need effort.

It is surprising that Cook should so evaluate "fact-finding," since he was peculiarly aware of the protean nature of "facts," and of the way in which human attitudes go into the very "making" of many things we call "facts."²⁶ When we look at the "external world," he wrote in 1937, it:²⁷

. . . presents itself to us as a shifting, varying series of changing patterns of color, sound, odor or what not [which may be called] . . . "brute, raw events" . . . If we try to describe . . . these "brute, raw events," we discover . . . that there are an infinite number of aspects in any "situation," and that, in order to talk about it at all, we have to select from among these infinitely varied aspects those which for some reason or other we are going to talk about. In the second place we discover that in talking about the selected aspects we have to relate them in such a way as to put them under some category, some class, for which we have (or perhaps create) a verbal symbol or name . . . In other words, in making a "statement of fact" about the "given" situation . . . so as to state "what it is," I have in every case necessarily selected certain aspects, thereby [bringing] . . . the selected "data" . . . under some category. Then and only then can I say "what it is," that is, make a "statement of fact."

The "facts," Cook concludes, "are the product first of 'abstraction' from the concreteness" of the "brute, raw events," and "then of interpretation of the elements abstracted. . . ."

What Cook Ignored:

When a court engages in fact-finding, there are presumably the same two steps. But, according to Cook, as I read him, the first step—the initial "selection" from the "brute, raw events"—a court always takes "automatically." Even the second step—the "interpretation" of the "selected" matter, the act of putting it under some legal category—is, says Cook, taken by the court with no intellectual effort

²⁶ I have discussed that subject at some length in Chapter XIV of my book, *FRANK, FATE AND FREEDOM* (1945).

²⁷ Cook, "Facts" and "Statements of Fact," 4 U. OF CHI. L. REV. 233, 238-39 (1937).

except in a few "unusual" cases. I think that Cook's account of judicial fact-finding is seriously inaccurate. As appears from the following, Cook's account errs because the "selections" are more numerous and complicated:

(1) The initial selection from the "brute, raw events" is not made by the trial judge or the jury, but by the witnesses. For those events (for example, an assault or an automobile accident) occurred in the past, and not in the presence of the judge or jury. At the time of an event's occurrence, the witnesses picked out some of its features. What features they then picked out depended on their then respective capacities for correctly seeing, hearing, touching, or smelling. It is common knowledge that many observers are physiologically deficient in one or more of these capacities; accordingly, on that ground alone, the "selections," from the event, made by any one or all of the witnesses, may have been seriously in error. In addition, emotional factors, affecting the witnesses' attention, may have marred those "selections." Moreover, the witnesses' subsequent memories of those initial "selections" are often deficient, due to physiological conditions, or to emotional factors, including bias and prejudice. Also witnesses, when they orally testify at a trial about their memories of their initial "selections," again often distort their reports of those memories;²⁸ they sometimes deliberately lie; more often they distort because of bias.²⁹

(2) When, as is usually the case, the witnesses who orally testify do not agree with one another as to their respective "selections," the trial court must "select." That is, the trial court must choose to believe one part of the testimony rather than another, one witness instead of another. This choice by the trial court may be erroneous. Trial judges or juries are themselves witnesses of the wit-

²⁸ Sometimes they make mistakes through inadvertent errors in the words they use in testifying. See FRANK, *COURTS ON TRIAL* 18 (1949).

²⁹ *Id.* at 18-20, 85-86.

nesses. These witnesses of the witnesses may have been inattentive when some of the testifying witnesses testified, or may reject a testifying witnesses' testimony because of an irrational bias against him. The trial court's fallible "selection" of some part of the testifying witnesses' fallible "selections" leads, then, to that court's determination ("finding") of a fact, i.e., its determination that some event was a "fact" that actually occurred in the past.

(3) But a further selection may be necessary. All that occurred—even assuming that it has been correctly ascertained by the trial court—may not be "relevant." That is, some portion of the "facts" that are "found" may have no bearing under any legal category (legal rule or principle) which may be deemed pertinent in the case before the court. From the trial court's "selection" of facts, there are culled out, "selected," only those which are considered legally "relevant."

Now Cook's discussion of the decisional process in a lawsuit relates exclusively to this last type of "selection." Cook says nothing of the difficulties and uncertainties involved (a) in the witnesses' "selections" or (b) in the trial court's "selection" from the witnesses' testimony (i.e., the trial court's choice of witnesses to be trusted). Accordingly, Cook leaves unexamined the most baffling and disturbing components of the judicial decisional process.

An illustration will help. Suppose that, in a trial of a lawsuit, some witnesses orally testify that Shadrach hit Abednego on the nose, or that Miss Glamor wore a red hat on a certain day; other witnesses testify exactly to the contrary. In determining whether Shadrach did hit Abednego, or whether Miss Glamor did wear a red hat, the trial judge or jury must select as correct the testimony of some witnesses in preference to that of others. The selection is usually final: If such a fact has any legal significance, and if the case is appealed, the upper court will usually accept

that selection as true, and will not make its own "selection" from the conflicting oral testimony.³⁰ In that sense, it can be said that the facts are not "found." They are "made"—by the trial court.

But it is another matter whether any fact so determined ("made")—through that sort of trial court selection—has any legal significance. If the trial court's decision is appealed, the upper court may choose some of the facts thus determined ("made") by the trial court, and disregard other facts thus determined ("made"). The upper court may say that a particular "fact" (e.g., that Miss Glamor wore a red hat) is not "relevant" in this lawsuit³¹—that is, that such a fact has no importance whatever under any acceptable legal rule which bears on the decision of that particular suit.

This determination of legal relevance, this legal categorization of "facts," is very different from the trial court's selection of some oral testimony as a correct report of a "fact"—such as that Shadrach hit Abednego. Facts of that latter sort so "selected" by the trial court—and which the upper court may or may not hold "relevant"—are "given" to the upper court, are "data," for it—because the trial court has already "selected" them with finality as to their truth—has "found" them, as we usually (but inaccurately) say. If, as is the case in most lawsuits, the facts thus "given" slide easily into some established category, the upper court's decision is virtually "automatic." A less automatic process occurs in the upper court only when that court

³⁰ For convenience, I assume throughout this discussion that the trial court has committed no procedural errors, including *inter alia* the improper reception or exclusion of evidence.

³¹ Whether her hat was red may be significant in some circumstances: Suppose that in a murder trial some witnesses, whom the trial court believes, testify that a woman wearing a red hat entered the apartment of the murdered man a half hour before he was found dead. Whether Miss Glamor on that day wore a red hat may, then, be significant as justifying the inferred fact that she was the woman who entered the apartment.

believes that the "given" facts present a "new situation" calling for the creation of a new legal category.³²

The foregoing may be illustrated as follows: Suppose that Mr. Meek sues the Acme Auto Company, the manufacturer of an automobile which Meek bought from Tompkins, a dealer in Acme cars, Tompkins being an independent contractor and not an agent of the Acme Company. At the trial, some witnesses testify that Meek's hip was fractured when his car ran into a ditch as a result of the breaking of the car's axle. Suppose that the trial court, believing these witnesses, "finds" that such were the "facts," although other witnesses, whom the trial court does not believe, testify that Meek was not hurt as a consequence of that accident—that his hip was fractured when, in his house, he slipped on a rug and fell. On appeal of Meek's case, the facts, as determined ("found") by the trial court, will probably be accepted as true. But, until 1916, the upper court would have said that those facts lacked legal significance, because of the then accepted legal rule that an automobile manufacturer is not, in such circumstances, legally responsible to a man who bought his car not from the manufacturer but from an independent dealer. However, beginning in 1916,³³ most upper courts changed that rule, and held that the manufacturer, if careless in manufacturing the car, would be liable to such a buyer. Through that

³² To render this discussion complete it would be necessary to discuss at length (1) facts which a trial court infers from (2) facts which it has determined by selecting some testimony as true. Suffice it to say here that, on appeal, ordinarily an upper court will accept as true any fact so inferred by the trial court, if the inference was reasonable, although a different inference might reasonably have been made. The drawing of such inferences corresponds roughly to what Cook calls "interpretation" of the "facts." (Of course, even the facts included in (2) are inferences.)

See *Lavendar v. Kurn*, 327 U. S. 645, 66 S. Ct. 232, 90 L. Ed. 916 (1945), as to the acceptance by upper courts of both kinds of "fact" as determined by trial courts. However, upper courts do not always, in all types of cases, accept trial courts' inferred facts of the kinds included in (1). Moreover, an upper court sometimes draws factual inferences of its own from the facts "found" by a trial court.

³³ *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N.E. 1050 (1916).

change in the legal rule, facts like those "found" in Meek's case became "relevant." A court today will, without much reflection, slide such facts (once they are "found") under the new rule.

In sum, it is solely this sort of legal categorization of "given" facts which Cook, and many other legal thinkers, describe when they write of "facts" and "new situations" or "usual situations." But Cook and those other thinkers entirely, or almost entirely, ignore the earlier process of selection by the trial courts of the facts, which usually become "given" facts for the upper court. Those thinkers, that is, ignore the selection by the trial courts of some part of the oral testimony as correctly depicting the past facts. Consequently, those thinkers go seriously astray in saying that, when a legal rule or principle is well settled—when a court is sure to employ a previously contrived and accepted legal category or rule—the decision will be so "routine," so much a product of "habit," that the court's decision is easily predictable before any suit is commenced or before any trial begins.

Summarizing what I have said up to this point, these legal thinkers err in not observing the following distinction in the functions of trial and upper courts: (1) A trial court, in most cases, (a) must, by evaluating the stories of the several witnesses, select "facts" from which (b) it must then winnow out those that are the "relevant facts"; that is, by applying a proper legal rule to the whole batch of facts which it has selected as the actual facts, the trial court arrives at the legally relevant facts. (2) Generally, an upper court does not engage in the first function—that of evaluating the witnesses' credibility—but confines itself to the second function, i.e., to deciding what facts ought to be winnowed out as "relevant" in terms of the properly applicable rule. Cook et al. deal with both trial and upper courts as if both had solely the second function.

More Detailed Description of Rule-Application—The Subjectivities Involved:

My description, thus far, of the trial court's function is over-simplified. It is important to set forth more painstakingly how courts "apply" the rules.

(1) A legal rule is a conditional (or "if-then") formulation which seems to run like this: "If facts of a designated kind occur, then these legal consequences should ensue." (2) On that basis, seemingly a court, in a lawsuit, will enforce a particular rule whenever there have occurred specific facts of the kind designated by that rule. (3) But that is not true. In a lawsuit it counts for nothing whatever whether certain facts did or did not occur. The court will enforce the rule if, and only if, it "finds" that those facts occurred. (4) The trial court's "finding" is, at best, but its belief about the belief of some of the witnesses as to whether those facts occurred.³⁴ (5) The trial court, as noted above, is itself a witness—a witness of what the witnesses say in the courtroom and of their demeanor while saying it. The trial court forms its belief from thus witnessing the witnesses. The trial court—a jury or a trial judge—is human and therefore, like any witness, may err in its witnessing. (6) If the trial court, because it believes erroneous testimony, believes that the facts occurred which are necessary to invoke a particular rule, the trial court (and the upper court, if there is an appeal) will enforce that rule, although actually those facts never occurred. (7) The facts, then, for the purpose of the court's decision are not the actual facts but only the facts as thus judicially determined, although that determination may be utterly mistaken.

Even the foregoing is too superficial: (8) When a trial court publishes a "finding," a determination, that some facts

³⁴ The trial court's belief, of course, may be an inference from some of the testimony, just as testimony is merely (1) a statement of (2) a witness' memory of (3) his inferences as to (4) what he saw and heard.

occurred, it is publishing—what? Merely a statement that it believes those facts occurred. A “finding” is no more than a report of that belief. That belief is subjective. Ordinarily, no one—including an upper court—can in any way discover whether the trial court has honestly and accurately reported its subjective belief.³⁵ Wherefore an upper court must accept the “finding” as an honest, accurate report of that subjective belief. (9) An upper court will usually accept as the facts, from which the “relevant” facts are culled,³⁶ the trial court’s report of its subjective belief, whenever there is some substantial oral testimony which, if taken as true, will support that belief, although there is other substantial oral testimony which, were it taken as true, would render that belief unsupportable.

“The sovereign trial judge . . . may declare himself convinced [as to what are the facts] without saying why,” writes Tourtoulon. “He may ignore competent witnesses . . . —nevertheless his decision rests supreme.” And Tourtoulon goes on to say that the judge:³⁷

. . . is never obliged to state the real motives of his decision. If he should make a rule that he would never decide between contending parties except according to the lengths of their noses, it would be easy for him to render judgments whose reasonings were perfectly correct according to law and absolutely unassailable, and no one could ever suspect him of the true motive which caused his decision.

On this basis, one might provisionally describe judicial rule-enforcement as follows: A rule will be enforced by a trial court’s decision, and the decision will be affirmed on appeal by an upper court, (a) if the trial court reports that it has a (subjective) belief (called a “finding of facts”) that facts occurred which are of the kind designated in that

³⁵ As to how trial judges may, and that sometimes trial judges (consciously or unconsciously) do, “fudge” their reports of their beliefs, see Frank, *Say It With Music*, 61 HARV. L. REV. 921, 926-28 (1948); FRANK, COURTS ON TRIAL 168-70 (1949).

³⁶ So far as they are relevant.

³⁷ TOURTOULON, *PHILOSOPHY IN THE DEVELOPMENT OF LAW* 396, 550 (Read’s trans. 1922).

rule, (b) provided only that the record contains some substantial oral testimony which, if taken as true, will justify that belief, (c) although the record contains other substantial oral testimony which, were it taken as true, would show that belief to be unjustifiable. *The actual facts, as they occurred, are entirely immaterial. Nor does it matter that the trial court did not really believe the testimony necessary to support its belief, if the trial court (as it almost always does in such a case) preserves silence as to that disbelief.*

What Makes a Case "Unusual"—The "Personal Bent" of the Trial Judge:

Adopting for the moment this provisional description, it is evident that Cook et al. overlook the following when they speak of "usual" and "unusual" cases: In many a lawsuit, there is some part of the oral testimony which will present an "unusual situation," if the trial court reports that it believes that testimony. If, however, the trial court reports (expressly or impliedly) that it did not believe that part of the testimony, then, with that testimony accordingly disregarded, the situation is one which the upper court will treat as "usual." *"Usualness" or "unusualness" is, then, dependent on the trial court's report of its (subjective) belief in one, rather than another, segment of the conflicting oral testimony.* (Repeatedly, the upper court of which I am a member rejects as futile an appellant's argument that his case is outside the usual rules—as it would have been if the trial court's report had shown a belief in the testimony on which the appellant relies.)

Dickinson (although perhaps not a Deweyite) joins Cook in missing the point I have just made. On the "case-to-case application of well-established rules," he writes:³⁸

These personal characteristics of the judges may fairly enough be said to have no appreciable influence. . . Rules

³⁸ Dickinson, *The Law Behind Law*, 29 COL. L. REV. 285, 308 (1929).

like these possess well understood objective authority in such sense that no competent judge, whatever his temperament or intellectual equipment, feels that he has any choice about giving effect to them.

The "personal bent" of the judge, says Dickinson, is a factor only in "the selection of new rules for unprovided cases."³⁹ True enough, when the facts are undisputed. But when they are in dispute, and there is a conflict in the crucial oral testimony, the "personal bent" of the trial judge—his idiosyncratic reaction to the witnesses, to the litigants and to the lawyers—frequently plays a controlling role in his determination of the facts, i.e., in his subjective belief about the facts (or his report of that belief). If, because of this "personal bent," he so "finds" the facts that a "well-established rule" is the only proper applicable rule, that "personal bent" will nowhere appear in his findings, in his written opinion, or in his decision; but it will have had its effect nonetheless, although the case, as decided, will not be an "unprovided case." If, however, he had so "found" the facts—because of the way his "personal characteristics" were stimulated by the witnesses, etc.—that no "well-established rule" applied, then there would have been an "unprovided case."

I note in passing that, on account of this same curious overlooking of fact-disputes, Dickinson (in concert with many other legal writers) maintains that highly precise legal rules prevent litigation;⁴⁰ whereas, in truth, thousands of suits are brought yearly (auto accident cases are illustrative) where the pertinent legal rules are as precise as rules can be, and where the decisions result from the trial judges' or jurors' "personal characteristics" as they are played upon by the events at the trial.

³⁹ The phrase, "unprovided cases," which Dickinson uses to label what Cook calls "new cases," was borrowed, I think, from the discussion by Continental lawyers of "gaps" in the "law."

⁴⁰ See discussion in FRANK, COURTS ON TRIAL 52-53 (1949).

Still More Details of Rule-Application:

My provisional description of rule-enforcement should be enough, I think, to show up the weaknesses of the thesis of Cook et al. But other weaknesses remain to be exposed. For my provisional description is still too superficial. The following must be added:

(1) Frequently, trial courts do not, in any manner, state what facts they have "found," i.e., do not report their beliefs (or purported beliefs) about the facts. Certainly a jury does not do so when it returns a general verdict; and, in many jurisdictions, many a trial judge often publishes neither findings of fact nor any explanation whatever of the bases of his decisions, but merely enters laconic, unexplained judgments. In any such case, the upper court, if there is an appeal, will, if the record evidence permits, affirm the decision by assuming (without proof) that the trial court made an unexpressed finding of fact—grounded upon a belief in some part of the testimony supporting the assumed finding—which will justify the decision under a proper legal rule.⁴¹ So it is that many upper court opinions say: "There was testimony from which the trial court could reasonably have found that, etc." In any such case, for all that anyone knows or can discover, the trial court had no such finding or belief in mind. The assumed finding may be the sheerest fiction (or myth). In those circumstances, it is impossible to tell what legal rule, if any, was at work in the trial court's decisional process.

(2) Moreover, at least sometimes, when a trial judge does publicly report findings of fact, he did not begin his thinking about the decision with those or with any other findings: He began with a composite, unanalyzed, reaction

⁴¹ See, e.g., *United Clay Products Co. v. Linder*, 119 F. (2d) 456 (D. C. Cir. 1941); *National Surety Co. v. Lincoln County, Mont.*, 238 Fed. 705 (9th Cir. 1917); *United States v. Standard Accident Co.*, 106 F. (2d) 200, 203 (7th Cir. 1939); *Frayne v. Bahto*, 137 N. J. L. 109, 57 A. (2d) 520 (1948). See discussion in FRANK, *COURTS ON TRIAL* 166-67 (1949).

to the trial, a feeling, a "gestalt" or "hunch," that a particular decision would be just. He then worked backwards to formulate findings of fact which, combined with an acceptable legal rule, would justify the decision he deemed just. His "discretion" in choosing to believe some part of the oral testimony (and to reject the rest) will usually protect his findings from attack on appeal, for those findings will stand up if they comport with some of the testimony,⁴² since (as already noted) there is no way of discovering whether or not he did believe that testimony.⁴³ (I shall not stop here to explain further the operations of the trial court's "gestalt"; instead, I refer the reader to what I have said of it elsewhere.⁴⁴)

The Out-of-Court Effect of Rules—Reliance on Precedents:

As I am here dealing with courts' use of the legal rules, I put to one side the out-of-court effects of those rules, their effects on "non-litigious" behavior. That is an important subject regarding which I shall here say merely this:⁴⁵ Men, it is often asserted, usually shape their conduct in reliance on the legal rules. Gray and others suggest that such reliance is less frequent than lawyers commonly assume.⁴⁶ But sometimes some men do so rely; and the best defense of the precedent system largely rests on the desirability of not disappointing their expectations.⁴⁷ Now take the case of a man who has acted in reliance on a particular, well-settled, definite rule, trusting that, should litigation arise, the court will apply that rule to his acts. If, however, litigation does arise, will the court apply that rule to those acts? Yes, usually, if there is no dispute about those acts. But if there is such a dispute, and if some wit-

⁴² Provided it was properly received in evidence.

⁴³ See Frank, *Say It With Music*, 61 HARV. L. REV. 921, 925 (1948).

⁴⁴ *Ibid.* See also Chapter XII, FRANK, COURTS ON TRIAL (1949).

⁴⁵ See further, FRANK, COURTS ON TRIAL 268-69, 283-84, 327 (1949).

⁴⁶ *Id.* at 268-69.

⁴⁷ *Id.* at 268-70.

nesses inaccurately testify orally concerning those acts, and if the trial court mistakenly believes that inaccurate testimony, or expressly or impliedly⁴⁸ reports that it so believes, then—what? Then the rule on which that man relied will not be applied to those acts. Instances of such disappointed reliance happen every day in our courts.⁴⁹ Thus do trials often play havoc with the precedent system.⁵⁰

The "Unruly" Factors in Trial Court Decisions:

In speaking of legal rules, I have been referring to the so-called "substantive" rules. Of course, there are also "procedural" rules, which, although called "subordinate," sometimes — for instance, by excluding evidence — have marked effects on decisions. But those "procedural" rules, no more than the "substantive," do not—cannot—control such matters, influencing trial court decisions, as these: the mistakes made by witnesses in their original observation of the past events; the witnesses' mistakes of memory; their biases and prejudices; the way in which lawyers, consciously and more often unconsciously, coach witnesses; the unconscious prejudices of trial judges or jurors for or against witnesses, or litigants or lawyers. Those factors, being uncontrollable by rules, are "unruly."⁵¹

Think, for example, of the "unruly" character of a trial court's estimate of witness-credibility. As Maine said, no rules can be devised to guide a trial judge "in drawing inferences from the assertion of a witness to the existence of 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, he continues:⁵²

⁴⁸ "Impliedly" when it makes no findings and the upper court, as previously explained, assumes that the trial court so found the facts as to justify its decision.

⁴⁹ FRANK, *COURTS ON TRIAL* 327-29 (1949).

⁵⁰ *Id.* at Chap. III.

⁵¹ *Id.* at Chap. VII.

⁵² MAINE, *The Theory of Evidence* in *VILLAGE-COMMUNITIES* 295, 317-18 (1876).

. . . 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.

Wigmore has said repeatedly that there are no rules available to aid juries in giving probative value to the testimony or any part of it.⁵³ Since there are no such rules, the reactions to witnesses vary from trial judge to trial judge, from jury to jury. The facts "found," after listening to witnesses, by one trial judge or jury may be quite different from those which would be "found" by another trial judge or jury, hearing the same witnesses.

Trials Are Off the Beat of Many Legal Thinkers:

That part of the judicial job which is peculiar to the trial courts is obviously out of focus for those persons who study solely the upper courts. Those persons therefore tend erroneously to assume that the trial courts function as do the upper courts. Thence came Cook's error. Trials were off his beat—except insofar as they involved procedural rules. He turned his back on all the "unruly" aspects of trials. And so, too, do many other legal thinkers.

It would have been legitimate for Cook, in describing the decisional process in a trial court, temporarily to omit the (almost) "always present uncertainty" of trials, thereby temporarily assimilating that process to that which goes on in upper courts—provided he had later corrected his description by adding the omitted trial court uncertainty. But that Cook never did.

Cook's attitude of indifference towards trials and trial courts—an attitude unfortunately shared by many of our leading legal thinkers, including some of the younger men who are notably intrepid⁵⁴—has helped to obscure the

⁵³ See, e.g., 9 WIGMORE, EVIDENCE 503 (3d ed. 1940).

⁵⁴ I refer to Edward Levi and Felix Cohen, whom I shall briefly discuss later.

unique features of trial court decisions and their vast importance in their impact on the lives of our citizens when they "go to law," as often they must. And that wholly unpragmatic attitude is squarely opposed to all that Dewey has written of the need to observe the relation of generalizations—rules and principles—to the actual goings-on of experience.

The Ambiguity of the Word "Fact":

Cook, in discussing "facts" (and I, in discussing Cook's discussion) run into this trouble, a trouble met in thinking or writing about "facts" in any field: The word "fact" is ambiguous. It may mean, *inter alia*, one of the following:

(a) An event as it actually occurred, *i.e.*, as, in all its aspects, it would appear to omniscience;

(b) Those limited aspects of that event which human beings—with their limited capacities—are capable of learning;

(c) Those still more limited aspects of that event which some particular human beings did observe (accurately or inaccurately);

(d) Some other human being's belief about (c);

(e) That limited, selected portion of (c) or (d) which is regarded by some human being as pertinent ("relevant") to some particular and restricted human purpose.⁵⁵

Consider those divers meanings of "fact" with reference to the "facts" of lawsuits: The witnesses, being human, can never know (a). Ordinarily, they do not attain to (b) but only to (c). We often speak, incorrectly, as if the trial court's "facts" were (a) or (b) or (c). But the trial court does not get as far as (c); it must content itself with (d). Out of (d), it (or the upper court) carves (e).

⁵⁵ The "facts," in that sense, are akin to theories. See Chapter XIV, FRANK, FATE AND FREEDOM (1945); see also Frank, *The Place of the Expert in a Democratic Society*, 16 *PHIL. OF SCIENCE* 1, 5-14 (1949).

Moreover, in speaking of courtroom "facts," we sometimes mean "background facts," i.e., the so-called social and economic "data" of the sort used in the famous "Brandeis briefs." Such "facts," usually of a statistical character, are, of course, different from the kind of "fact" one means when he speaks of the "fact" that Sloan ran over Pierce, or the "fact" that Mrs. Rich was not of sound mind when she made her will. However, contrary to common belief, the "background" kind of "facts" is not free of subjectivity.⁵⁶

2. *Professor Karl Llewellyn:*

Llewellyn purports to be something of a Deweyite, as can be seen in his occasional use of Deweyite terminology. Llewellyn's failure to observe pragmatically how far his theories about courts depart from much of judicial reality is more striking than Cook's, because of Llewellyn's acknowledged steadfast refusal to study trial courts. That refusal is the more strange since almost twenty years ago, in 1930, he wrote in his important book, *The Bramble Bush*:⁵⁷

Surely it is clear that I am damned out of my own mouth. If, as I claim, what appellate judges *do* is vastly more important than what appellate judges *say*, that can only be because importance to other people, to the laymen, to the poor devils to whom they do it, appears to me the primary measure of importance, and on that basis surely you should ask me: how *many* people do appellate courts affect? For a thousand cases appealed to the court of last resort there are ten thousand which reach the intermediate court of review. For a thousand which reach the intermediate court there are ten or twenty thousand which go wholly unappealed. More; for a thousand cases on trial in the higher courts of trial . . . there are again ten or twenty thousand settled *finally* in some lesser court of trial: a small claims court, a municipal court, the court of a magistrate or a justice of the peace. Here, in this moving mountain of the cases unappealed, is the impact

⁵⁶ See FRANK, COURTS ON TRIAL 211-13 (1949).

⁵⁷ LLEWELLYN, THE BRAMBLE BUSH 48, 89-91, 143 (1930).

of the officials on society—even within the realm of litigation. . . . By my own showing, on my own premises, these are what count. I pass them by. Out of my own mouth I am damned. . . . Yet what can I do . . . What records have I of the work of magistrates? How shall I get them? Are there any? And if there are, must I search them out myself? . . . There is excuse . . . there is reason, for fixing attention on these upper courts. But is that excuse for stopping with them? . . . Ignorance, accidents of experience, favor, indolence, even corruption: how much, how often, when, and where? . . . Law *is*, to the community, what law *does*. What picture of the doing can you find in all this study of appellate courts alone?

In that same book, Llewellyn told law students to “visit the courts . . . not as spectators, but as students and critics”; and he wrote: “The man who sees line-play in the football game is the man who once tried playing on the line himself. A Harlem audience responds to niceties in tap-dancing you do not even know are hard to do.” In 1931, he complained that legal scholars had neglected the trial courts, had succumbed to “the threat of the available,” the material “available in libraries—the statute books and reports of upper-court opinions.”⁵⁸

That he had not taken his own advice and visited the trial courts, as student and critic, probably explains an astonishing statement he had made in 1929 about “facts.” He began this statement with the comment that:⁵⁹

. . . the record of the facts [on appeal] is thrice distorted. The story people tell in court may or may not reflect the actual transaction. The rules of evidence, the procedural set-up of the case, the presentation of the case in terms of lawyers’ theories, again twists the reflection of the true transaction. And the statement of the facts by the appellate judge involves again their picking over, their reorganization, this time in terms of so grouping, so phrasing them, as to make plausible the decision which the court has reached.

⁵⁸ Llewellyn, *Legal Tradition and Social Science Method* in *ESSAYS IN RESEARCH IN THE SOCIAL SCIENCES* 89, 95-96 (1931).

⁵⁹ Llewellyn, *The Conditions for and the Aims and Methods for Legal Research* in *HANDBOOK OF ASS’N. OF AMER. LAW SCHOOLS* 42-45 (1929).

Then, amazingly, Llewellyn added, "For all this, the facts break through in the record."⁶⁰ Now, on his own first assumption, that last statement simply cannot be true: When the witnesses' stories in court do not "reflect the actual transaction," how can that "actual transaction" ever "break through in the record"?

It is fairly obvious why Llewellyn wanted to believe that unbelievable statement: Were it true, he would not need to bother much about what happens in trial courts, since, by merely reading the upper court record, he would know the actual past facts.

In an article published in 1941,⁶¹ he said that "wherever a rule is clear, and plainly wise, and plainly applicable . . . it can be predicted" that a judge will follow it. The context shows that Llewellyn did not mean merely that, in those circumstances, a judge will employ such a rule, but that he meant that the judge's decision is easily to be foretold. Llewellyn qualified this remark by saying that "inquiry into what there is . . . beside the rules, seems at first blush to lead into all the vagaries of individual psychology and so into hopeless additional complications." When I read that remark, I thought that he was about to consider those "vagaries of individual psychology" which affect a trial judge's belief in some rather than other witnesses, and that Llewellyn would then conclude that the resultant unpredictability of the trial judge's view of the facts, when oral testimony is in conflict, often entails an inability to predict the judge's decision, even when one can foresee what legal rule the judge will use. I was wrong. Llewellyn said nothing of such "complications" relative to the trial judge's ascertainment of the facts.⁶² Instead, he went on to demonstrate, to his own satisfaction, how differences of "individual psychology," as between one judge and another, often "prove to be the least vital part" in prophesying decisions.

⁶⁰ *Ibid.*

⁶¹ See Llewellyn's essay in *MY PHILOSOPHY OF LAW* 183 (1941).

⁶² Or as to what I call the trial judge's "gestalt."

I could point to remarks, in other articles by Llewellyn, of similar character.⁶³ Not long ago, in a conversation with me, he defended himself on this ground: He should not be criticized for not writing of trials and trial courts, for he disclaims knowledge of that subject. Fair enough—if in each of his writings he had made such a disclaimer, i.e., had said that he had confined himself to upper court doings. But that he has not done. His intuitive genius had enabled him occasionally to sense from second-hand information (talks with trial lawyers) what many other legal thinkers have overlooked as to the impact on legal certainty of trial courts' methods of "finding" facts. But his flashes of intuitive perception can be no adequate substitute for personally seeing, and participating in, actual trials. As I have said elsewhere, Llewellyn resembles a color-blind artist attempting to paint the vivid colors of a sun-drenched autumn landscape.⁶⁴ Since there is so much of legal practice of which he is deliberately ignorant, his legal theorizing, according to Dewey's precepts and his own, must have a very limited value: Highly excellent on the upper court level, it is remote from, and foggy in relation to, the largest and most significant area of the judicial process.

3. *Professor Edwin Patterson:*

For five years, Patterson and Dewey, at Columbia Law School, jointly conducted a seminar entitled "Logical and Ethical Problems of Law," based on "readings" which they jointly prepared. In the foreword to Patterson's second edition of his own book, *An Introduction to Jurisprudence*, published in 1946, he acknowledges his indebtedness to his "former colleague," Dewey, "for the sane guidance of his philosophy." Here, then, we have a disciple of Dewey who doubtless contributed to Dewey much of the latter's knowledge of matters legal.

⁶³ See, e.g., Llewellyn, *Counselling and Advocacy Especially in Commercial Transactions*, 46 *COL. L. REV.* 167 (1946); Llewellyn, *On Reading and Using the New Jurisprudence*, 26 *A. B. A. J.* 418 (1940).

⁶⁴ See FRANK, *COURTS ON TRIAL* 75-77 (1949).

The influence of Dewey on Patterson appears in Patterson's article, "Logic in the Law," published in 1942,⁶⁵ an article which to my mind is one of the ablest expositions of that subject—on the upper court level. But it is in Patterson's book, *An Introduction to Jurisprudence*, that he has set forth extensively his notions of the judiciary. In that book, which consists of 223 pages, all the passages, scattered here and there, which treat of trials, trial courts, trial judges, juries, witnesses and trial court "finding" of fact, total up to about three pages.

The most revealing passage of that sort is the following:⁶⁶

In the 1920's one sometimes heard the sophisticated question, was X convicted of murdering Y because he did the deed, or because certain witnesses swore that they saw X run out with a smoking revolver from a room in which Y was found shot to death by such a revolver? Such questions imply cynical doubts as to the reliability of proof in some cases, but do not deny that reliable knowledge of what X did may be obtained by inference.

Now why does Patterson speak of such doubts as "cynical"? I suspect that the reason is this: He finds such doubts unpleasant—and therefore wants to give a bad name to the doubters. The truth is that usually a conviction of murder does signify, at best,⁶⁷ no more than that the trial judge or jury did believe the testimony of some, rather than other, witnesses. And the further truth is that those witnesses who were believed by the trial judge or jury may have made mistakes in their observation of the events which they reported in their testimony at the trial, or mistakes in their recollections of their observations; or they may have perjured themselves; or they may have been so prejudiced against the defendant that unconsciously they twisted their testimony in a manner unfavorable to him.

⁶⁵ 90 U. OF PA. L. REV. 375 (1942).

⁶⁶ PATTERSON, *AN INTRODUCTION TO JURISPRUDENCE* 30 (2d ed. 1946).

⁶⁷ I say "at best" because, thanks to the trial court's "sovereignty" and the "gestalt," the decision may have been undiscoverably unrelated to the evidence.

Borchard's important book, *Convicting the Innocent*, published in 1932, should persuade any reader that such mistakes, and perjury and prejudices, have often led to wholly erroneous convictions. Moreover, in countless of civil suits, like factors have led to decisions against men who should have won their suits, decisions which have brought about financial ruin to the losers. Patterson's characterization of the resultant doubts as "cynical" indicates his unwillingness to explore the possibilities of inventing detailed practices by which the number of such tragedies may be substantially reduced—an unwillingness which, almost surely, is related to his failure to study carefully the trial courts.⁶⁸ Had he carefully studied them, he would have learned much about non-rational factors in the decisional process which do not reveal themselves in upper court opinions. His notion of legal logic would have been far more circumspect.

In an article published in 1942, Patterson said:⁶⁹

The selectors with which the legal inquirer takes "facts" from or through his sense stimuli, and by which he shapes facts into the "operative facts" of the law, are derived not alone from his previous legal experience and from his legal education, but also from his total experience and from his *peculiar drives and preferences*. No fixed legal categories or concepts can wholly isolate this process of selection and shaping; on the contrary, *the influence of any inquirer's biological and social matrices is an inevitable limitation on the "purity" of his reasoning*. Hence the total personality of the judge (or administrative adjudicator) can be a guaranty of good government no less than the quality of the laws which he seeks and purports to apply. An *inquiry as to the prejudices, or ideals, of a prospective judge* is thus no less relevant than an inquiry into his moral character or professional competence. (Emphasis supplied.)

⁶⁸ In 1947, Patterson noted that "American juristic theory during the past three decades has concentrated upon the judicial process, especially the judicial process of appellate courts. . . ." See Patterson, *Pound's Theory of Social Interests* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 558, 567-68 (1947). But he has not followed up that lead.

But he has not followed up that lead:

⁶⁹ Patterson, *Logic in the Law*, 90 U. OF PA. L. REV. 875, 893 (1942).

Patterson's reference to "biological" as well as "social" matrices, and to a judge's "peculiar preferences and drives," seemed to mean that he fully recognized all the "subjective" factors affecting decisions.

But, in a more recent publication, he apparently backs away from such an approach, perhaps because his discussion of "jurisprudence" and of the judicial process almost completely ignores the trial court. At any rate, in the 1946 edition of his book, in discussing the suggestion "that the decisions of judges are influenced by individual personality factors," we find him saying: "In its extreme form this view predicated the importance of the judge's digestion upon his decision. Since judges suffering from indigestion do not have any uniform predilections, as far as I know, this theory never got very far." For that reason, Patterson goes on to consider "a more moderate view," i.e., "that a judge's views on economic, moral and social questions influence his decisions." Patterson surmises that "judges are influenced, in a good many cases, by their views on economic and social questions." But, he argues, these influences principally affect decisions relating to constitutional issues which are "somewhat legislative in character" and therefore "not typical of the judicial process as a whole"; moreover, he says, "even in such cases the influence of political and economic beliefs is not wholly inescapable." He concludes this discussion thus: "In private law cases, the occasions when the judge's conservative or liberal political or economic views are determinative, seem much less frequent." Let us probe Patterson's 1946 attitude:

(1) He says, in effect, that no inquiry into the influence on decisions of judge's "individual personality factors" can "get very far"—because those individual factors do not reveal "any uniform predilections." You see his trouble? *He is looking for uniformities.* If such an inquiry discloses—as it almost surely will—that uniformity is often absent in trial judges' and jurors' reactions to conflicting

oral testimony, Patterson apparently loses his interest in the inquiry, shies away from it. Why? Because (as this 1946 treatise elsewhere discloses) Patterson regards a considerable amount of "generality" as an essential of a sound and sane judicial process. Since such a study of un-uniform trial court factors, which influence judicial "fact-finding" especially, threatens to reveal un-uniformity (an absence of "generality"), that study is distasteful to Patterson. It cannot "get very far"—except to disclose sources of considerable legal uncertainty. But should not a conscientious theorizer conclude that he is indeed "getting far" when he learns that the subject matter of his theorizing is not certain (as he had assumed), but uncertain? It would seem imperative for a Deweyite to know the real nature of what he is theorizing about.

(2) We may assume (and I happen to believe) that Patterson is correct in saying that the influence of "political and economic" beliefs, even in constitutional cases, is "not wholly inescapable." We may also assume, *arguendo*, that beliefs of that sort much less frequently influence decisions in "private law cases." But precisely in "private law cases," individual trial judges, in "finding the facts," where the testimony is oral and conflicting, are often affected by their peculiar sub-threshold "preferences" and "prejudices" of a kind that do not have a "political" or "economic" character, and that are far less escapable.⁷⁰

In passing, I note how cavalier is Patterson's method of discussing those subliminal, non-rational, factors: He refers solely to the influence of the judge's condition ("what the judge had for breakfast") on his decision. Even that sort of influence I think one should not laugh off: A trial judge's dyspepsia or eupepsia may sometimes affect his attention to the witnesses, and consequently his "fact-finding"—and

⁷⁰ I shall not bother here to state again how those preferences and prejudices may yield decisions which, undiscoverably, are not related to the evidence.

thus his decision.⁷¹ But forget the judge's alimentary canal. Can one, if he is an accurate observer, ignore the trial judge's prejudices (often unconscious) for or against particular witnesses—prejudices not caused by the state of his digestion—on his conclusion as to what are the facts of the case? ⁷²

In one brief paragraph of his jurisprudence book,⁷³ Patterson refers to the witnesses' selections made in the course of their observations of events, and notes that these selections account for the "unreliability of the testimony of witnesses." All he says, however, on that important subject is that "the rules of judicial proof are designed to minimize errors due to this 'subjective' element." But he gives no explanation of how that aim is, or could be, achieved—how, for example, any rules can eliminate honest errors in a witness' observations. Patterson then proceeds thus: "From the narratives of lay witnesses' perceptions, the tribunal has to make further selections of those which have legal relevance." Like Cook, he blithely glides over a kind of "selection" by the trial court which is equally important but more difficult to deal with: the "selection," as between conflicting narratives of divers witnesses, of some part of the testimony as a reliable reflection of the past facts as they occurred, a "selection" which is clearly "subjective" and often leads to errors that no "rules of judicial proof" do or can minimize. Like Cook, Patterson depicts the trial court's "selection" as one concerned solely with picking out "relevant" facts, as if the "relevant" and "irrelevant" facts were "given" to the trial court.

What Patterson and Cook overlook is this: When a trial court believes mistaken testimony, the "facts" from which it winnows out the "relevant facts" do not match the actual facts. In those circumstances, the decision does not relate

⁷¹ See FRANK, COURTS ON TRIAL 162 (1949).

⁷² *Id.* at 150-56.

⁷³ PATTERSON, AN INTRODUCTION TO JURISPRUDENCE 30-31 (2d ed. 1946).

to what actually happened, and injustice results. Injustice also results when crucial evidence, which reflects the actual facts, and which the trial court might have believed, is not brought into court, because the party whom that evidence would have favored did not have sufficient funds to obtain that evidence, i.e., could not afford (a) to pay an investigator to locate a missing witness or document or (b) to hire a handwriting expert, a mining engineer or an accountant.⁷⁴

Patterson's reference to "judicial proof" might have set him to asking, with Wigmore, of what such proof consists. Wigmore's huge volume on that subject⁷⁵ would have taught Patterson, by a wealth of illustrations, that judicial proof usually means at best a trial judge's or jury's fallible guess about the facts—a guess based (sometimes intelligently and sometimes not) on the trial judge's or jury's reaction to the witnesses' fallible reports of their fallible recollections of their fallible observations of the actual facts. Wigmore, who began with the hope of discovering or inventing a "science" of judicial proof, confessed that, after many years, he was forced to conclude that such a science was unattainable, because of the ineluctable subjectivities involved in the course of proving facts in a courtroom.⁷⁶

The Relevance of the "Irrelevant":

How Patterson's concentration on "relevance," and his neglect of subjectivity in the "selection" by the trial court of some part of the conflicting oral testimony, narrow Patterson's vision of courtroom realities shows up in one of his writings.⁷⁷ There, referring to an article by Holmes,⁷⁸

⁷⁴ FRANK, COURTS ON TRIAL 94-99; Frank, *White Collar Justice*, Sat. Ev. Post, July 17, 1943, p. 22, col. 1; Frank, Book Review, 56 YALE L. J. 594 (1947).

⁷⁵ WIGMORE, PRINCIPLES OF JUDICIAL PROOF (1913).

⁷⁶ See FRANK, COURTS ON TRIAL 49 (1949); FRANK, IF MEN WERE ANGELS 93-94 (1942).

⁷⁷ Patterson, Book Review, 41 COL. L. REV. 562, 564 (1941).

⁷⁸ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897), reprinted in HOLMES, COLLECTED LEGAL PAPERS 166, 167 (1920): "The reason why a lawyer [in stating his case] does not mention that his client wore a white

he says that "what the plaintiff was wearing," at the time of the occurrence of past events in issue in a lawsuit, has "no place in the courtroom, because 'the public force will act in the same way'" no matter what "the plaintiff wore."⁷⁹ Now had Patterson studied trials, he would have known that, for failure (often intentional) of the opposing lawyers to object,⁸⁰ such "irrelevant" facts frequently do get before the trial courts and do influence their decisions. "Irrelevance," writes Judge Bok, an outstandingly able trial judge, "can be highly enlightening." And he continues:⁸¹

The witness who starts with what she had for breakfast and remembers it was Thursday because her husband's sister had come down with the measles when she shouldn't if she had only gone to the doctor, the one with glasses—should be a delight to the judge's heart and make the jury feel at home. Behind this leisurely sweep of incident they can follow her as they please, and it will give them at least her barometric pressure at the time when she signed the note at the bank without reading it. After listening to enough of it, any idiot would know that she was an accommodation endorser who had done it to help her husband and had got nothing out of it herself, but if the judge or jury are presented with a dry handful of disconnected facts they can't be so sure.

Moreover, if Patterson had studied trials, he would have noticed that, even if a plaintiff's attire in the past, before the trial, may be unimportant, nevertheless the plaintiff's appearance—sartorial or otherwise—at the trial, may sub-

hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head."

⁷⁹ It may sometimes have "legal relevance," as in the case of Miss Glamor's red hat, when some witnesses testify that they saw a woman wearing such a hat near the scene of a murder.

⁸⁰ Most of the exclusionary rules are waived if not urged. An experienced trial lawyer will often, in a jury trial, refrain from objecting to "inadmissible" testimony because the objection may prejudice the jury against his client.

⁸¹ Bok, *I Too*, NICODEMUS 322 (1946). Compare this passage with the quotation from Holmes, *supra* note 78; and see Patterson, *Logic in the Law*, 90 U. OF PA. L. REV. 875, 894 (1942): ". . . Mrs. Grundy on the witness stand will insist upon telling many details which the judge and the lawyers regard as trivial."

stantially affect the attitude of the jury or trial judge toward the plaintiff's testimony. In terms of the legal rules, that appearance lacks significance, i.e., is "irrelevant." But when that appearance induces the trial judge or jury to accept that testimony as true, it may influence the "finding" of "facts," and consequently determine the decision.⁸² Experienced trial lawyers do not disregard such factors. But those factors are out of bounds in Patterson's "jurisprudence" which overlooks the "subjective" element in trial courts' "selections" of the "facts."

Recalling Patterson's close association with Dewey, one may surmise that Dewey's own failure (which I shall discuss later) to exploit more fruitfully, in respect of the courts, his own notions of theory and practice, stems from this: Patterson did not call Dewey's attention to trial courts as invaluable judicial laboratories in which one can see for himself the way in which legal rules and principles are frequently frustrated through their application to mistakenly "found" facts.

4. *Mr. Justice Cardozo:*

Cardozo often cited Dewey. But like Cook, Llewellyn and Patterson, he gave little heed in his extra-judicial writings to trial courts, because, perhaps, when at the bar he had been principally an appellate lawyer, and when on the bench—except for a few months—an appellate judge. As I have elsewhere tried to do so at length,⁸³ I shall not here tell how, because Cardozo was infected with appellate-court-itis, his description of the judicial process, superlative with respect to upper courts, is astonishingly misdescriptive of the much larger and more important part of that process which goes on in the trial courts.

⁸² Or may yield a decision, I repeat, undiscoverably unrelated to the evidence.

⁸³ Frank, *Cardozo and the Upper-Court Myth*, 13 LAW & CONTEMP. PROB. 369 (1948).

Suits won or lost solely on the facts, where the legal rules are clear, "make up the bulk of the business of the courts," said Cardozo. The decisions in those cases, he wrote, are "important for the litigants concerned in them. . . . But they leave jurisprudence where it stood before." It "remains untouched."^{83a} In other words, for Cardozo "jurisprudence" (i.e., legal theorizing) has no interest in the methods practiced in ascertaining the "facts" in the "bulk" of lawsuits—although avoidable defects in those methods may send innocent men to the chair or financially ruin others, through judgments resulting from mistakes in fact-finding.

It is sometimes thought that Cardozo coined the phrase "judicial process." He did not.⁸⁴ What he did, alas, was to use it so that (contrary to previous usage) it seemed to denote nothing but the appellate court process. Consequently, he described "discretion" so as to exclude fact-discretion, the distinctive "sovereignty" of the trial court.⁸⁵

5. *Some Younger Legal Thinkers:*

I said above that some of our younger and more intrepid legal thinkers share Cook's unwillingness to study trials. Consider, for example, Felix Cohen. He should not be classified as a devout disciple of Dewey. However, in his remarkably fine paper, "Transcendental Nonsense and the Functional Approach," published in 1935,⁸⁶ Cohen cites Dewey with some approval; and he accepts Holmes' "pragmatist" position concerning legal rules.⁸⁷ In that paper, he discusses several ways of dealing with "facts."⁸⁸ But neither there, nor (as far as I know) elsewhere, does he ever refer (1) to the problem involved in a trial court's "selection" of what are the "facts" from the conflicting "selections" made by

^{83a} CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 163-64 (1921).

⁸⁴ *Id.* at 373 n.23.

⁸⁵ *Id.* at 377-78.

⁸⁶ 35 *COL. L. REV.* 809 (1935).

⁸⁷ *Id.* at 827-28.

⁸⁸ *Id.* at 829 *et seq.*

the several disagreeing orally-testifying witnesses, or (2) to the subjectivity of trial court fact-finding, or (3) to the trial court's "gestalt."⁸⁹

In a more recent paper,⁹⁰ Cohen says that some legal thinkers "have denied that there can be any certainty or objectivity in law, but the most energetic of these, upon donning judicial robes, has had to profess an appeal to something more than the uncertainties of his own subjective emotions when he has reversed the decision of a lower court." In the first half of this sentence, Cohen writes of the "certainty or objectivity" in "law," not in decisions; and in the second half, when he does mention a decision, it is, significantly, that of an upper court judge, not that of a trial court.

In this paper, Cohen correctly states that even in "science" there is "subjectivism," because "there is a subjective element in judgments of fact, cold, light, color, weight, pressure and everything else that is the object of human experience," and because "no scientific statement would have any meaning if it could not be tested by such subjective personal experience as our experiences of color, pressure, etc." But, he says:⁹¹

What saves science from being a planless succession of day-dreams is that there are connections among our own and other people's subjective experiences which are not always too abstruse for human understanding. Consequently, men, or at least some men, are able to think about, anticipate, and make conscious use of a world beyond the egocentric here-and-now. Such understanding and manipulation go beyond merely subjective impressions. . . .

True enough. The so-called "inter-subjective" impressions⁹² often can be treated as "objective" facts, for practical pur-

⁸⁹ See further discussion of Cohen in FRANK, COURTS ON TRIAL 148-50, 155 (1949).

⁹⁰ Cohen, Book Review, 61 HARV. L. REV. 1469 (1949).

⁹¹ *Id.* at 1470.

⁹² See, e.g., FRANK, COURTS ON TRIAL 189 (1949).

poses, in science and elsewhere.⁹³ But Cohen has never faced the difficulty of applying that conclusion to fact-finding by trial courts: The varying subjective impressions (1) of the witnesses and (2) of trial judges or jurors, since those impressions are hopelessly "egocentric," cannot be checked against one another in a way even remotely like that used by scientists when testing their respective subjective impressions.⁹⁴ Many of the subjective impressions encountered in trials are therefore not "inter-subjective."

Although Cohen, in his writings, has several times quoted Tourtoulon's book, *Philosophy in the Development of Law*, I see no sign that Cohen's legal thinking has been affected by the following cogent passages in that book:⁹⁵

In order to apply the law to the fact, the judge ought to substantiate the fact. He should substantiate material facts often difficult to establish, and psychological facts almost impossible to investigate. Were there but one litigation to be decided in the whole course of existence, it is not at all certain that the most clear-sighted man could gain a perfect knowledge of all the elements of the fact which he was to evaluate. But, taking into consideration the number of matters which pass under his eyes, the most conscientious judge can have only an extremely vague knowledge of each of them. . .

⁹³ It should be noted, however, that there are several kinds of "subjectivity." See FRANK, COURTS ON TRIAL 187-88 (1949): "I have made much use of the word 'subjectivity.' Disputations about 'subjectivity' and 'objectivity' are never-ending. I cannot here discuss that subject at length, but I make these tentative and elliptical suggestions. Man encounters at least five kinds of 'subjectivities': (1) those which stem from the divers social heritages of divers social groups; (2) those due to the grammatical structures of particular languages; (3) those arising from physical location (Russell calls them 'physical' subjectivities); (4) those which derive from the unique ('private') attitudes of particular persons; (5) those which inhere in the finite, limited, capacities of all human beings. The first and second (which are related) can be eliminated to some considerable extent, perhaps some day completely. The third has been successfully eliminated in part by modern physicists (Einstein & Co.). The fourth would seem to be largely unconquerable. The fifth, of course, will never be eradicated; one recalls Bacon's statement that men are uniformly 'mad,' and Santayana's that all of us are victims of 'normal madness.'" See also Frank, *The Place of the Expert in a Democratic Society*, 16 PHIL. OF SCIENCE 1 (1949).

⁹⁴ See FRANK, FATE AND FREEDOM 333-34 (1945).

⁹⁵ See TOURTOULON, *PHILOSOPHY IN THE DEVELOPMENT OF LAW* 395, 548, 556 (Read's trans. 1922).

Juridical theory is more particularly represented by the law school, and one who teaches there may be considered as the type of theorist. He acquires his knowledge of law by study, reflection and criticism of the reflections of others. By the study of cases and judicial decisions, he may descend from the general to the particular; but he never knows the case in all its details, he never has a human being explain himself to him and recount to him, with all the particulars, the circumstances, of his dispute. He can only know what the judge has retained and chosen,—a few fragments from a bulky record. . . In reality, the judge may . . . by inexact appraisements of the facts, always extricate himself from the restraint of the law.⁹⁶

Professor Edward Levi (educated at Yale Law School where he imbibed pragmatist attitudes) has recently published *An Introduction to Legal Reasoning*,⁹⁷ which is a daring and penetrating exposition of judicial logic—but entirely on the upper court level. He maintains that “change in the rules is the indispensable dynamic quality of law.” This change, he writes:⁹⁸

. . . occurs because the scope of a rule of law, and therefore its meaning, depends upon a *determination of what facts will be similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process.* . . . The problem for the law is: When will it be just to treat different cases as though they were the same? A working legal system must therefore be willing to *pick out key similarities* and to reason from them to the justice of applying a common classification. . . . The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas. (Emphasis supplied.)

You see how he takes for granted that the facts of each case are “given,” and regards the court’s task as solely that of deciding “similarity or difference” in such “given” facts. His valuable discussion of “legal reasoning” says nothing of the trial court’s ascertainment of what are the “facts,”

⁹⁶ See also quotation from Tourtoulon, *supra* note 37.

⁹⁷ Originally published in 15 U. OF CHI. L. REV. 501 (1948).

⁹⁸ LEVI, INTRODUCTION TO LEGAL REASONING 2 (1949). See further as to Levi in FRANK, COURTS ON TRIAL 320-21 (1949).

through its choice of one witnesses' story rather than that of another; nor does he deign to mention the subjectivity of the trial court's reaction to the witnesses, or the trial court's "gestalt."⁹⁹

IV.

The "Unclassified Residuum"

William James once referred to the "unclassified residuum" consisting of "phenomena unclassified within the system of ideas" prevalent in any particular field. To those who adhere to such a prevailing idea-system, said James, such phenomena are "paradoxical absurdities." If, James continued, "there is anything which human history demonstrates it is the extreme slowness with which the ordinary academic . . . mind acknowledges facts to exist which present themselves as wild facts, with no stall or pigeon-hole, or as facts which threaten to break up the existing system."¹⁰⁰ So it is as to the facts about trial court "facts." The existing system of ideas about the courts, a system dear to the Deweyites, contains no stall for these "wild facts."

It is true that, in the writings of the Deweyites, and of some other legal thinkers largely devoted to that system, one will discover, here and there, hints about the effects of uncertainties in trial court operations.¹⁰¹ But of such hints

⁹⁹ Levi quotes Aristotle but does not refer to Aristotle's elaborate discussion, in the *Rhetoric*, of the effect of emotional appeals on court's decisions, a discussion which I shall consider later.

¹⁰⁰ JAMES, *THE WILL TO BELIEVE* 299-300 (1897).

¹⁰¹ Interesting here is Thomas Reed Powell. In 1922, discussing upper court decisions, he said: "I have the glimmering of an idea which I cannot express, that what is settled [by any such decision] is not what we assume it to be. Every decision of an appellate court is a judgment on a hypothetical state of facts. The judge no longer cares what is really so. He is interested only in what appears on the face of the record from the trial court. We have an elaborate and in many respects an artificial mechanism for transmitting the deeds of man into printed record. In so far as the process of transmutation conforms to the required procedure, the record is final for the purpose of the law. But it remains at best a hypothesis. The further issues raised by the hypothesis may be said to be settled when they are finally passed by the court

one can say what Carl Becker said of the idea of "evolution" in Montesquieu's *Spirit of Laws*:¹⁰²

Very true it is that the idea was there in his own manuscript. But the significant thing is that Montesquieu made little use of it, that no one (Leibnitz excepted) made much use of it. The idea was present in the eighteenth century, but no one made it welcome; it wandered forlornly about in the fringes of consciousness, but it never really got across.

To put it somewhat differently: Many legal thinkers seal off (a) whatever thinking they do about trial court realities from (b) their thinking about the judicial process in general. The case of Roscoe Pound is here especially noteworthy: (1) More shrewdly and correctly than the legal Deweyites, he has written of the way the "personal element" in trial judges' decisional processes interferes with the supposed and outward-appearing certainty in the application of legal rules.¹⁰³ He has, indeed, lauded trial by jury just because jurors are able to, and often do, pay no attention to the legal rules which the trial judges tell them they must apply.¹⁰⁴ (2) Yet Pound has repeatedly said (with loud applause from many other legal writers) that, in litigation concerning "property" or "commercial transactions," legal certainty prevails since (says Pound) decisions in such suits not only should but do strictly conform to precise legal rules.¹⁰⁵

Those two themes are irreconcilable. In litigation involving "property" or "commercial transactions," as in other

above. There is an actual solution of a hypothetical issue. Some one must pay money or go to jail because of an opinion on an assumed set of facts." Powell, *How Philosophers May Be Useful to Society*, 31 INT. J. OF ETHICS 289, 298 (1922). However, Powell never sedulously followed up that "glimmering of an idea."

¹⁰² BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHERS* 97 (1932).

¹⁰³ See Pound's writings cited and quoted in FRANK, *IF MEN WERE ANGELS* 341-45 (1942), and in FRANK, *LAW AND THE MODERN MIND* 208-16 (1930).

¹⁰⁴ Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18-19 (1910).

¹⁰⁵ See FRANK, *IF MEN WERE ANGELS* 341-45 (1942), for pertinent citations of and quotations from Pound's writings.

kinds of litigation, trial courts (whether jurors or trial judges in non-jury cases) often believe (or, expressly or impliedly,¹⁰⁶ report that they believe) perjurious or otherwise erroneous testimony about the facts.¹⁰⁷ No less in such lawsuits than in others are jurors heedless of the legal rules. How, then, can it be said that in this particular type of lawsuits the "personal element" is inoperative and does not yield uncertainty in the decisions? Pound here has walled off his shrewd observations of trial court uncertainties from the balance of his legal thinking. The result is most misleading.

When discussing legal certainty in any sort of litigation, it is seriously misdescriptive to describe merely the certainty of the legal rules the courts employ and to neglect to state that such rule-certainty may well have no correlation with decision-certainty. Men who invest in "property," and who are advised that certainty in the legal rules protect them, should litigation arise, will be little solaced when they lose their investments through court decisions based on trial court's mistakes of fact or which result from juries' failure to follow trial judges' instructions about the rules.¹⁰⁸

Even more acutely than Pound have Maine¹⁰⁹ and Tourtoulon¹¹⁰ perceived the vagaries and baffling uncertainties of trial court "fact-finding." But they, too, have so compartmented that subject that the major part of their legal writings is unaffected by it.

¹⁰⁶ See my earlier discussion as to "impliedly."

¹⁰⁷ If anyone thinks that the parol evidence rule can prevent the legitimate introduction of oral testimony in such cases, he should read Corbin, *The Parol Evidence Rule*, 53 YALE L. J. 603 (1944).

¹⁰⁸ See Chap. XXIV, FRANK, COURTS ON TRIAL (1949).

¹⁰⁹ See MAINE, LECTURES ON THE EARLY HISTORY OF INSTITUTIONS 48-50 (1875); MAINE, *The Theory of Evidence in Village-Communities* 311-12, 318 (4th ed. 1871); cf. FRANK, IF MEN WERE ANGELS 116-17 (1942).

¹¹⁰ Tourtoulon's book, except for the few passages I have cited, reads as if the problem of trial court fact-finding did not exist.

Distorted Views of Legal Certainty and Uncertainty:

The best way to measure legal certainty is to consider a well-trained lawyer's ability to tell his client how a court will decide a lawsuit. Most legal thinkers (including the four legal Deweyites, Cook, Llewellyn, Patterson and Cardozo) grossly over-estimate the quantum of legal certainty, because they have not recognized that the lawyer's guessing-power varies with the stage at which his forecast is requested. Let us take the case of a question about a future court decision relative to a contract:

(1) When the client, having just signed a contract, asks what are his legal rights pursuant thereto, at that time neither the client nor the other party to the contract has as yet taken any steps under the contract. The lawyer's prediction at this stage must include a hazardous guess as to what each of the parties will do or not do in the future. The prediction must frequently be so full of if's as to be of little practical value.

(2) After events have occurred which give rise to threatened litigation, the client may inquire concerning the outcome of the suit, if one should be brought.

(a) Before the lawyer has interviewed prospective witnesses, his guess is on a shaky foundation.

(b) After interviewing them, his guess is somewhat less shaky. But unless the facts are certain to be agreed upon, the guess is still highly dubious. For, if (as is usual) the witnesses are to testify orally and will disagree about what they saw and heard, seldom can anyone guess how the trial judge or jury will react to the testimony.¹¹¹ Especially is the guessing at large, if the lawyer does not know what trial judge will sit, should the trial be juryless; it is still more so, if the trial be by jury, since the lawyer cannot know what persons will be the jurors.

¹¹¹ And, as well, to the litigants and lawyers.

(3) After the trial, but before decision, the lawyer's prophesy may be somewhat better, for he is now guessing the reaction to the testimony¹¹² of a known trial judge or jury observed in action in the particular case. Yet that guessing is often none too easy, even so.

(4) After trial and judgment by the trial court, the guess relates to the outcome of an appeal, should one be taken. It therefore usually relates solely to the rules the upper court will apply to the facts already "found" by the trial judge or jury. At this stage, a competent, trained lawyer can often predict with accuracy. Only this last prediction situation, no others, do most legal thinkers discuss.

Surely such discussion is altogether too restricted. And surely those interested in the judicial process ought not to disregard such non-rule factors, producing uncertainties in decisions, as, inter alia, the following: perjured witnesses, coached witnesses, biased witnesses, witnesses mistaken in their observation of the facts as to which they testify or in their memory of their observations, missing or dead witnesses, missing or destroyed documents, crooked lawyers,¹¹³ stupid lawyers, stupid jurors, prejudiced jurors, inattentive jurors, trial judges who are stupid or bigoted or biased or "fixed" or inattentive to the testimony. Nor ought humane men ignore the fact that a party may lose a suit he should win because, in preparation for trial, he cannot afford to hire a detective, an engineer, an accountant, or a hand-writing expert.¹¹⁴ Are judges and lawyers to give no heed to such matters, and, because of such heedlessness, to do nothing to improve, so far as practicable, the methods of fact-finding in trial courts?

¹¹² See the preceding footnote.

¹¹³ See ROVERE, HOWE & HUMMEL: *THEIR TRUE AND SCANDALOUS HISTORY* (1947).

¹¹⁴ Frank, *White Collar Justice*, *Sat. Ev. Post*, July 17, 1943, p. 22, col. 2; Frank, *Book Review*, 56 *YALE L. J.* 589 (1947); FRANK, *COURTS ON TRIAL* 94-99, 105-06 (1949).

Moral Irresponsibility of the Arm-Chair Jurists:

Because many modern writers on legal theory have seldom, if ever, practiced in trial courts,¹¹⁵ they resemble the Roman juriconsults (during the closing days of the Republic and up to the time of Diocletian). Those juriconsults, who gave legal opinions based upon hypothetical statements of facts, looked down upon the practicing advocates (the "orators") who tried lawsuits.¹¹⁶ Yet it was not these arm-chair theoretical jurists but the advocates—like Cicero—who, using the tools of their craft, appeared in court and won (or lost) the suits, and whose activities thus vitally affected the fate of litigants. Cicero, for instance, boasted that he had cast dust in the eyes of the jury in the case of Cluentius. But the juriconsults did not care whether, by such or other means, innocent men were convicted or guilty men escaped. The modern "juriconsults"—Cook, Patterson, Llewellyn, et al.—like their Roman predecessors, pay no attention to the way in which the trial courts reach their determinations of fact, although the decisions, both of trial and appellate courts, often depend on those determinations.

There is a moral irresponsibility in this aloofness from practice. To the legal Deweyites, and many other legal thinkers, there might be applied these words of Dewey:¹¹⁷

Ends separated from means are either sentimental indulgences or if they happen to exist are merely accidental . . . Construction of ideals in general and their sentimental glorification are easy; the responsibilities both of studious thought and of action are shirked. Persons having the advantage of positions of leisure and who find pleasure in abstract theorizing . . . have a large measure of liability for a cultivated diffusion of ideals and aims that are separated from the conditions which are the means of actualization.

¹¹⁵ Cardozo is only an apparent exception.

¹¹⁶ See, e.g., SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* 43-45, 53-55, 108-09, 268 (1946).

¹¹⁷ DEWEY, *THE QUEST FOR CERTAINTY* 279, 281-82 (1929).

Trial Court Mistakes Frustrate Ideals:

Legal rules, if well-contrived, embody important social policies and moral ideals. But those policies and ideals are not actualized when, due to a mistake in fact-finding, such legal rules are applied to facts that never happened. Some of those mistakes could be prevented through improvements in our method of trying cases and in the education of future trial judges. But the improvements in rule-techniques to which the legal Deweyites are obsessively devoted will not prevent the tragedies resulting from avoidable trial court mistakes in ascertaining facts. When a court applies an impeccable rule to non-existent facts—as when it sends a man to jail for a theft he did not commit, or when it enters a huge money judgment against a defendant who, in actual fact, did the plaintiff no harm—the court's performance resembles that of a surgeon who, because of mistaken identity, uses perfect surgical techniques to cut off the leg or to remove the stomach of a healthy patient. Those who profess to be interested in the health of our citizens would be alert to prevent such surgical blunders if they were likely often to occur. But most of the legal Deweyites have been indifferent to equivalent judicial blunders. Those men have sentimentally glorified the ideals and shirked the action necessary to realize those ideals.

Two-Dimensional Legal Thinking:

As I have elsewhere suggested,¹¹⁸ legal thinking which disregards trials is flat, two-dimensional; in such thinking, what goes on in the third dimension is out of sight and therefore out of mind; only when trials are included does the thinking become, more accurately, three-dimensional.¹¹⁹ The legal Deweyites portray (with much fidelity, to be sure) a two-dimensional judicial world alone. That disciples of Dewey should so narrow their studies is truly remarkable.

¹¹⁸ See preface to sixth printing, pp. ix-x, FRANK, *LAW AND THE MODERN MIND* (1930); FRANK, *COURTS ON TRIAL* 74, 198 (1949).

¹¹⁹ Perhaps inclusion of the trial court's gestalt may be said to add a fourth dimension; see FRANK, *COURTS ON TRIAL* 182-83 (1949).

The Scorn of "Wild Facts" About Courts:

If these men were true followers of Dewey, they would be constantly on the lookout for the "wild facts" about courthouse government which cast doubt on their theories. For Dewey has said:¹²⁰

. . . the primary value of hypotheses and theories is found in their power to direct observation to discovery of newly observed facts and in their power to organize facts in such a way as to forward the solution of a problem. . . What a scientist asks of his hypotheses is that they be fruitful in giving direction to his observations and reasonings. Confrontation with an observed fact which does not square with a hypothesis is consequently just as welcome as one which does—since it enables him to introduce modifications into his idea that renders the latter more efficient in future conduct of inquiry. . . In science, discovery of an exception, of a fact that contradicts a theory in the form in which it has been previously held, is a positive means of advance. It is not only welcome when hit upon but is actively searched for.

A convinced legal Deweyite would not, like Cook, shove off into a footnote the "always present uncertainty of trials"; or, like Llewellyn, refuse to visit trial courts; or, like Patterson, depict as "cynical" any reference to doubts about trial court mistakes in fact-finding; or like Cardozo, ignore the trial courts' "fact-discretion" and say that tragic fact-blunders are of no interest to the student of "jurisprudence."¹²¹

Now let us look at Dewey's writings to see whether, vis a vis the courts, he has been wiser than his legal disciples.

(To be concluded)*

Jerome Frank

¹²⁰ DEWEY, *Experience, Knowledge and Value: A Rejoinder* in I THE LIBRARY OF LIVING PHILOSOPHERS 576 (Schilpp ed. 1939).

¹²¹ See Frank, *Cardozo and the Upper-Court Myth*, 13 LAW & CONTEMP. PROB. 370, 376-78, 381, 385-86 (1948).

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