

1-1-1947

Words and Music: Some Remarks on Statutory Interpretation

Jerome N. Frank
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers



Part of the [Law Commons](#)

Recommended Citation

Frank, Jerome N., "Words and Music: Some Remarks on Statutory Interpretation" (1947). *Faculty Scholarship Series*. Paper 4100.
http://digitalcommons.law.yale.edu/fss_papers/4100

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

COLUMBIA LAW REVIEW

Vol. 47

DECEMBER, 1947

No. 8

WORDS AND MUSIC: SOME REMARKS ON STATUTORY INTERPRETATION*

JEROME FRANK

I.

Centuries ago, Aristotle illuminatingly discussed the problems of statutory interpretation. When judges today grumble that invariably their difficulty in learning the meaning of statutes is the fault of the legislature, they should be told to recall that long ago he wrote that on many subjects a wise legislature will deliberately use vague and flexible standards.¹ Most of the modern expositions of legislative construction are but restatements, with here and there a bit of embroidery, of what Aristotle said.² For instance, recent essays on "gaps" in legislation, on "unprovided cases," and on the "equity" of a statute, rely on sources which in turn are glosses on passages in the Stagarite's writings.³ That despite the centuries of discussion we still have no precise answers to these and cognate problems stems from the fact that statutory interpretation is not a science but an art⁴

I want at the outset to note a recurrent theme in legal writing. The Roman lawyers, as you know, frequently delighted in the *elegantia juris*. Blackstone, an amateur poet, indulged freely in legal aesthetics. An amateur archi-

* Most of this paper was contained in a talk at the COLUMBIA LAW REVIEW Dinner, April 25, 1947. I have inserted footnotes and have included some matter at which I could only hint in the talk as delivered.

1. See, e.g., FRANK, *IF MEN WERE ANGELS* 197-202, 350-53 (1942); *Guiseppe v. Walling*, 144 F.2d 608, 615-23 (C.C.A. 2d 1944).

2. One bit of modern embroidery is found in the suggestion that vagueness in a statute is sometimes due to the fact that the legislature "is unable to determine a policy because of a political statement." See Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUMBIA LAW REV. 359, 361, 366-67, 371 (1947) citing ILBERT, *THE MECHANICS OF LAW MAKING* 19-23 (1914). Cf. CURTIS, *LIONS UNDER THE THRONE* 247 (1947); *Extracts from Recent Address of Mr. Justice Hughes*, 1 MASS. L. Q. No. 2 at 13, 15 (1916).

3. See, e.g., citations in the following: *Guiseppe v. Walling*, 144 F.2d 608, 621 n. 38 (C.C.A. 2d 1944); *Slifka v. Johnson*, 161 F.2d 467, 470 n. 5 and n. 6 (C.C.A. 2d 1947) (concurring opinion); *McAllister v. Commissioner*, 157 F.2d 235, 237, 240 n. 6 (C.C.A. 2d 1946) (dissenting opinion); *Commissioner v. Beck's Estate*, 129 F.2d 243, 245 n. 4 (C.C.A. 2d 1942).

4. In an article which I first read after this paper was written, Mr. Justice Frankfurter seems so to conclude. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUMBIA LAW REV. 527, 530 (1947). See p. 1265 *infra* for discussion of Wurzel's protest against this idea.

tect as well, he absurdly extolled the beauty of the English legal system,⁵ comparing it often to a well-constructed building.⁶ A California court, justifying its refusal to abandon an unwise precedent, said that to do so would be to mar the "beauty and symmetry" of the "law." Sir Frederick Pollock years ago spoke of the "law" as a "work of art"; Llewellyn in 1942 wrote at length on the Beautiful in Law;⁷ Wolfsohn in 1945 published some sprightly suggestions in his paper, *Aesthetics In and About the Law*,⁸ and many others have touched on that theme.

I am therefore not unjustified in exploiting the fine-art metaphor. I suggest a comparison between (1) the interpretation of statutes by judges and (2) the interpretation of musical compositions by musical performers.⁹ I know that Llewellyn in his essay rejected the musical analogy, and (although without obeisances to Blackstone) insisted that "the esthetic phase of a legal system is cognate to architecture."¹⁰ But, as on a few other occasions, I dare here to disagree with Llewellyn, while always admiring him.

Krenek, a brilliant modern musical composer, criticizes those musical "purists" who insist on what they call "work-fidelity." The performer of a musical piece—an individual pianist, violinist, or an orchestra-leader—should, say the purists, engage in "authentic interpretation" which eliminates the interpreter altogether, by "the actual rendition" of the musical symbols just as they were written, in order to "serve the true intention of the composer." Krenek shows that often such literalism is absurd. He agrees that the "romantic" school went to excesses when they improvised freely, on the basis of their individual moods. But Krenek says that "the honest efforts" made today "to get as close as possible at the originals may involve as great a number of errors as the innocent enthusiasts of the romantic school committed," in their attempt to "serve the true intentions" of composers.

Even literalism cannot wholly prevent varieties of musical interpretation. How "in spite of declared work-fidelity," Krenek asks, "does it happen that

5. See, e.g., Frank, *Sketch of An Influence*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 189 (1945).

6. Radin suggests that the notion of legal "stability" has its aesthetic appeal, architecturally derived. Radin, *The Trial of the Calf*, 32 CORN. L. Q. 137, 147 (1946).

7. *On the Good, the True, and the Beautiful in Law*, 9 U. OF CHI. L. REV. 224 (1942).

8. 33 KY. L. J. 33 (1945).

9. In 1945, Maurois read a paper, *The Role of Art in Life and Law* (Brandeis Lawyers' Society, 1945) in which, *inter alia*, he briefly compared the opinions of great judges with the works of musicians. A very brief suggestion comparing musical and statutory interpretation appeared in 1947 in an article by Cossio, *Phenomenology of the Judgment*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 85, 97 (1947).

I want, therefore, to assert my claim to priority: The comparison first occurred to me when, in December 1944, I read an article by the musical composer, Ernest Krenek, *The Composer and the Interpreter*, 3 BLACK MOUNTAIN COLL. BULL. (1944). I wrote him on January 8, 1945, calling his attention to the analogy. In his reply of January 15, 1945, he suggested that I read his book, *MUSIC HERE AND NOW* (1939). In the summer of 1945, I began writing an article on the theme I am here exploiting.

10. *Supra* note 3, at 230.

the 'Seventh' as read by Furtwaengler will differ considerably when Toscanini conducts? How can this happen, when each claims to be an infallible executor of the composer's will?" Abject literalism fails to discriminate between major elements and those of subordinate significance.

There are, Krenek observes, composers who regard interpreters as "their natural enemies." They insist that there is "only one single way of interpreting their music." But some great composers have a different view. They know that the process of interpretation is not mechanical, automatic. Wagner, Krenek relates, after some disappointing experience with interpreters who followed faithfully his metronomic markings, decided to dispense with that kind of indication altogether.¹¹ And the same is true of directions that a certain phrase is to be played "with determination" or "with tenderness." Even careful indications cannot help leaving "a substantial margin for the interpreter." The attempt at "work-fidelity which sticks to the letter of the score leads to an unbearable caricature of the composition." The trouble with such an attitude is that the literal "interpreters are trying too hard to suppress their own imagination." Another composer, Darnton, reports that "the written notes are at best only an approximation to the composer's intention, no matter how fully they are supplemented by verbal directions." It "makes nonsense of the music to play it as if the truth, the whole truth and nothing but the truth reside in the notes and such directions," for "all kinds of nuances and inflections, variations of tempo and dynamics are essential to the music. . . . The result varies with the musical insight and interpretative skill of the interpreter."¹²

Krenek urges a mean: There is middle ground, between disregarding the composer's intention and being intelligently imaginative. Interpretation of a score usually "allows for a great number of equally good . . . and satisfactory variants." The composer legitimately wants to "get his message across . . . in undistorted and unadulterated fashion." But he must recognize that he cannot completely control the performer, that he is "practically helpless," and becomes a "passive onlooker," as "soon as he has handed his music over to the interpreter." Nor is this merely a counsel of despair. The composer should have sufficient confidence in human nature to "enjoy rather than to fear the medium of personal life through which his message is filtered. . . . The personality of the interpreter is not necessarily a stumbling block on which the work . . . goes to pieces." Unfortunate cases there are. In "the good cases, which ideally should be the rule, that personality vouchsafes an

11. "Wagner parodied the tendency to regard the printed notes as 'sacred and inviolable' when he created the character of Beckmesser . . . who knew all about rules, nothing about inspiration." Herbage, *Brains Trust*, 1 PENGUIN MUSIC MAGAZINE 75 (1946).

12. DARNTON, *YOU AND MUSIC* 40, 161-62 (1946).

increment of vitality that is not only desirable but truly necessary in order to put the message across." The wise composer expects the performer to read his score "with an insight which transcends" its "literal meaning." He does not deplore the performer's creative activity, does not denounce it as "caprice" or "subjective tricks." The attempt to eradicate the "human element . . . merely shows," writes Krenek, "distressing cynicism and distrust," similar to that which, in the political sphere, "has resulted in the rise . . . of dictators."

You will see the bases for my comparison of art interpretation and statutory interpretation. Sometimes a literal interpretation of a piece of legislation is indubitably correct. Often, however, so to construe a statute will yield a grotesque caricature of the legislature's purpose. When, not so long ago, some judges were anti-democratic, they often obstructed the democratic will voiced by the legislature. This they sometimes did by obstinately construing a statute narrowly, without real regard to its intention.

Let me illustrate. You will recall that, in 1936, the Supreme Court, in an opinion by Mr. Justice McReynolds, interpreted the famous "commodities clause" of the Interstate Commerce Act, enacted in 1906, designed to stop railroad favoritism to certain kinds of shippers.¹³ Mr. Justice Stone, in a dissenting opinion, showed that this interpretation gutted the legislation. He said that if the Court's construction were correct, "one is at a loss to say what scope remains for the operation of the statute," and that it brought about its "reduction . . . to a cipher in the calculations of those who control the railroads of the country."¹⁴

At the time, no protest came from a certain well-known columnist. But now that the majority of the Supreme Court has adopted Stone's democratic perspective, this columnist, in purist fashion, editorializes that the present Court "insists on writing legislation by employing the fiction that it is merely interpreting legislation."¹⁵ He forgets that, long before the New Deal existed, Charles Evans Hughes (later to become Chief Justice) in some lectures remarked that the meaning of "a federal statute is what the [Supreme] Court says it means."¹⁶

13. *United States v. Elgin, J. & E. Ry.*, 298 U.S. 492 (1936).

14. *Id.* at 512. An English court observed: "[I]t is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain a degree of precision which a person reading in bad faith cannot misunderstand." *In re Castrom*, [1891] 1 Q.B. 149, 167.

15. This same columnist, severely criticizing the recent decision of our court in *NLRB v. Clark Bros.*, 163 F.2d 373 (C.C.A. 2d 1947), said that the court "considers itself obligated to write a law or promulgate legislation which the Congress did not adopt. . . . As long as New Deal judges sit on the bench and legislate, Congress will have to grow more instead of less legalistic. . . ." It happens that the court in that case consisted of Judges Swan, A. N. Hand and myself, the opinion of the court being written by Judge Swan. Judges Swan and Hand were appointed to the circuit court in 1927 by President Coolidge.

16. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 280 (1928).

The "demolition of the purpose of Congress, through stingy interpretation, is the most emphatic kind of judicial legislation." *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949, 967 (C.C.A. 2d 1942) (dissenting opinion).

Factory workers can commit sabotage effectively by failing to use intelligent imagination in complying with the management's rules, *i.e.*, by literally following them. So, too, we learn from Krenek, can orchestra-leaders. Similarly, some judges, like Justice McReynolds, sabotaged legislative purposes by sticking to the exact words of statutes. When judges, however, use their imagination in trying to get at and apply what a legislature really meant, but imperfectly said, they cooperate with the legislature.¹⁷

The non-lawyer, when annoyed by the way judges sometimes interpret apparently simple statutory language, is the victim of the one-word-one-meaning fallacy, based on the false assumption that each verbal symbol refers to one and only one specific subject. If the non-lawyer would reflect a bit, he would perceive that such an assumption, if employed in the non-legal world, would compel the conclusion that a clothes-horse is an animal of the equine species, and would make it impossible to speak of "drinking a toast." Even around the more precise words, often there is a wide fringe of ambiguity which can be dissipated only by a consideration of the context and background. The literalist should also consider that essentially the same problem arises in construing private writings, such as contracts, trusts and wills.¹⁸ (One wonders whether the columnist I mentioned has never had a dispute as to what he meant by a letter or an editorial.)¹⁹

Judge Learned Hand has often spoken of the way in which literalism in interpretation can thwart the purpose of Congress. The courts, he wrote some thirty years ago, by "scrupulousness to the written word," had at times so interfered with the intention of the statute-makers that the courts fell under public suspicion, and recourse was had, excessively, to administrative agencies.²⁰ Again and again he has criticized the dictionary theory of statutory construction. It is, he said in a recent opinion, "one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary, but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."²¹ Here he was following Holmes who had said: "The Leg-

17. See *Hoffman v. Palmer*, 129 F.2d 976, 986 (C.C.A. 2d 1942) as to the need of judges to avoid excessive "generosity" with "other people's words." Cf. *Slifka v. Johnson*, 161 F.2d 467, 470 (C.C.A. 2d 1947) (concurring opinion).

18. Compare the "objective theory" of contractual interpretation. For criticism of over-extensions of that theory, see concurring opinion in *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757, 760-64 (C.C.A. 2d 1946).

19. Thayer wrote of "that lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fulness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes." THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 428-29 (1898).

20. Hand, *The Speech of Justice*, 29 HARV. L. REV. 617, 620 (1916); cf. Wyzanski, *Judge Learned Hand's Contribution to Public Law*, 60 HARV. L. REV. 348, 362 (1947).

21. *Cabell v. Markham*, 148 F.2d 737, 739 (C.C.A. 2d 1945).

islature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."²² Holmes added that "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." Does not this sound like Krenek's criticism of "work fidelity" with respect to music?

No more than in the case of music, can differences in interpretation be prevented. Yet the wise legislative composer will be in accord with Krenek's attitude towards musical performers: A judge with an imaginative personality supplies "an increment of vitality that is . . . desirable . . . and truly necessary in order to put" the legislative "message across," for only such a judge can read a statute "with an insight which transcends its literal meaning."

The legislature is like a composer. It cannot help itself: It must leave interpretation to others, principally to the courts. In a recent article, Herbage says that "music does not exist until it is performed."²³ Perhaps that is too sweeping a comment. It arouses in some musicians a resentment resembling that provoked in some lawyers by Gray's insistence that all "law" is "judge-made," because ". . . it is with the meaning declared by the courts and with no other meaning that [statutes] are imposed upon the community as law."²⁴ You will remember Bishop Hoadly's famous utterance, which Gray liked to quote, that "whoever hath an absolute authority to interpret any . . . laws, it is he who is truly the Law Giver. . . ."²⁵ As I say, that view may be too sweeping. But, basically, it contains a large part of the truth.

Those who today complain of any "judicial legislation" in statutory interpretation are complaining of the intrusion of the judges' personalities. However, just as Krenek shows that the effect of the performer's personal reactions cannot be excluded, so legal thinkers, in increasing numbers, have shown that the personal element in statutory construction is unavoidable. Yet Krenek's mean, too, has its judicial parallel: The creativeness of the judges should always be limited; but, within proper limits, it is a boon not an evil.²⁶

There is a story of Miss Goodlooks, the chorus-girl, who, in an emergency, acted Ophelia. In the players' scene, you will recall, Hamlet asks

22. *Johnson v. United States*, 163 Fed. 30, 32 (C.C.A. 1st 1908).

23. Herbage, *supra* note 11, at 76.

24. GRAY, *THE NATURE AND SOURCES OF LAW* 170 (2d ed. 1921).

25. Cf. HOBBS, *LEVIATHAN* 197 (Cambridge ed. 1904): "By the craft of an Interpreter, the Law may be made to beare a sense, contrary to that of the Sovereign; by which means the Interpreter becomes the Legislator."

26. Cf. Herbage, *supra* note 11, at 76: If a musical "conductor does not interpret a work with every atom of understanding and expression of which he is capable, I consider he has failed as an artist. I would never have him restrain himself out of 'reverence' to a composer's supposed wishes. If he does not feel, and is not convinced, he had better leave the music alone. I need hardly add that any attempt to focus attention upon himself rather than the music is pure charlatanism."

Ophelia, "Are you chaste, my lady?" and (so the text reads) she answers, "Chaste, my lord?" But Miss Goodlooks said, "Chaste? My Lord!" When chided, she remarked, "Well, that was my interpretation of the part." Of course, no judge should thus let his personality run riot. Nevertheless, there are many legitimately differing ways of reading Shakespeare. Apposite here is the opinion of a great American, both a lawyer and an artist: Thomas Jefferson, in his *Thoughts on English Prosody*, said that there is "a modulation in tone of which it is impossible to give a precise idea in writing," that there are "different shades of emphasis which . . . judgment dictates," so that "the difference" in interpretation "exists in the judgment. . . . No two persons will accent the same passage alike. . . . Perhaps two real adepts who should utter the same passage with infinite perfection, yet by throwing the energy into different words might produce very different effects."²⁷ So we find Holmes writing that "the meaning of a sentence [in a statute] is to be felt rather than to be proved."²⁸ Nevertheless, what Krenek says of the musical performer holds good of a judge. He "should put himself in the place of the composer, trying to reconcile the impulses of his (own) imagination with the principle" that he must "obey the prescription of the composer as well as he can." In that vein, Wurzel properly protested against the unqualified suggestion that statutory interpretation is "exclusively an art" in which the judge gives free play to his fancy as if he were a poet.²⁹

Here it is important to observe that the proper latitude of judicial construction should vary with the nature of divers statutes. (1) When a court strives to ascertain the legislative purpose, the judges should try to eliminate as far as possible their own personal views of policy. For the legislative purpose is the resultant of the pressure of conflicting interests in the legislature. In 1942, answering a litigant's suggestion that we should ignore both the language and purpose of a tax statute "to achieve what we might regard as a more just result," I said for our court:³⁰ "Such a remaking of the legislation would require consideration of questions of legislative policy bearing on fiscal and economic matters and on administrative convenience; to discharge that task efficiently we would be obliged to hold a sort of Congressional Committee hearing, at which all interested persons would be heard, so as to be sure that our amendments would not entail unforeseen and undesirable results. We have no power to embark on such an enterprise."³¹ (2) But the problem

27. Quoted from PADOVER, *THE COMPLETE JEFFERSON* 832, 845, 846 (1943).

28. *United States v. Johnson*, 221 U.S. 488, 496 (1911).

29. Wurzel, *Methods of Juridical Thinking* (1904) translated in *THE SCIENCE OF LEGAL METHOD* 286, 326-32 (1917).

30. *Commissioner v. Beck's Estate*, 129 F.2d 243, 246 (C.C.A. 2d 1942).

31. The courts properly look to the "legislative history" for light concerning the legislature's purpose.

As even such light may not be sufficiently strong, courts may sometimes go astray in

is different when the legislature uses words which, by their nature, leave to the courts the job of applying broad vague standards. Required to apply the phrase "in restraint of trade" in the Sherman Act, Learned Hand said, in 1943, in the *Associated Press* case: "Certainly such a function is ordinarily 'legislative'; for in a legislature the conflicting interests find their respective representation, or in any event can make their political power felt, as they cannot upon a court. The resulting compromises so arrived at are likely to achieve stability, and to be acquiesced in: which is justice. But it is a mistake to suppose that courts are never called upon to make similar choices: *i.e.*, to appraise and balance the value of opposed interests and to enforce their preference. The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made, especially in this very branch. Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case."³²

Pekelis brilliantly illuminated this subject. He pointed to the fact that today statutes abound with words such as "reasonable," "fair," "equitable," "proper." Those words, he said, invite, they require, judicial legislation.³³ Those judges who, neglecting such court-house legislation, reiterate the "accepted folklore" that the legislature "necessarily had a specific intention with respect to every case which subsequently invites consideration of the statute," that the legislative intention has a "Platonic existence before the Courts discover it in the words of the statute,"³⁴ are not to be taken too seriously. As Radin says of a somewhat similar utterance with respect to precedents, "it has become what an eminent judge called the *Cantillena* of justice, that is, a sort of pious chant which will no more be questioned than any other part of a long repeated ritual."³⁵

Musical interpreters often face a problem much like that which courts sometimes face. When a modern performer plays Bach, it is all but impossible to reproduce the exact mood of that composer (who lived in a period in which the general mood was substantially different from ours), to recreate the "taste" of that period. So, too, a court, when called upon to interpret a statute enacted in the 17th century, or in 1789, or even in 1830. Often the judges

construing intricate statutes, like the federal Revenue Acts. See Eisenstein's brilliant article, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477 (1945); Paul, *The Place of the Courts in the Taxing Process* (an address before the National Tax Conference, June 6, 1946); *McAllister v. Commissioner*, 157 F.2d 235, 237, 240 n. 6 (C.C.A. 2d 1946) (dissenting opinion).

32. *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943).

33. Pekelis, *The Case for a Jurisprudence of Welfare*, 11 Soc. RESEARCH 312 (1944).

34. Eisenstein, *supra* note 31, at 509.

35. Radin, *supra* note 2, at 144.

cannot be at all sure that they have recaptured the purpose of the composers of the legislation, who lived in an era with a quite different outlook.³⁶

I have referred to what judges should do in applying statutes. Not all judges, however, have the brilliant sympathetic imagination of a Learned Hand. Some are sure to be dull-witted. Others will not be as conscientious. When asked by the legislature to legislate judicially, some will exploit their personal prejudices, instead of trying to base their solutions on their honest estimates of the community's sense of values. Even, however, if all judges had Learned Hand's qualities, yet agreement among them, as to statutory interpretation, would not be invariably assured. For here, as in the case of the judge-made rules, sometimes there exists, not one community notion of policy, but several such notions; and the judges, obliged to choose, sometimes disagree.

I have frequently cited Learned Hand because I consider him the greatest American judge. But I have another reason. For, in 1934, he said, when interpreting a statute, that "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."³⁷ In that utterance you hear echoes of *Gestalt* psychology which makes much of the unanalyzability of melodies³⁸ (a subject to which I shall briefly return later). Another such echo sounded in Cardozo's statement that "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view."³⁹

A legislature can make plain when it wants literalness, and when it wants to authorize judicial legislation. It can, in effect, say to the courts, "Play this statute with tenderness," or that statute "with determination." It can give unequivocal directions to the courts. The composer Stravinsky asked his interpreters to be wholly unimaginative. Krenek says that this is possible "in the case of the highly mechanized music that Stravinsky writes." Likewise, a legislature can write a highly mechanized statute.

36. I must promptly add that I am not here succumbing to the notion of an overwhelming "Time Spirit" or "climate of opinion." Those notions have a dangerously deterministic flavor. For criticism of them, see FRANK, FATE AND FREEDOM c. 7 (1945); Frank, *A Sketch of an Influence*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 189, 218 (1947); Perkins v. Endicott-Johnson Co., 128 F.2d 208, 217 n. 25 (C.C.A. 2d 1942); Witmark v. Fisher Music Co., 125 F.2d 949, 954, 964-65 (C.C.A. 2d 1942) (dissenting opinion).

37. *Helvering v. Gregory*, 69 F.2d 809, 810-11 (C.C.A. 2d 1934).

38. The *gestalt* idea has other bearings on the decisional process. See *Old Colony Bondholders v. N.Y., N.H. & H.R.R.*, 161 F.2d 413, 431, 449-50 (C.C.A. 2d 1947) (dissenting opinion); *In re Fried*, 161 F.2d 452, 463 n. 28 (C.C.A. 2d 1947). I hope soon to develop that theme elsewhere.

39. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433, 439 (1934) (dissenting opinion).

Unfortunately, legislation sometimes is so worded as not to disclose whether the legislative composer wants literalness or *ad lib.* interpretation.⁴⁰ The drafting of statutes can be much improved. I agree with Conard who in a recent article says that "many ways of making laws more readable" exist and should be employed.⁴¹ He is, nevertheless, somewhat over-sanguine. Words often are unruly. To overcome that obstacle, a statute sometimes contains an "interpretation" or "definition" section, a sort of special dictionary or glossary defining the words used in the statute. That device does not always work. The definitions often themselves are ambiguous. "These interpretation clauses," said an English judge, "are often the most difficult to be understood."

Krenek, you will recall, said that the aim of the musical purists to eliminate the interpreter altogether, to eradicate the "human element," was a symptom of "distressing cynicism and distrust," similar to that which "resulted in the rise of . . . dictators." It is significant that two despots, Frederick the Great and Napoleon, each attempted to forbid judges from interpreting statutes. Those attempts failed. It is significant, too, that, in the decades preceding fascism, even the so-called liberals on the European continent had a similar aim. When in charge of a democratic government, they had, said Pekelis,⁴² "out of distrust . . . of the discretion of judges, . . . engaged in the pursuit of that legal blue bird, . . . the perfect statute" that "would foresee, classify and judicially regulate in advance every possible case." In so doing, Pekelis later perceived, they had paved the way for fascism. In this country we have done far better, he concluded, by our reliance on the "common sense, decency and skill" of judges in the handling of individual cases.

I briefly note some other resemblances between musical and statutory interpretation: Krenek writes that the "number of possibilities in which a work of art may be interpreted convincingly is an indication of its greatness. Only small and insignificant things have only one aspect, allowing only a single interpretation." Krenek's has been the approach of all our great Supreme Court Justices in construing the Constitution.

Another parallel: At one time, every composer was the sole performer of his compositions. So, at one time, English judges actively participated in enacting the statutes which they interpreted. And, just as later there was a dissociation of the functions of composing and performing, so there developed in

40. "The composer can never explain himself enough. And the trouble is that he does not even try. When Shaw complained that Ibsen's plays were unintelligible, unless they were produced on the stage by a man of genius, Ibsen's reply was: 'What I have said, I have said.' To which Shaw promptly retorted: 'Precisely. But what you haven't said, you haven't said.'" Darnton, *op. cit. supra* note 12.

41. *New Ways to Write Laws*, 56 *YALE L.J.* 458 (1947).

42. Pekelis, *Administrative Discretion and the Rule of Law*, 19 *Soc. RESEARCH* 22, 34-35 (1943).

America a pronouncedly American version of the doctrine of separation of governmental powers—the differentiation between statute-making and judicial interpretation. American courts, however, have been given the power to promulgate their own rules governing procedure. In that respect, they openly engage in a kind of statute-making. The judges then interpret those rules. So, to that extent, modern courts differ from most modern composers: The courts both compose and perform; they play their own compositions.

Another difference is noteworthy. Many a musical performer strives to make the music sound as if he were creating it in the act of playing it. But our courts, until recently, have tried to conceal their limited creativeness, have attempted to make their conduct appear as if there were no judicial "law-making." While the musical composer is a definite known person, when judges speak of the legislature's intention or purpose, they have difficulty in ascertaining to what persons they refer. Sometimes the sole purpose which can be definitized is that of a single member of a legislative committee.⁴³ Thus a Senator once said of a tax measure that "even Senators who worked upon the bill for months do not understand it," and another Senator remarked that "there are many sections of the bill which it is almost humanly impossible for a man who is not an expert to understand or comprehend."⁴⁴

The reason for the judges' reluctance to admit their own creativeness is not far to seek. The theory of our democratic government is that as (subject only to constitutional restraints) the legislature expresses the popular will, legislation is the voice of the people. Since our Constitutions allocate the legislative function to the legislatures, the courts would seem to be acting beyond their powers were they frankly to legislate. Fear of popular denunciation of illegal usurpation of power accordingly has led judges to obscure by words what they actually did, what they could not help doing.

Yet most of our "common law" is judge-made. When judges modify a common-law rule, by expansion or contraction, they continue this process of legislation. They do so also when they apply such a rule to a set of facts of a kind to which that rule has not previously been applied. That holds true when the rule was enacted by the legislature. For, in so doing, they interpret the statute—and interpretation is inescapably a kind of legislation.⁴⁵ To be sure, as, in such circumstances, legislative legislation and judicial legislation interact, the latter should be more restricted than when judges interpret common law rules.⁴⁶ But it is difficult to understand the disagreement with the

43. See Wigmore, *The Judicial Function*, in *THE SCIENCE OF LEGAL METHOD* xxvi (1917); Eisenstein, *supra* note 31, at 518-19.

44. Eisenstein, *supra* note 31, at 519.

45. See Morgenthau, *Implied Regulatory Powers in Administrative Law*, 23 *IOWA L. REV.* 576, 585 (1943).

46. Cf. Learned Hand, *How Far is a Judge Free in Rendering a Decision?* (an address) May 14, 1933, *LAW SERIES 1*, Nat'l Advisory Council in Radio on Education, 1933.

statements of wise judges, such as Learned Hand and Cardozo, that, in statutory interpretation, courts often must engage in "law-making."⁴⁷ Indeed, contrary to the optimistic views of some codifiers, frequently legislation paradoxically augments the judges' "law-making."⁴⁸ Speaking of Justinian, Montaigne put it thus: "I do not much like the opinion of the man who thought that to multiply the laws [by codification] was to curb the authority of the judges, by cutting up their meat for them. He did not realize that there was as much liberty and latitude in interpreting the laws as in the making of them."⁴⁹ In part, this result derives from the fact that the process of "applying" a statute compels "interpretation" which, to repeat, is a kind of legislation.

Another way of putting the matter is this: The legislature cannot itself enforce the statutes. It must delegate that task to other governmental agencies—to the executive and his subordinates, or to administrative bodies, or to the courts. When the delegation is to the executive or to administrative agencies, usually the aid of the courts is also invoked; and when the job is assigned directly to the courts, often they must call in the executive to assist them. We do not usually speak of "delegation" to the judiciary, but the fact of such delegation is undeniable, whatever the label. As Jaffe says, "Indeed, every statute is a delegation of law-making power to the agency appointed to enforce it," since " 'jurisdiction,' the power to declare the law applicable to a case, is the power to apply a general formula to a specific situation. This [delegated] power, when exercised by the judiciary, is ordinarily called interpretation or discovery of the legislative intention."⁵⁰ Although "we must not take lightly the objection to indiscriminate and ill-defined delegation,"—an objection which "expresses a fundamental democratic concern"—we should not "insist that 'lawmaking' is the exclusive province of the legislature." We should, according to Jaffe, demand no more than that in the total process we achieve government by consent.⁵¹

47. L. Hand, *supra* note 46; see CARDOZO, *THE JUDICIAL PROCESS* 14 (1922).

48. SEAGLE, *THE QUEST FOR LAW* 298 (1941); *cf. id.* at 196. And see CALHOUN, *INTRODUCTION TO GREEK LEGAL SCIENCE* c. IV (1944).

49. *ESSAYS*, Book III, c. 13 (On Experience).

As to the fatuousness of the notion that codification puts an end to judicial legislation, see, e.g. FRANK, *LAW AND THE MODERN MIND* Part I, c. XVII and Appendix VI (1930); *Guisseppi v. Walling*, 144 F.2d 608, 620 (C.C.A. 2d 1944).

50. Jaffe, *supra* note 9, at 360.

51. See *Guisseppi v. Walling*, 144 F.2d 608, 620-22 (C.C.A. 2d 1944).

Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 *HARV. L. REV.* 370, 372 (1947), implies that my concurring opinion in the *Guisseppi* case (an excerpt from which he quotes) shows that I think judges should follow the practice of administrative agencies, *i.e.*, should regard themselves as having "no mandate save that they should not disregard whatever meaning [of a statute] is reasonably apparent." When, in a letter, I called his attention to portions of my opinion which he had not quoted, and to my opinion in *Commissioner v. Beck's Estate*, 129 F.2d 243, 246 (C.C.A. 2d 1942), he replied, "I plead guilty to the charge that I gave a misleading impression of your views. Although I did not read the passage in the *Guisseppi* opinion the way you intended it, . . . still I was

But that consent can scarcely be said to have been given voluntarily if the consenters do not know that they have given it. Wherefore the courts should not conceal from the public their delegated power of sub-legislation, but should make every effort to inform the citizenry of how that power is exercised. If judges speak always of "interpretation," if always they avoid and resent the use of the phrase "judicial legislation," they conduct themselves misleadingly, undemocratically.⁵² Correct advice to our citizens about the courts necessitates telling them the difference between "legislative legislation" and "judicial legislation." To make that difference popularly understood may not be easy, but it will seem impossible only to those who undemocratically distrust our citizens. It is, then, the job of judges and lawyers to let the public know that judges, like violinists and pianists, are often creative interpreters—because they must be.

Awareness and public acknowledgment by judges of their legislative power may well induce restraint in exercising it. Judges like McReynolds and Butler were often ruthless in exploiting their personal notions of policy in construing statutes, thus often eviscerating popular social legislation. But, by using fundamentalist talk about judges never legislating, they concealed their brashness. A judge like Learned Hand, who publicly admits that at times he cannot help legislating, is far more demanding of himself, far more restrained when doing so. Such a judge will do his best to enforce the policy of a statute even when he detests its aim. If he is a so-called conservative, he will not try to frustrate a distastefully liberal statute; if he is a so-called liberal, he will deal similarly with what he considers perniciously reactionary legislation.

There is an important difference, usually overlooked by commentators, between the interpretive latitude of the highest courts and that of lower courts. A court like that on which I sit, an intermediate appellate court, is, *vis-a-vis* the Supreme Court, "merely a reflector, serving as a judicial moon."⁵³ Judges on such a court usually must, as best they can, cautiously follow new "doctrinal trends" in the court above them.⁵⁴ As their duty is usually to learn, "not the congressional intent, but the Supreme Court's intent,"⁵⁵ their originality is often inadvertent.⁵⁶

fearful even as I wrote that I should make a more complete study of your opinions before referring to you by name." I quote from Professor Cox' letter with his permission.

52. See Frank, *The Cult of the Robe*, 28 SAT. REV. OF LITERATURE 12 (1945); Frank, *Editorial*, 16 AMERICAN SCHOLAR 265 (1947); FRANK, IF MEN WERE ANGELS 107-08 (1942). And see *In re J. P. Linahan*, 138 F.2d 650, 652-53 (C.C.A. 2d 1943).

53. *Choate v. Comm'r*, 129 F.2d 684, 686 (C.C.A. 2d 1942).

54. See *Perkins v. Endicott-Johnson Corp.*, 128 F.2d 208, 217-18 (C.C.A. 2d 1942); *Pieard v. United Aircraft Corp.*, 128 F.2d 633, 636 (C.C.A. 2d 1942).

55. Surrey, *The Supreme Court and the Federal Income Tax*, 35 ILL. L. REV. 779, 808 (1941).

56. See *Choate v. Comm'r*, 129 F.2d 684, 685 (C.C.A. 2d 1942).

Montaigne wrote: "It is more of a business to interpret the interpretations than to interpret the things . . . ; we do nothing but gloss one another." *ESSAYS*, Bk. III, c. 13.

Another important distinction is that between the interpretation of a statute and constitutional interpretation. Thus Curtis, in his otherwise sage book, is guilty of an important error when he says that the Supreme Court, in all respects, is a peculiar kind of political agency and not a true court.⁵⁷ There "can be, and there should be, a sharp difference of degree between the legitimate limited scope of judicial concern with policy when the Supreme Court construes a statute and that Court's far greater legitimate scope when it determines in the name of the Constitution, whether to veto a statute."⁵⁸ Because of the danger of confusing these two functions, it has sometimes been suggested that there be two Supreme Courts, one of which would exclusively consider constitutional issues.⁵⁹

In any event, the conscientious, intelligent judge will consider government a sort of orchestra, in which, in symphonies authorized by the people, the courts and the legislature each play their parts.⁶⁰ The playing may sometimes be bad.⁶¹ There may, occasionally, be some disharmonies. But, after all, modern music has taught us that a moderate amount of cacophony need not be altogether unpleasant.

I might summarize the foregoing: Just as, perforce, the musical composer delegates some subordinate creative activity to musical performers, so, perforce, the legislature delegates some subordinate (judicial) legislation—*i.e.*, creative activity—to the courts.

II.

Because, however, the courts have a function matched by nothing in the work of musical interpreters the scope of creative judicial activities with respect to statutes is broader than that of the pianist or violinist with respect to musical scores. Here we come upon an aspect of court-house government to which the law schools have paid too little attention, with the result that usually the judicial process is superficially described by lawyers to one another, and therefore by lawyers to the lay public. I refer to fact-finding.

Although little studied in the schools, the methods of fact-finding are

57. Curtis, *op. cit. supra* note 9, at 24.

58. Frank, Book Review, N.Y. Times, April 20, 1947, § 7, p. 6, col. 2 at p. 31, col. 3.

59. HEXNER, *STUDIES IN LEGAL TERMINOLOGY* 90 (1941), refers to JOSEPH-BARTHÉLEMY, *DROIT CONSTITUTIONNEL*, as giving examples of special courts to examine such issues.

60. Cf. SHAKESPEARE, *HENRY THE FIFTH*, Act I, Scene 1:

"For government, though high and low and lower,
Put into parts, doth keep in one consent,
Congreeing in a full and natural close
Like music."

61. "When there are several performers, as in the case . . . of orchestras, the number of things that can go wrong is terrifying. The astonishing thing is not that the generality of performances is bad, but that it is so good." DARNTON, *op. cit. supra* note 12, at 40-41 (1946).

probably the crucial factors in the decisional process. In the overwhelming majority of law-suits, the parties do not dispute about the pertinent legal rules but solely about the facts; and the facts—always events which happened in the past—are by no means easy to ascertain, for, in each of that great majority of cases, the testimony is in conflict concerning those past events. When the witnesses thus disagree, a trial judge or jury must try to learn the following: which (if any) of the witnesses (1) was accurate in observing those events at the time when they happened, (2) was accurate in remembering his observations, and (3) at the trial correctly reported that memory. Fact-finding, then, calls for a determination of the credibility (i.e., reliability) of the respective witness.⁶² Perhaps it would be somewhat more accurate to say: The “facts” as “found” consist of the fallible subjective reactions of the trial judge or jury to the discrepant stories told by the fallible witnesses.⁶³ It is well to note that, as the job of fact-finding is the most important job in court house government, and as that job is assigned to the trial courts, those courts are far more important than the upper courts which, even in the very few appealed cases, usually accept the facts as “found” by the trial courts.

Aware of the difficulties and transcendent importance of fact-finding, many cultures, at some period, have resorted to the supernatural—to magic, or religion, or both—to ascertain the facts, at least in some kinds of ease. At one stage of legal development on the European continent, with the decline of the magico-religious ordeals, an effort was made to escape the vagaries of human beings, in getting at the “true” facts, by resort to quantitative proof. Evidence was quantified; different degrees of credibility were allotted to the statements of divers witnesses, according to their sex, age and social position. The aim was that of “reducing the function of the trial judge as far as possible to that of an accountant.”⁶⁴ When this book-keeping method was abandoned, some continental jurists said that judicial fact-finding had become “discretionary.”⁶⁵ That word—“discretionary”—illuminates the subject of statutory interpretation. It shows that a court’s power to find facts is a delegated power of major import. If we conscientiously explore, with the help of that illumination, we see that this delegated power includes much legislative power.

62. *Warning: This statement over-simplifies.* Even when the witnesses do not disagree, their narratives may not be trustworthy.

Whenever, then, I speak of “conflicting testimony,” I should be understood to include cases in which the trial judge or jury must exercise judgment as to credibility with reference to oral testimony.

63. I say “somewhat more accurate” because the decisional process is sometimes more intricate: Often a decision is an undifferentiated composite containing no articulated or sharply defined “findings” of the facts. See, e.g., Frank, Book Review, 56 *YALE L.J.* 589, 590-92 (1947).

64. ENGELMANN, *HISTORY OF CONTINENTAL LEGAL PROCEDURE* 43 (Millar’s trans. 1927); *id.* at 41-49. See other citations in FRANK, *IF MEN WERE ANGELS* 91, 361 (1942).

65. See Frank, *op. cit. supra* note 64, at 91.

What I mean is this: *When a court applies a legal rule—statutory or not—to the facts of a case, the court must interpret not only the rule but the evidence.* Suppose now that, without doubt, there is but one possible interpretation of a statute. If the court so interprets the evidence as to arrive at “facts” which do not come within that interpretation of a statute, the court may then appear to be exercising no delegated legislative authority. But that appearance may be most deceptive. *For a court nullifies a statute when the court mis-finds the facts of a case in such a way that the statute is inapplicable. The delegated “discretion” to find the facts can, then, become a power to prevent the operation of the legislative purpose.*

This result may be most readily perceived in jury trials when the juries return general verdicts. Indeed, the general-verdict jury system has frequently been lauded precisely on the ground that such a verdict allows the twelve men in the jury-box to frustrate legislation.⁶⁶ Juries, it is contended, “liberalize” strict “law” just because they can, and often do, pay no heed to the judges’ instructions. An English judge, Mr. Justice Chalmers, not at all satirically, put that argument as follows: “Again, there is an old saying that hard cases make bad law. So they do when there is no jury. The Judge is anxious to do justice to the particular parties before him. To meet a particular hard case he is tempted to qualify or engraft an exception upon a sound general principle. When a judge once leaves the straight and narrow path of law, and wanders into the wide fields of substantial justice, he is soon irretrievably lost. . . . But hard cases tried with a jury do not make bad law, for they make no law at all, as far as the findings of the jury are concerned. The principle is kept intact while the jury do justice in the particular case by not applying it.” This attitude is expressed in varying fashions. “The jury system,” said a well-known judge, “is generally regarded as deriving one of its chief advantages from having the law applied by persons having no permanent offices as magistrates and who are not likely to get into the habit of forcing cases into rigid forms and arbitrary classes.” And another judge spoke in favor of the jury as against the judge because “it is a matter of common observation that judges and lawyers, even the most upright, able and learned, are sometimes too much influenced by technical rules.” More bluntly, it has been said that the public wants its conduct to be judged by laymen, by the man in the street. “It cannot be doubted,” says Chamberlayne, “that a principal claim of the jury to popular favor is its traditional ability to defy, in a general verdict, the law of the land as announced by the judge.”⁶⁷ Here, then, in our court system is an amazing instance of extensive delegated legislation (al-

66. Or “common-law” rules.

67. See FRANK, *LAW AND THE MODERN MIND* 173-74 (1930); Wigmore, *A Program for the Trial of a Jury Trial*, 12 J. AM. JUD. Soc’y 166 (1929).

though it is not so labelled, being called "fact-finding"): Each jury is a twelve-man ephemeral legislature, not elected by the voters, but possessed of the power to destroy what the elected legislators have enacted. If you like, you may say that juries merely veto statutes; but to veto is to act legislatively. The power to destroy legislation is a legislative power.⁶⁸

When a judge tries a case without a jury, he becomes, in part, a jury. He, too, can so find the facts as to frustrate a rule, whether or not statute-made. Years ago, Dean Pound wrote⁶⁹ that juries find the facts in such a way as to compel a result different from that which the legal rule strictly applied would require, so that the facts as found are by no means necessarily the facts of the particular case.⁷⁰ And Pound more than suggested that trial judges sometimes act similarly. Dickinson, later, said: "There can be no doubt that occasionally courts employ this power of finding facts to evade the necessity of applying a legal rule to a case to which it would otherwise be applicable."⁷¹ Unquestionably some trial judges sometimes thus knowingly "force the balance." "The writer," I have said elsewhere, "will never forget one of his experiences as a young lawyer. He participated in a lawsuit, lasting a week, tried by an able judge without a jury, during the course of which, on every doubtful question concerning the admission or exclusion of evidence, the judge, to the writer's great indignation, ruled in favor of the other side. To the writer's surprise, a few weeks after the trial was ended, the judge decided the case in his client's favor, with strong findings of fact. A year later the writer met the judge who referred to the case, saying: 'You see, on the first day of the trial, I made up my mind that your client was a fine hard-working woman who oughtn't to lose all her property to the plaintiff who had plenty of money. The plaintiff was urging a rule of law which you thought was wrong. I thought it was legally right but very unjust. So I decided to lick him on the facts. And by giving him every break on law points during the trial, I made it impossible for him to reverse me on appeal, because I knew the upper courts would never upset my findings of fact.' That judicial conduct was not commendable. But the judge's story did open the writer's eyes to the way in which the power of a trial judge to find the facts can make his decision final, even if, had he correctly found the facts, it would have been reversible for error in the applied legal rule."⁷² More frequently, such a mis-finding, such a "forcing the balance," is unconscious or inadvertent.

68. The musical performer perhaps acts comparably when he refuses to perform a musical composition.

69. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 121 *et seq.* (1922).

70. That this suggestion imputes an undue amount of sophistication to juries, see FRANK, IF MEN WERE ANGELS 85 *et seq.* (1942).

71. Dickinson, *Legal Rules*, 79 U. OF PA. L. REV. 833, 855 (1931).

72. FRANK, IF MEN WERE ANGELS 98-99 (1942).

See dissenting opinion in *La Touraine Coffee Co. v. Lorraine Coffee Co.*, 157 F.2d

Since, as I have indicated, trial courts, by deliberate or inadvertent misfindings of facts, can nullify or distort non-statutory as well as statutory legal rules, an adequate discussion of the role of "facts" in the decisional process would carry me far beyond the subject of statutory interpretation. Suffice it to say here that the inherently baffling nature of fact-finding, and the resultant uncertainties, account largely for legal uncertainty, i.e., for the inability of lawyers to predict the decisions of most specific law-suits, especially those not yet commenced. Prediction of any such decision means, usually, a prophecy of the future subjective reactions of a trial judge or jury to the future conflicting testimony of some particular persons who will be called as witnesses. Presumably because of the inability in many cases to predict the "facts," Judge Learned Hand, after considerable experience as a trial judge, stated in 1921: "I must say that . . . as a litigant I should dread a law-suit beyond almost anything else short of sickness and death."⁷³ Now all decisions are specific decisions in specific suits. Courts do business at retail, not at wholesale. Wholesaling occurs in the *stare decisis* department, where the courts deliver pronouncements concerning the legal rules. But the facts of individual cases always ultimately divert the courts' business into retail channels.⁷⁴ A wholesale rule unrelated to the particular facts of particular cases is a fiction, convenient at times but nevertheless tainted with the inaccuracy of all fictions.⁷⁵

115, 119, 123-24 (C.C.A. 2d 1946): "There is no escape from the circumstance that the trial judges, because they conduct the fact-finding process, are the most important judicial officials. Fact-finding, when a judge sits without a jury and the record consists of oral testimony, is his responsibility, not that of the upper courts. Only when it is clear beyond doubt that he has closed his eyes to the evidence, may an upper court properly ignore his version of the facts. Since his 'finding' of 'facts,' responsive to the testimony, is inherently subjective (i.e., what he actually believes to be the facts is hidden from scrutiny by others), his concealed disregard of evidence is always a possibility. An upper court must accept that possibility, and must recognize, too, that such hidden misconduct by a trial judge lies beyond its control. Only, perhaps, by psychoanalyzing the trial judge could his secret mental operations be ascertained by us; and we are not skilled in that art, which, at the least, would require many hours of intensive personal interviews with the judge."

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

74. It amazes me that many eminent keen-minded law-professors go on prating that—except in the unusual cases where there are gaps in the legal rules, cases which are therefore called "marginal" or "improved" cases—law-suits seldom occur, that clear and precise legal rules usually prevent litigation. What nonsense when, in most law-suits, the disputes relate not to any legal rule but to the facts. The truth is that, in almost any lawsuit, some crucial issue of fact can be put in issue. In that event, the decision usually turns on a determination of the witnesses' credibility by a trial judge or jury. See *Ricketts v. Pennsylvania R.R. Co.*, 153 F.2d 757, 761 n. 6 (C.C.A. 2d 1946) (concurring opinion).

75. As to fictions, see, e.g., *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 133-34 and n. 3 (C.C.A. 2d 1945); *Hammond-Knowlton v. United States*, 121 F.2d 192, 199-200 (C.C.A. 2d 1941); COHEN AND NAGEL, *LOGIC AND SCIENTIFIC METHOD* 372-75 (1934); FRANK, *LAW AND THE MODERN MIND* 37-41, 312-22 (1930); TOURTOULON, *PHILOSOPHY IN THE DEVELOPMENT OF LAW* 293-96, 383-99, 644 *et seq.* (trans. 1924); VAHNINGER, *THE PHILOSOPHY OF "AS IF," passim* (trans. 1925); Cohen, *Fictions*, 6 ENCYC. OF

With that in mind, and recurring to my musical analogy, perhaps I may sum up much of my discourse thus: In deciding any case where the testimony is in conflict or where credibility is otherwise a pivotal factor (and most cases fit in that category), a court contrives, so to speak, an individual song (a song for that particular case) in which the legal rules are the music and the "facts" are the words. Those two elements fuse in a composite (a *gestalt*), the unique character of which derives principally from the "facts."⁷⁶

Chief Justice Hughes once observed: "An unscrupulous administrator might be tempted to say, 'Let me find the facts for the people of my country, and I care little who lays down the general principles.'" ⁷⁷ Leave out the word "unscrupulous," and that comment is fully as applicable to trial courts. It follows that the "general principles," the legal rules, are often at the mercy of trial court fact-findings. Reverting to my main theme, rules embodied in legislation are at their mercy. Consequently, while I applaud the proposal of Stone and Pettee⁷⁸ for the creation of a stream-lined "law revision" super-

Soc. Sci. 225 (1931); Cohen, *On the Logic of Fiction*, 20 THE JOURNAL OF PHILOSOPHY 477 (1923).

See *United Shipyards v. Hoey*, 131 F.2d 525, 526-27 (C.C.A. 2d 1942): "In formulating the reasons for their decisions, judges often adopt rulings made in previous decisions in which the facts were somewhat similar, saying, in effect, 'This situation is sufficiently like those which we previously considered so that we can disregard the differences and restrict ourselves to the resemblances.' And, thus ignoring—for the purpose immediately at hand—the unlikenesses, the situations are, frequently, spoken of as identical. But elliptical discussions of cases partly alike, as if there were complete identity, is merely for convenience. There is present, although it may be unexpressed, an 'as if,' a 'let's pretend'—a simile or metaphor. Such 'as-if' or metaphorical thinking is invaluable in all provinces of thought (not excepting that of science). However, some of the greatest errors in thinking have arisen from the mechanical, unreflective, application of old formulations—forgetful of a tacit 'as if'—to new situations which are sufficiently discrepant from the old so that the emphasis on the likenesses is misleading and the neglect of the differences leads to unfortunate or foolish consequences. In governmental or business administration, such neglect, when it occurs, provokes justifiable irritation at 'bureaucracy'; in judicial administration it deserves criticism as unenlightened precedent-mongering."

76. The *gestalt* in a trial court's decision, when credibility is involved, makes the decisional process more complicated than I have, for the most part, suggested in this paper. See, e.g., for a corrective, the dissenting opinion in *Old Colony Bondholders v. N.Y., N.H. & H. R.R.*, 161 F.2d 413, 431, 449-50 (C.C.A. 2d 1947); *In re Fried*, 161 F.2d 453, 463, n. 28 (C.C.A. 2d 1947). Wherefore it is misleading to say, as Brandeis, J., said in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 404, 411 (1932): "When the underlying fact has been found, the legal result follows inevitably."

Paul, observing that Brandeis "generally avoided the pitfalls of oversimplification," criticizes this statement, saying that it "requires a clarifying amendment: The legal result becomes inevitable once there is a determination of the applicable legal rule as well as the meaning. The choice of either is often quite removed from the realm of the inevitable. . . . Paradoxically, law both precedes and follows fact and even determines the fact. . . . The law . . . has set the pace for the facts. But the facts perform a similar pace for the law, since a principle must rest upon the facts from which it is deduced." Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753 (1944). Yet Paul himself is not always wholly guiltless of oversimplifying. See Frank, *Introduction to Paul, Studies in Federal Taxation* 3-4 (1927); Cahn, Book Review, 2 TAX L. REV. 289-90 (1947).

77. N.Y. Times, Feb. 13, 1931, p. 18, col. 1; cf. Bell, *Let Me Find the Facts*, 26 A.B.A.J. 552 (1940); *United States v. Forness*, 125 F.2d 928, 942 (C.C.A. 2d 1942).

78. Stone and Pettee, *Revision of Private Law*, 54 HARV. L. REV. 221 (1940).

committee to serve as a constant adviser to legislatures, I do not share the enthusiastic belief of present-day disciples of Bentham and Livingston, like Mitchell Franklin,⁷⁹ that any such device, even if it prevented the more obvious judicial perversions of statute-made rules, could conceivably stop trial courts from disembowelling statutes—via “fact” determinations in deciding individual law suits.⁸⁰ In short, *the trial courts often affect the interpretation of statutes more significantly than the upper courts.*⁸¹ *A study of statutory interpretation which neglects trial-court fact-finding uses a scissors minus one blade. Such study will end in futility.*

79. Franklin, *Concerning the Historic Importance of Edward Livingston*, 11 TULANE L. REV. 163 (1937); Franklin, *The Judiciary State*, 3 NAT. LAW. GUILD Q. 27 (1941).

80. See concurring opinion in *Ricketts v. Pennsylvania R.R. Co.*, 153 F.2d 757, 760, 769 n. 46 (C.C.A. 2d 1946): “I said above that legal rules, no matter how valuable the policy they embody, are often at the mercy of the fact-determinations in particular cases, and that those fact-determinations often involve ineradicable subjective factors; see *In re J. P. Linahan, Inc.*, 138 F.2d 650, 652, 653 (C.C.A. 2d 1943). The remedy for that defect lies, I think, in improved methods of fact-finding; cf. *United States v. Forness*, 125 F.2d 928, 942, 943 (C.C.A. 2d 1942). As improvement in fact-finding is slow in developing and, at best, cannot be a complete remedy, it might be argued that it is silly to bother about the legal rules. The answer, briefly, is that one should not be thoroughly defeatist as to the efficacy of legal rules. They frequently do play an important role, even if often not the controlling role, in litigation. Wherefore, the courts should strive to bring those rules (within the limits allowed by proper respect for *stare decisis*) into line with intelligent social policy.”

81. See, e.g., *Alaska Pacific Salmon Co. v. Reynolds Metal Co.*, 163 F.2d 643 (C.C.A. 2d 1947). Cf. Freeman and Kirschner, *An Ounce of Prevention: A Study in Corporate Tax Evasion*, 46 COLUMBIA LAW REV. 951, 958 and n. 48 (1946).

Warning: To avoid possible misunderstanding, I must add that, in my references to trial courts, I intend no top-loftical upper-court denigration of trial judges. Excepting Learned Hand, this country, I think, has no abler judge than a graduate of Columbia Law School, Judge Rifkind—and he is a trial judge. But the task of trial judges is immeasurably more complex than that of appellate judges. The trial judges sorely need the help of law-school teachers. They have received little such help, nor will they receive it as long as most of those teachers continue to rivet their attention almost exclusively to the legal rules, either statutory or “common law.”