"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism

Jerome N. Frank
Yale Law School

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

Part of the Law Commons

Recommended Citation
Frank, Jerome N., "'Short of Sickness and Death': A Study of Moral Responsibility in Legal Criticism" (1951). Faculty Scholarship Series. 4098.
https://digitalcommons.law.yale.edu/fss_papers/4098

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.
"SHORT OF SICKNESS AND DEATH": A STUDY OF MORAL RESPONSIBILITY IN LEGAL CRITICISM

JEROME FRANK

"I must say that, as a litigant, I should dread a law suit beyond almost anything short of sickness and death."1

"The practical thing for a traveller who is uncertain of his path is not to proceed in the wrong direction: it is to consider how to find the right one."2

"And if our theory is wrong it is certainly more intelligent to try to set it right by making appropriate qualifications than to attempt blindly to cling both to the theory and to the fact that contradicts it on the pretext that theories and facts belong to different worlds."3

"It is essential ... to rid ourselves of deeprooted, often uncritically repeated prejudices."4

"An unlearned carpenter of my acquaintance once said in my hearing, 'There is very little difference between one man and another; but what little there is, is very important.'"5

"All systems which deny the fundamental diversity of men ... are essentially unjust and unsteady."6

"The most significant advances in intellectual thinking are characterized by the focusing of critical attention upon facts and issues which were formerly considered unimportant, indecent or self-evident."7

JEROME FRANK is a Judge of the United States Court of Appeals, Second Circuit; author of LAW AND THE MODERN MIND (1930), SAVE AMERICA FIRST (1938), IF MEN WERE ANGELS (1942), FATE AND FREEDOM (1945), COURTS ON TRIAL (1949) and many shorter works.

1 Hand, The Deficiencies of Trials to Reach the Heart of the Matter, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).
5 James, The Importance of Individuals, The Will to Believe 255, 256-257 (1896).
I.

When, in any area directly affecting human beings, there exists a grave unsolved problem, and when the absence of a solution leads to many tragedies, then those who, well aware of the problem, seek to conceal or belittle its importance, may be considered morally irresponsible. Why? Because they tend to create a mood of complacency towards the tragedies, and because such complacency impedes efforts that may, at least partly, help to solve the problem.

One such problem which, as long as it remains unsolved, will yield daily tragedies, is that of obtaining accurate determinations of the facts in the trials of law suits. When, some twenty years ago, a prosecutor smugly remarked that innocent men were never convicted of crimes, Borchard replied, in 1932, by publishing his great book, *Convicting The Innocent*, which disclosed that many men have gone to jail for crimes they did not commit, because the trial courts had made mistakes about the facts. Since such mistakes are due to defects in the methods of judicial fact-determination—defects that cause trouble in civil as well as criminal litigation—it follows that men not only lose their liberty but also often lose their property, their savings, their jobs, or their reputations, through court judgments based on judicial "findings" of facts that never actually happened. Here is a moral problem of the first magnitude.

The problem exists for these reasons: The decision of a law suit, it is said, requires the application of a legal rule to the facts of the case. In most law suits, the litigants dispute solely about the facts, e.g., whether, on a certain day in the past, Gross made a promise to Gentle, or Tit hit Tat. As, at the time of the trial, those facts are past events, the trial court—a trial judge (in a non-jury case) or a jury—can’t observe them. The judge or jury can do no more than to form a belief about those past events. That belief is formed after listening to the testimony of witnesses who have (or purport to have) observed those events. In most law suits, the witnesses testify in open court and contradict one another. In such a suit, the facts, for decisional purposes, are then not necessarily the actual facts. They are merely, at best, the belief of

---

8 Some of these defects derive from ineradicable human frailties but others are eradicable.
9 That this statement is over-simplified, I shall try to show later.
the trial judge or jury about those actual past events. For the practical purposes of a court decision, it does not matter what the actual facts were. All that matters is that belief. That belief, at best, is a guess based upon a belief—a guess—about the believability of some rather than other witnesses.

That belief of the trial judge or jury—which, to repeat, is all that, judicially, constitutes the facts of the case—is by no means sure to be the same as or even to approximate the actual past events, because of the following: (1) Testimony is notoriously fallible: witnesses sometimes lie, and honest witnesses frequently err in [a] observing events, [b] in remembering their observations, and [c] in communicating those memories in the courtroom. (2) Trial judges and juries are fallible in determining (guessing) which (if any) of the several disagreeing witnesses has reliably reported the actual facts. These fallibilities cause those tragic blunders of the kind described by Borchard, and also cause those that are encountered in civil suits. Doubtless the results of these fallibilities prompted Learned Hand, our wisest judge, to remark, after years of service as a trial judge: "I must say that, as a litigant, I should dread a law suit beyond almost anything short of sickness and death."

These fallibilities may be viewed from what may seem to be another angle: They interfere with the prediction of future court decisions. When, on April 10, 1952, Mr. Hopeful acts, no one can then tell him what, if a law suit should later arise—say in 1954—relative to his conduct on April 10, 1952, those who will appear as witnesses in 1954 will testify about that conduct. Nor, on April 10, 1952, can any one tell which of the stories of the witnesses, who will appear in court in 1954, will be believed by the trial judge or jury trying that case. Indeed, no one can tell, in 1952, whether such a suit in 1954 will be tried before a judge without a jury or with a jury, or who the judge or jurors will be. Consequently, even if, on April 10, 1952, when Hopeful acts, a lawyer can reliably predict what legal rule the court will apply in any such future law

10 For a closer analysis, see In re Fried, 161 F.2d 453, 462-464 (2d Cir. 1947).
11 It will be seen, as we go on, that, often, what matters is not actually that belief but, rather, what either purports to be or (more often) is assumed to be that belief.
12 Hand, supra note 1, at 105.
suit, and how that court will interpret that rule, still no one can at all reliably predict that the trial court will correctly ascertain Hopeful’s conduct on April 10, 1952—and therefore no one can at all reliably predict, on April 10, 1952, what that future court decision will be.

Now to speak of this litigation-uncertainty—this decision-unpredictability—is usually but another way of speaking of the moral problem to which I have referred. For many of the very factors which prevent prediction of decisions also account for the mistakes which yield the tragedies. Some persons, however, regard as of major importance the predictability aspect of the decisional process. Some of them can’t bear to contemplate a condition in which competent lawyers are unable to foresee the decisions in most law suits that have not yet been begun. They therefore shut their eyes to the obstacles to judicial determination of the facts of cases (e.g., whether Gross made a promise to Gentle, or Tit hit Tat). Many such eye-shutters contrive description of, or theories concerning, the decisional process which, largely disregarding those obstacles, make it seem that prediction of court decisions of most future law suits, is or can be, relatively simple. Because they want to think that most future decisions are, or could be, predictable, they disregard the factors which interfere with such predictions; but, as those same factors cause many court-house tragedies, those would-be predicters ignore those tragedies and their causes.

Such persons create the false impression that correct courthouse fact-finding is relatively simple, that errors in such fact-finding seldom occur or can easily be avoided—and that therefore the moral problem posed by defective trial-court fact-finding deserves relatively little attention. In short, thanks to their eagerness to have decisions predictable, they blind themselves, and others, to the circumstances that give rise to that problem, and thus, although unintentionally, lend support to the smug and morally irresponsible position of the prosecutor to whose remarks Borchard’s book was a reply.

As that problem ought not be shirked, it is desirable, if possible, to expose the fallacies of the prediction-addicts. For, if the

---

13 Should the trial be by jury, the rule will appear only in the judge’s charge to the jury and, if there is a general verdict, the jury may well ignore that rule. More, as we shall see, the jury may ignore the evidence.
fatuousness of their hopes is demonstrated, they may cease to pooh-pooh the immense extent of the trial-court uncertainties which bring about unjust decisions that wreck the lives of altogether too many litigants. The prediction zealots may then come to see the pressing need, in the interest of morality, for “a wide-spread appreciation of the great difficulty of arriving at the truth through the taking of testimony.”14

Conspicuous among these zealots is an unusually brilliant lawyer, who is also a sagacious legal thinker and learned philosopher, Felix S. Cohen. He has shed light on many dark spots in the legal realm. In so doing, he has repeatedly, and wisely, stressed the moral problem inherent in the practical operations of court-house government. If the views of so keen a thinker concerning decision-prediction turn out to be fallacious, we may be reasonably sure that the views of less able prediction-addicts will be at least equally unsound. I select Cohen’s views for criticism, then, precisely because of his outstanding ability and his lively interest in morality.

II.

Cohen’s pertinent writings began with an article published in 1931,15 which he incorporated in his book, Ethical Systems and Legal Ideals, published in 1933. In that book, he defined “law” as a “body of rules according to which the courts . . . decide cases.”16 “Law,” so defined, must, he said, be subjected to moral evaluation; sound legal criticism is no more, ultimately, than ethical criticism: “Fundamental”, he said, “to all adequate thought on politics and society lies the question of what law ought to do, the search for valid standards of legal criticism. The problem is . . . an ethical one, since legal criticism is a passing of judgments of good and bad, right and wrong, upon human acts and works.”17 There “is no way of escaping the final responsibility of law . . . to morality.”18

---

15 Cohen, The Ethical Basis of Legal Criticism, 41 YALE L. J. 201 (1931).
16 Cohen, Ethical Systems and Legal Ideals 11-12 (1933).
17 Id. at 2.
18 Id. at 16-17.
Cohen maintained that "the ideal of legal criticism is an analysis of legal elements into ultimate terms of that which makes human life good." He wrote that the standard of such criticism is this: "The law ought to bring about as much good as it can." One should say, "This decision or statute is desirable because in some way it promotes the good life." The idea of "justice" provides the same standard, one which "demands the complete calculation of legal activities in terms of the good life." Cohen maintained that this ethical standard imposes two duties: [1] "in thought, the translation of the books of the law into the universal language of human joys and sufferings, [2] in practice, the struggle for the attainment of ideals thus discovered." He took the position that "the instrumental value of law is simply its value in promoting the good life of those whom it affects, and that any law, or other element of the legal order which has effects upon human life, can be judged to be good or bad in the light of those effects.

Since he was concerned, as a moralist, with the practical effects, good or bad, of decisions on men's lives, one would naturally expect that he would interest himself in observing the practical effects, on the lives of particular men, of particular decisions—and therefore, the practical effects on those lives of trial-court decisions and thus of trial-court fact-findings. But he never mentioned such matters; he displayed an indifference to them.

That indifference he soon began to couple with this thesis: Through sufficient study, it will be possible to predict the decisions in most future law suits. This prediction thesis he put forward explicitly in articles published in 1935, 1937, and 1950. But the assumptions on which he grounds that thesis had already been stated in his book in 1933. There he declared that legal criticism—i.e., ethical criticism of "law"—must rest on a study, not of particular decisions, but of a "system" to which those decisions are subsidiary.

19 Id. at 54.
20 Id. at 7.
21 Id. at 21.
22 Id. at 95.
23 Id. at 229.
24 Id. at 42.
Although in that book he said that "law" is a "body of rules according to which the courts . . . decide cases", he explained that those rules are not the rules "enunciated by courts" but the "pattern in which judges decide cases." He asserted that "particular decisions are significant only in the context of potential decisions systematically related. . . . [In] the actual practices of courts uniformities and systematic relations" can be found. We should seek a "systematic knowledge of legal decisions", their "systematic implications", the "systematic relations of cause and effect." He wrote that "law is a creature of uniformity."

His aim was a formulation of "principles of judicial conduct." This formulation could be attained by a "systematic analysis of the economic and social background, the moral presuppositions, and the psychological habits of thoughts of judges and other legal officials", which "play a governing role."

However, when he referred to the "psychological" habits of judges, he did not mean their individual, unique reactions, but the "psychological habits" common to all such persons. For, he said, that although the "personal desires and ideals of those in whom law administration is vested can never be wholly negligible", nevertheless this factor will be of "rather inconsiderable importance", and its effects will be "reduced to a minimum", wherever the "class" of such men "is comparatively homogeneous in outlook"; and in our judiciary, according to Cohen, such a homogeneous outlook prevails. "The play of personal beliefs as to the desirability of a given rule or ruling receives its primary check in the feeling of the officer of law that his office entails a duty to the legal order as such, whatever its content"; above all, the "professional spirit . . . compels allegiance to one's co-workers and to the traditions of one's craft." For example, the "trial judge loses professional prestige when he is too frequently overruled in an appellate tribunal." In many ways, "professional loyalty constitutes an effective check upon the exercise of legal discretion. . . ."
In Cohen's article published in 1935, he overtly used these assumptions as the basis of his prediction thesis. Now he said that, although there is a "large realm of uncertainty in the actual law", it is important to see the "relevance of significant, predictable, social determinants that govern the course of judicial decision." For "actual experience does reveal a significant body of predictable uniformity in the behavior of courts." This "predictable uniformity", he wrote, can be discovered by "probing behind [each] decision to the forces which it reflects", and by recognizing that the "motivating forces that mold decisions" are "social forces", because "every decision is a social event", a "function of social forces", a "product of social determinants." There is need "to weigh the social forces which are represented on the bench" need also for a "publication ... showing the political, economic and professional background and activities of our various judges." He expressed confidence that, with adequate "research", there would be success in "formulating the social forces which mold ... decisions."

In his 1937 paper, he restated these views. There he said that "the study of the social factors that determine the course of judicial decision" is an "essential part of the lawyer's outfitting if he is to predict with accuracy the probable course of his client's plans." Some "students of the law" had already made "illuminating studies of the social, economic and political backgrounds of judges and decisions." Studies of that kind, he suggested, were on the right track in "helping us to predict judicial behavior", for "every legal problem [can] be interpreted as a question concerning the positive behavior of judges."

In his 1950 paper, Cohen repeats this thesis, in somewhat different terminology. By careful study, he writes, we can develop a fairly dependable "scientific approach" to the prediction of decisions; those who think otherwise are "mystics" who unjustifiably exaggerate the uncertainties. His argument now runs as follows:

36 Id. at 843-845 (emphasis supplied).
37 Id. at 833.
38 Id. at 846.
39 Id. at 845 (emphasis supplied).
41 Id. at 12-13, 14-15.
The study of decisions, when founded on conventional assumptions of the way courts employ precedents, creates an impression of immense uncertainty, of vast unpredictability. But this impression misleads. It will be dissipated if we discern the "value attitudes" of judges. This, says Cohen, is to be done by watching what decisions a particular judge uses as precedents for other decisions. The judge's "selectivity operations" disclose his "value selectivities", his "implicit value judgments." Thus we can learn the judge's "selectivity patterns", or "value patterns". Those "patterns" "shape the line of development of any precedent." As on those "patterns" depend the way judges utilize and modify precedents, we can find out much "about the relevant factors in plotting the path of a precedent." True, each judge has his own peculiar personal "value attitudes" (or "value standards"). But, says Cohen, they do not interfere with the discovery of the more general "paths" of precedents. For the "egocentric distortions" of any particular judge — "those directions of activity that are peculiar to himself" — are "likely to cancel out against the opposing directions" of other judges who have preceded him and of his colleagues on the bench. He is constrained by his exercise of the duties of his "office" to surrender his inclination to follow those "directions peculiar to himself." Why? Because "lines of precedent" are "large-scale social facts", and "large-scale social facts cannot be explained in terms of the atomic idiosyncracies and personal prejudices of individuals." Consequently, to explain how "a rule of law comes into being or changes", one can ignore the personal, individual, private, "egocentric distortions" affecting any particular judge. That is "why a realistic view" of precedents "requires an exploration of group-enforced value patterns."

In his 1937 paper, Cohen said that, in the effort to "predict judicial behavior", studies of the psychological factors affecting individual judges had not reached "any significant result." Similarly, in his 1950 paper, he writes that such studies have "not yet produced any useful techniques for predicting judicial decisions." Although judges have some "value judgments which are inarticulate and unconscious", it is possible nevertheless "to ferret out the value judgments that underlie decisions" by examining judicial opinions;

43 1 MOD. L. REV. at 13.
44 59 YALE L. J. at 261.
thereby we can lay bare a judge's "suppressed premises". For "the meaning of a value standard is to be found in its actual and possible applications. . . . Concretely, we can expect to find the value standards of a judge in his reactions to day-to-day problems of statutory construction, the weight of precedents, standards of 'reasonable care' or 'due process' and causation. We find the value patterns of a judge, as of any other human being, in the choices he makes between competing interpretations of fact, in the selection of value-charged words to describe given facts, and in the implicit and inarticulate premises of his arguments." Cohen summarizes thus: "In the suppressed moral premises of judicial opinions, in the choices of words of different value tones, in the selection, classification and interpretation of facts and precedents, and in the tracing of lines of causation, we find prime indicators of the value patterns of a judge, a judiciary. . . ."

Here, it may be noted in passing, Cohen substantially agrees with Llewellyn, who has often engaged in a search for uniform "real rules", or "latent rules", behind the "paper rules" used in judicial opinions. The "real rules", says Llewellyn, are "akin to" but lie "deeper" than the "paper rules"; and, by "cutting below" the superficial level "of the paper rules" to the "real rules", one can achieve a "working approximation of uniformity or regularity", and discover a "great realm of workable predictability", in "judicial behavior" (in the "practices of the courts"). The search "for the similarities in [the] attitudes and behavior" of diverse judges is, Llewellyn writes, a "search for predictabilities . . . which transcend individuality"; there is no need of "delving into all the vagaries of individual psychology."45

In short; Cohen (more or less like Llewellyn) apparently would have us believe the following: (1) The operative "value patterns" or "value attitudes" of particular judges can be discovered without too much difficulty; (2) by discovering them, we will know in advance what legal rules any particular judge will apply in any particular case, how he will interpret those rules, and how he will "interpret" the "facts" of that case; (3) in that way, it is possible

45 See the following articles by Llewellyn: A Realistic Jurisprudence—The Next Step, 30 Col. L. Rev. 431 (1930); The Rule of Law in Our Case Law, 47 Yale L.J. 1243 (1938); On Reading and Using the Newer Jurisprudence, 26 A.B.A.J. 418 (1940); My Philosophy of Law 183 (1941).
to predict, with a fair degree of accuracy, the decisions of most future individual law suits.

III.

But what of the fact-findings of trial courts? Will it be possible, via Cohen's method, to predict how, in most future law suits not yet begun, trial judges and juries will "find" the facts? No mention of that question occurs in Cohen's book or his 1935 and 1937 papers. With a few brief exceptions (to be discussed later) his 1950 paper also ignores it. For Cohen's prediction thesis relates to prediction of decisions only after the trial courts have already determined—reached their beliefs about—the facts, i.e., what happened in the past. Cohen is preoccupied with "plotting the paths of precedents", with prophesies concerning the precedents the courts will use, and how they will use them, in deciding cases.

This preoccupation severely restricts the scope of his prediction thesis, assuming it to be otherwise valid. For, in the great majority of suits, the lawyers have not the slightest difficulty in foreseeing what legal rules the courts will apply, since most of those rules are well settled and precise, and neither the parties nor the judges bother with them, because the sole issues are fact issues—such as whether Ding was driving at 80 miles an hour when he hit Dong, or that Nervous shot and killed High, or that Simple handed the deed to his farm to Simon.

Most suits, then, are "fact suits"—suits in which the decisions depend solely on the beliefs of the trial judges or juries about the past events the occurrence of which is in dispute. Prediction of future decisions in "fact suits" not yet commenced means prediction of those future beliefs of trial judges or juries about the past facts. To predict such a decision, one must prophesy that the trial judge or jury will or will not believe that Ding was driving at 80 miles an hour when he hit Dong, or that Nervous did shoot and kill High, or that Simple did hand the deed to his farm to Simon.

The job of determining—"finding"—the facts is for the trial court. Its fact determination is usually final, especially when, as in most law suits, witnesses testify orally and flatly contradict one another.

---

40 This is also the flaw in Llewellyn's prediction thesis.
47 Sometimes there is no such dispute: The parties may have stipulated the facts, or one party, by demurrer or motion to dismiss, may have admitted the other party's fact-assertions.
another. Why? Because (1) in any such case, determination of the facts requires an estimate of the credibility of the respective witnesses; and (2) as their demeanor, while testifying, counts heavily in appraising their credibility—their observable demeanor, as "wordless language", being an important part of the evidence—the upper court, which can't see and hear the witnesses, and which therefore has no access to this demeanor evidence, usually adopts the trial court's "finding" of the facts. In the upper court, those facts, so "found", are fixed data, i.e., "given"—given to it by the trial court.

For that reason, and because most suits are exclusively "facts suits", only a tiny percentage of trial-court decisions are appealed, and the upper courts affirm most of the decisions in the few cases that are appealed. In the overwhelming majority of cases, trial-court fact-findings, and thus trial-court decisions, spell the fate of the litigants. Wherefore, to repeat, prediction of most decisions means prediction of the trial courts' beliefs about the facts.

It follows that the crucial test of Cohen's thesis is this: Whether it is possible—through knowledge of judges' "value-attitudes", or "value patterns", or of their "social, economic, and political background", or by a study of their opinions—to predict that, in a particular future law suit, a trial judge (if the trial is jury-less) or a jury will believe, after listening to the oral testimony of disagreeing witnesses, that, for example, on January 8, 1945, Sleek promised to pay Mild $10,000; or that Old was drunk when he signed his will; or that Cute attended a Communist meeting on October 11, 1947; or that Dolt, a week before Rough died of poisoning, threatened to kill him. Can Cohen, or anyone else, two years (or even a week) before a suit has begun, make any such prophecy with a fair degree of accuracy? Will Cohen's prediction technique, even if perfected, render such predictions possible?

48 See Orvis v. Higgins, 180 F. 2d 537 (2d Cir. 1950) and Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F. 2d 77 (2d Cir. 1949) for qualifications of this statement, qualifications which may be disregarded for present purposes.

49 See, e.g., Wigmore, Evidence § 946 (3d ed. 1940); Broadcast Music, Inc. v. Havana Madrid Corp., supra note 48 and cases there cited. That the demeanor of witnesses is no infallible clue to their credibility, see e.g., Ram, Facts (4th ed. 1890).

50 Qualifications of this statement are noted below.
IV.

As already noted, Cohen's book and his subsequent 1935 and 1937 papers do not discuss such questions. His 1950 paper contains but a few brief statements which perhaps may be thought to bear on them. (1) "Lawyers", he writes, "have ample opportunity to know how earnestly two litigants will swear to two inconsistent statements of a single event. Lawyers thus have special opportunities to learn what many logicians have not yet recognized: that truth on earth is a matter of degree, and that, whatever may be the case in Heaven, a terrestrial major league batting average above .300 is nothing to be sneezed at. . . . From the standpoint of rigorous logic, a proposition is either true or false. There is no middle ground. . . ." [But] the "simple, traditional true-false dichotomy is often quite useless."\(^5\)

(2) If a "defendant [is] charged with reckless driving", and if the witnesses "each honestly gives his views, the court will have the benefit of synoptic vision. Appreciation of the importance of such synoptic vision is a distinguishing mark of a liberal civilization. . . . The accumulation of different views of the same event is the only remedy we have found for fanaticism. . . ."\(^6\)

But how will such knowledge either prevent the tragedies caused by mistakes in the judicial determinations of simple fact-issues, or assist in the prediction of decisions that turn on those determinations? In a prosecution for passing counterfeit money in New York City on November 20, 1948, three witnesses testify that they saw the defendant pass the money in that city on that date, and two witnesses testify that during the entire month of that November the defendant was with them in Austin, Texas. The trial judge or jury must determine whether the defendant was or was not in New York on that day, and, in so determining, cannot fall back on the comforting idea that "truth on earth is a matter of degree", or decide that fact issue by virtue of a "synoptic vision" supplied by the flatly contradictory testimony. The trial court must use the "true-false dichotomy". No "middle ground" position will serve.

Cohen cites with approval\(^7\) Thouless, *How To Think Straight*. But Cohen has forgotten Thouless' warning about a fallacious use

---

51 59 Yale L. J. at 239.
52 Id. at 241-242.
53 Id. at 242 n. 3, 244 n. 6.
of the notion of compromise. "Clearly", says Thouless,\(^{54}\) "the truth does not always lie in the mean position between two extremes, and however attractive such a notion may be, it is of no practical use in discovering where the truth lies, because every view can be represented as the mean between two extremes." Moreover "the truth is just as likely to lie on one extreme as in the middle position." It is not, says Thouless, safe, sound and intelligent to accept the idea that two and two make five as a mean between the "extreme position" that they make four and the other "extreme position" that they make six.

And so, if an innocent man, because of mistaken fact finding, is erroneously convicted of a crime and sent to jail for a year, when the judge could have given him ten years, you may call that a fair compromise—but the innocent man in jail will righteously object. So, too, if Clever sues Frail for $20,000, when in truth Frail owes Clever nothing, it will not please Frail if the trial court enters a "compromise" judgment for $10,000.

V.

However, in his 1950 paper, Cohen does make a third statement which comes somewhat closer to the question of the predictability of trial-court fact-finding: "The question that confronts jurisprudence", he writes, "is whether the practical know-how that enables an experienced judge to discount bias can be formulated and rendered more systematic and less haphazard.\(^{55}\) Cohen never explicitly replies to that question that "confronts jurisprudence", but the ensuing pages of his article imply an affirmative answer. As nowhere does he at all clearly state his position concerning trial court fact-finding, it may be justifiable to infer his position from that implied answer. On that assumption, his position appears to be this: (a) All (or most) errors in testimony are due to the biases of the witnesses. (b) Most trial judges are so "experienced" that they possess a "practical know-how" by which they invariably—or usually—perceive and "discount" such biases. (c) The operations of this "know-how" can be "formulated and rendered more systematic". (d) Consequently, the effects of this "know-how" in particular lawsuits can be known. (e) Wherefore, most trial-court determinations of fact can be predicted.

\(^{54}\) Thouless, How to Think Straight 42-45 (1949).
\(^{55}\) 59 Yale L.J. at 244.
But any such notion of fact-finding clashes with the views of all those who—like Stephen,\(^5\) Maine,\(^6\) Gross\(^8\) and Wigmore\(^9\)—have with care studied many trials. These writers agree on the following: (1) Many mistakes of witnesses stem not from bias but from honest errors in their original observations of the past events at the time those events occurred, or from honest mistakes of memory about those observations. (2) Frequently, no one can discover whether or not a witness has made such honest errors. (3) Deliberately perjured testimony also often goes undetected. (4) The unconscious bias of an honest witness is even more difficult to detect.\(^6\) (5) Above all, the methods used by trial judges in determining whether or not to believe particular witnesses cannot be formulated in rules and rendered systematic.

Since this last point, especially, hits Cohen's apparent thesis in the solar plexus, it is worthwhile to quote these comments: "How is it possible", wrote Stephen,\(^6\) "to tell how far the powers of observation and memory of a man [i.e., a witness] seen once for a few minutes enable him, and how far the innumerable motives by any one or more of which he may be actuated dispose him, to tell the truth upon the matter on which he testifies? Cross-examination supplies a test to a certain extent, but those who have seen most of its application will be disposed to trust it least as a proof that a man not shaken by it ought to be believed. A cool, steady liar who happens not to be open to contradiction will baffle the most skillful cross-examiner in the absence of accidents, which are not so common in practice as persons who take their notions on the subject from anecdotes or fiction would suppose. No rules of evidence which the

\(^8\) Gross, Criminal Investigation (transl. 1907); Gross, Criminal Psychology (transl. 1911).
\(^9\) Wigmore, Principles of Judicial Proof (1913; 2d ed. 1931).
\(^6\) Train, The Prisoner at the Bar 228 (2d ed. 1908), after discussing honest but biased witnesses, says: "The liar with his prepared lie is far less dangerous than the honest but mistaken witness, or the witness who draws inadvertently upon his imagination." Moore, Facts § 1113 (1908) writes: "Nothing is more deceitful than half the truth, and biased witnesses are much addicted to half truths and coloring of facts. . . . Such a witness is more dangerous than one who commits a gross perjury. . . ."

\(^6\) Stephen, op. cit. supra note 56, at 41-43.
legislator can enact can perceptibly affect this difficulty. Judges [i.e., trial judges] must deal with it as well as they can by the use of their natural faculties and acquired experience, and the miscarriages of justice in which they will be involved by reason of it must be set down to the imperfection of our means of arriving at truth. The natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not lying, is by far the most important of all a [trial] judge's qualifications, infinitely more important than any acquaintance with law or with rules of evidence. No trial ever occurs in which the exercise of this faculty is not required; but it is only in exceptional cases that questions arise which present any legal difficulty, or in which it is necessary to exercise any particular ingenuity in putting together the different facts which the evidence tends to establish. This pre-eminently important power for a [trial] judge is not to be learnt out of books. Insofar as it can be acquired at all, it is to be acquired only by experience, for the acquisition of which the position of a judge is by no means peculiarly favourable. People come before him with their cases ready prepared, and given the evidence which they have determined to give. Unless he knows them in their unrestrained and familiar moments, he will have great difficulty in finding any good reason for believing one man rather than another. . . .

"Upon the whole, it must be admitted that little that is really serviceable can be said upon the inference from an assertion [by a witness] to the truth of the matter asserted. The observations of which the matter admits are either generalities too vague to be of much practical use, or they are so narrow and special that they can be learnt only by personal observation and practical experience. Such observations are seldom, if ever thrown by those who make them into the form of express propositions. Indeed, for obvious reasons, it would be impossible to do so. The most acute observer would never be able to catalogue the tones of voice, the passing shades of expression or the unconscious gestures which he had learnt to associate with falsehood; and if he did, his observations would probably be of little use to others. Every one must learn matters of this sort of himself, and though no sort of knowledge is so important to a judge, no rules can be laid down for its acquisition. . . . No process is gone through, the correctness of which can be inde-
pendently tested. The judge has nothing to trust but his own natural and acquired sagacity."

Sir Henry Maine agreed with Stephen. He said that there are no "rules to guide" a "Judge of the Fact" in "drawing inferences from the assertion of a witness to the existence of the facts asserted by him." "It is", he said, "in the passage from the statements of a witness to the inference that those statements are true, that judicial inquiries generally break down. The English procedure of examination is doubtless entitled to high praise; but, on the whole, it is the rarest and highest personal accomplishment of a judge to make allowance for the ignorance and timidity of witnesses, and to see through the confident and plausible liar. Nor can any general rules be laid down for the acquisition of this power, which has methods of operation peculiar to itself, and almost undefinable."

Several points made by Stephen merit marked attention:

(1) Only in "exceptional cases" do questions arise presenting any "legal difficulty", that is, any difficulty about the applicable legal rule or precedent.

(2) The prime difficulty in almost every law suit is that of determining the facts. That determination involves two different kinds of inferences: (a) The trial court has to make up its mind as to the credibility of the several witnesses. If it believes a witness' statement of a fact, the trial court is inferring from his statement that it is a fact. For example, a witness, Alert, testifies that a day after the murder of Weak, Alert saw, in the possession of the defendant Snide, the knife that killed Weak; another witness, Squint, testifies that all during that same day he saw the knife in the possession of Rogue. If the trial court believes Alert's testimony and disbelieves Squint's, it becomes an "established" fact, for the purposes of decision, that Snide had the knife on that day. Wigmore calls such an inference a "testimonial inference"; it might also be called a "primary inference". (b) From a fact taken as a fact

62 MAINE, op. cit. supra note 57, at 317-318.
63 WIGMORE, PRINCIPLES OF JUDICIAL PROOF 16 (2d ed. 1931).
64 At first glance, it may seem that such an inference is not necessary where a document (or other material object) is offered in evidence. But such evidence is based on testimony. "It may be said that in strictness all evidence is oral, as documents or other material things must be identified by oral evidence before the court can take notice of them." STEPHEN, op. cit. supra note 56, at 11. "Real evidence" is perhaps an exception. Also "judicial notice" dispenses with the need to prove a fact by evidence.
by means of such a "testimonial" or "primary" inference, another kind of inference—call it a "secondary" or "derivative" inference—may be drawn, for instance, that Snide killed Weak. Several facts reached by "primary" inferences or "derivative" inferences may be put together to form still another "derivative" inference. The facts are often found by a chain of "primary" and "derivative" inferences. 65

(3) The making of what I have termed "derivative" inferences, says Stephen, is usually easy for a trial judge. (Stephen does not note that it may be more difficult for a jury, and that not infrequently jury verdicts are set aside because they cannot be justified by any rational "derivative" inference from any substantial part of the testimony even if that testimony be taken as true.)

(4) But, says Stephen (with whom Maine, Wigmore and others agree), the drawing of "primary" or "testimonial" inferences—which a trial-court must undertake in almost every law suit—is a singularly baffling job, 66 and one for which there are no rules.

In other words, the pivotal element in almost every suit is the belief or disbelief of the trial judge or jury in the sworn statements of some of the persons who testify; the forming of that belief or disbelief constitutes the prime difficulty in deciding most suits; and no one can put into the shape of rules or generalizations the means of correctly forming that belief or disbelief.

If able trial judges often fluke in ascertaining credibility, think how much more likely it is that juries do. Yet Cohen (who, in the thirty-four pages of his 1950 article, includes but one brief sentence mentioning juries) 67 does not discuss the capacity of jurors to un-

65 "It will be found upon examination that inferences employed in judicial inquiries fall under two heads: (1) Inferences from an assertion whether oral or documentary. (2) Inferences from facts which, upon the strength of such assertions, are believed to exist, to facts of which the existence has not been so asserted. . . . The judge hears with his own ears the statement of the witness and sees with his own eyes the document produced in court. His task is to infer from what he thus hears and sees the existence of facts which he neither sees nor hears." STEPHEN, op. cit. supra note 56, at 38.

66 The derivative inferences "are generally considered to be more difficult than to draw inferences from an assertion to the matter asserted. In fact, it is far easier to combine materials supposed to be sound, than to ascertain that they are sound." STEPHEN, op. cit. supra note 56, at 46. For a somewhat more detailed discussion of "primary" and "derivative" "secondary" inferences, see the Appendix (points I and II) to the dissenting opinion in Wabash Corporation v. Ross Electric Corporation, 187. F.2d 577 (2d Cir. 1951).

67 This one sentence, (59 YALE L. J. at 259) reads: "A value differential in
cover witnesses' honest errors or lies; nor does he discuss the scant likelihood that methods used by thousands of juries in reaching their verdicts can be so formulated as to furnish the means of predicting decisions in most future jury cases. Cohen's jurisprudence omits "juries'prudence."

Inasmuch as the ways of witnesses, and the ways of trial judges or jurors reacting to the witnesses, cannot be reduced to rules, they are "un-ruly". Other factors affecting trial-court fact-finding and blocking predictions are also unruly, e.g., missing witnesses, missing documents, the skill or ineptitude of the lawyer representing one or the other of the parties, and the ability or inability of litigants to meet the expense of obtaining evidence—including the hiring of expert accountants or engineers—essential to success in their suits.

Cohen shoves all these unruly factors under the rug. Apparently he agrees with Patterson in accepting, without questioning, the complacent "assumption which underlies the law... that governmental officials [presumably including trial courts] are capable of acquiring knowledge about facts sufficiently reliable to justify the legal consequences attached to them." Perhaps Cohen also

attitude of judge and jury towards a given class will be reflected in differences of judgment as to whether individuals of that given class are responsible for the wrongs complained of." In his book, published in 1933, he fleetingly refers to the discrepancy "between the instructions to the jury" and the "laws" of "jury behavior". But never does he consider how that discrepancy blocks the search for "uniformities". Op. cit. supra note 16, at 237. I find no mention of juries in his 1935 or 1937 papers.

Hornstein says that a lawyer can easily prophesy the decisions of nine-tenths of the cases because they will be governed by obvious precedents. (He completely neglects the difficulty of predicting the fact-findings.) As to the remaining one-tenth, he says that the difficult part of prediction comes in guessing "whether the judge will be convinced... that the precedents are in point, and sustain the principle urged; that there are no conflicting precedents, that the precedents are reasonable; and that no additional factors (including economic or social changes) now require a different ruling. Whether a lawyer is 'good' then turns on his having been trained to find prior decisions which bear on the principles involved in the problem; his ability to reason (which includes the skill to anticipate which of conflicting precedents or principles will prevail; and his general knowledge of the community interest which will bear on the decision." Then Hornstein adds: "Even so, his prediction may prove erroneous if these various elements are not adequately presented by the advocates before the court when the matter reaches litigation... But the lawyer cannot base his advice on anticipation of inadequate presentation in the event that a problem reaches the courts." Hornstein, A Lawyer Looks at the Law Schools, 1 J. LEGAL EDUC. 516, 530-531 (1949). But often a lawyer does not know whether a case will be adequately presented to the court. What then?

FRANK, COURTS ON TRIAL 94-99 (1949); Frank, White Collar Justice, SAT. EVE. POST, JULY 17, 1943; Frank, Book Review, 56 YALE L. J. 589 (1947).

PATTERSON, INTRODUCTION TO JURISPRUDENCE 30 (1946).
agrees with Patterson that "the rules of judicial proof are designed to minimize errors due to the 'subjective' element..." in testimony. If so, Cohen should heed Stephen who says, "The rules of evidence may provide tests, ... by which judges may be satisfied that the quality of the materials upon which their judgments are to proceed is not open to obvious objections; but they do not profess to enable the judges to know whether or not a particular witness tells the truth." 71

One wonders what such as Cohen and Patterson have to say about Learned Hand's remark that a law suit is to be feared beyond almost anything short of sickness and death.

(To avoid misunderstanding of what I have said of a trial court's "derivative" inferences, I must briefly digress to add the following: When an upper court reviews a trial judge's decisions, the upper court will usually accept his "primary" or "testimonial" inferences, unless, in the light of undisputed documentary evidence or for other reasons, they are absurd.71a However, the upper court will not necessarily accept a trial judge's "derivative" inference even if it is rational: Where an alternative rational "derivative" inference is possible, the upper court may adopt it, rejecting that of the trial judge. But, in most jurisdictions, the same latitude is not open with respect to a jury's general verdict: The upper court must accept the jury's "derivative" inferences if rational, although other alternative rational "derivative" inferences could be drawn from the "testimonial" inferences.72 The remarks in this paragraph should be read into every statement in this paper about the effect on upper courts of trial court fact-finding.)

VI.

Recall now Cohen's remarks that personal idiosyncracies and biases ("egocentric distortions") have a "rather inconsiderable importance", and that their effects are "reduced to a minimum", because the men who participate in the process of making decisions are "comparatively homogeneous in outlook", and are restrained by a "professional spirit." Now witnesses surely play a leading part

71 Stephen, op. cit. supra note 56, at 42.
71a See Gindorff v. Prince, 189 F. 2d 877 (2d Cir. 1951).
72 For a more detailed discussion, see Wabash Corp. v. Ross Electrical Corp., 187 F. 2d 577 (2d Cir. 1951) (dissenting opinion, Appendix, Point 1).
in that process, since they supply one of the most important ingredients of most decisions. Do Cohen's remarks apply to witnesses?

Plainly they do not. Assume (what is often not true) that witnesses are "comparatively homogeneous in outlook." Still no such general homogeneity will produce substantial similarity in their observations of events and their memories of their observations. Their mistakes are peculiarly due to causes that are "private", individual, idiosyncratic, usually hidden, without detectable "patterns". No background of professional education, and no "professional loyalty" to their "office", hold in check their "personal idiosyncrasies and biases".

All this should be obvious but, since it seems not to be to Cohen and to many others who think decision-prediction fairly easy, I shall quote two comments (out of many dozens) by lawyers experienced in coping with witnesses.\textsuperscript{73} Gross,\textsuperscript{74} after noting that several witnesses, speaking of the same incident, will differently characterize it as "a very ordinary event" or "altogether a joke", or "quite disgusting", says, "Now is it possible to think that people who have so variously characterized the same event will give an identical description of the mere fact? They have seen the event in accordance with their attitude toward life. One has seen nothing; another this; another that; and, although the thing may have lasted only a very short time, it made such an impression that each has in mind a completely different picture which he now reproduces. . . . To compare the varieties of intellectual attitude among men generally, we must start with some sense perception, which, combined with mental perception, makes a not insignificant difference in each individual. . . . One man overlooks half because he is looking at the wrong place; another substitutes his own inferences for objects; while another tends to observe the quality of objects and neglects their quantity; and still another divides what is to be united, and unites what is to be separated. If we keep in mind what profound differences may result in this way, we must recognize the source of the conflicting assertions by witnesses. . . . In order to know what another person has seen and apprehended, we must first of all know how he thinks, and that is impossible. If we know, at least approxi-

\textsuperscript{73} For many other such comments, see, e.g., Wigmore, Principles of Judicial Proof (2d ed. 1931).
\textsuperscript{74} Gross, Criminal Psychology, §§ 35, 83 (1907), quoted in Wigmore, op. cit. supra note 73.
mately, the kind of mental process of a person who is as close as possible to us in sex, age, culture, position, experience, etc., we lose this knowledge with every step that leads to differences. We know well what great influence is exercised by the multiplicity of talents, superpositions, knowledge and apprehensions. . . . The individuality of the particular person makes [his] perception . . . individual, and makes it almost the creature of him who perceives.” Which is to say that witnesses are not fungible, and that their perceptions are often not negotiable.

Barry writes that in the course of an argument before the High Court in Australia, Mr. Justice Dixon remarked that the ability to observe correctly “is an idiosyncracy, and that the ability to give evidence in the witness-box in a clear, definite and convincing manner is also an idiosyncracy, but that the two idiosyncracies are not necessarily related.”

In his 1950 paper, Cohen, in support of his general thesis, discourses at some length on some concepts of modern physical science. That discussion, and his assertion that, in the decisional process, somehow the private, idiosyncratic attitudes of individuals are cancelled out, tie in with something he said in another recent paper. There he noted that even in “science” there is “subjectivism”, since “there is a subjective element in judgments of fact, cold, light, color, weight, pressure, and everything else that is subject to human experience”, and since “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 added, “What saves science from being a planless succession of day-dreams

---

25 Barry, The Problem of Human Testimony, 11 Aust. L. J. 314 (1938). STFEN, op. cit. supra note 56, at 42: “The grounds for believing or disbelieving particular statements under particular circumstances may be brought under three heads—those which affect the power of the witness to speak the truth; those which affect his will to do so; and those which arise from the nature of the statement itself and from surrounding circumstances. A man’s power to speak the truth depends upon his knowledge and his power of expression. His knowledge depends partly on his accuracy of observation, partly on his memory, and partly on his presence of mind; his power of expression depends on an infinite number of circumstances, and varies in relation to the subject of which he has to speak. A man’s will to tell the truth depends on his education, his character, his courage, his sense of duty, his relation to the particular facts as to which he is to testify, his humour for the moment, as to the presence or absence of which in any particular case it is often too difficult to form a true opinion.”

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. . . ."

Of course. Some "subjective impressions" can be and are communicated, publicized, and made the basis of common, uniform, or "objective", understandings. But the varying discrepant private "subjective impressions" of disagreeing witnesses as to what they saw and heard of, say, an automobile accident two years ago, are usually so hopelessly "egocentric", so "subjective", that they cannot be checked against one another in a way even remotely like that used by scientists when checking their respective "subjective impressions". A physicist, when conducting an experiment, has prepared himself to be a witness. He meticulously, and contemporaneously records what he observes. Ordinarily, he employs precision instruments as aids to his observation. Supplied with his report of his observations, other physicists can repeat the experiments under conditions almost exactly the same. Every effort is made to allow for the "personal equation". But seldom have the witnesses at a trial prepared themselves to observe the events concerning which they later testify. They make no contemporaneous record of their observations, employ no instruments to assist their observations. Moreover, their observations (of the past event) which they report in court cannot be repeated by other carefully prepared observers. What the witnesses saw or heard—the signing of a will, or the oral statement of a litigant—is not an experiment which can be substantially repeated.

Physicists, of course, are not infallible. But it is, to say the least, unwise to conclude that because, usually, their observations are highly precise, despite the distracting influence of individual subjective factors, therefore the effects of individual subjective

---

77 I shall discuss later the meaning of the words "subjective" and "objective".

78 See, e.g., Stephen, op. cit. supra note 56, at 28-29, 33-34; Maine, Village-Communities 311-312 (4th ed. 1881); Wolters, The Evidence of Our Senses 49-79 (1933); Burrill, A Treatise on Circumstantial Evidence 94 (1868).

79 As to the all-too-human prejudices of even great natural scientists, see Frank, Fate and Freedom 180-184 (1945).

factors—on those ordinary observers who testify as witnesses are equally small, equally subject to correction, and therefore largely negligible.\textsuperscript{81} 

Testimony is an indispensable raw material of decisions in most litigation. Gross, speaking of witnesses' sense perceptions, says that to study them "is to study the fundamental conditions of the administration of law. . . . If the perceptions are good, our judgments may be good; if they are bad, our judgments must be bad."\textsuperscript{82} The like is true of the memories of witnesses and the accuracy of their narrations in the courtroom. Insofar as the reactions of the believed witnesses to the actual past facts do not match those facts, the judicial administration of justice goes sour.

Yet testimony is notoriously fallible, uncertain, unpredictable. "It would be correct, I think, to say", remarked Sir Frederic Eggleston, a famous-trial-lawyer, "that no witness can be expected to be more than 60\% correct, even if perfectly honest and free from preconception."\textsuperscript{83} Said Carter, "From my experience as a man, a lawyer, a prosecuting attorney, and a judge, I am compelled to say that the most uncertain thing I know of is human testimony."\textsuperscript{84} Barry writes that "such investigations as have been made support the view that the usual assumptions of the value of human testi-

\begin{itemize}
\item men, upon entering a laboratory, are temporarily endowed with infallibility is a popular myth. . . . No great scientist is blind to the degree of honest error involved in physical observation. People—and scientists are people—see to a certain extent what they want or expect to see . . . ."
\item This point needs high-lighting. It serves to answer as able a thinker as Jerome Hall who tries to make light of mistakes in trial-court fact-finding due to witnesses' errors. In his book, Living Law of a Democratic Society (1949) he says (p. 42) that "relevant factual truth can usually be discovered in sufficient degree for the practical purposes of the legal order"; and he speaks (p. 105) of "the common sense practical 'certainty'" of the facts in most law suits. This complacency he apparently justifies by saying (p. 41) that a contrary view (1) ignores "the absolute assurance of normal persons regarding the correctness of their sense perceptions" and (2) involves the "ultimate assumption that science is nonsense because the conditions of correct sense perception are non-existent." On both points, one wishes he and Cohen would read and reflect on what has been said by such writers as Stephen, op. cit. supra note 56, at 28-29; Maine, Village-Communities 311-312 (4th ed. 1891); Wolters, The Evidence of Our Senses 49-79 (1933); Wigmore, Principles of Judicial Proof (2d ed. 1931); the works of Gross supra note 58.
\item Gross, Criminal Psychology § 35 (1911).
\item Eggleston, Legal Development in a Modern Community, Interpretation of Modern Legal Philosophy 167, 182 (1947).
\item Carter, The Old Court House 144 (1890).
\end{itemize}
mony err on the side of generosity, and that the value ordinarily assigned to it in courts of law is exaggerated."\(^8\) "It must be admitted", said Gross, "that at the present day the value of the testimony of even a truthful witness is much overrated. The numberless errors in perceptions derived from the senses, the faults of memory, the far-reaching differences in human beings as regards sex, nature, culture, moods of the moment, health, passionate excitement, environment, all these things have so great an effect that we scarcely ever receive two quite similar accounts of one thing; and between what people really experience and what they confidently assert, we find only error heaped on error."\(^9\) Stephen said that, "according to my observation, the power to tell the truth, which implies accurate observation, knowledge of the relative importance of facts, and power of description, properly proportioned to each other, is much less common than people usually suppose it to be."\(^7\) One form or another of "lie detectors" may perhaps, in the future, uncover all perjury, and perhaps, some day, even bias; but no device can discover witnesses' errors in their original observations.

Since most decisions are at the mercy of the unique, unforeseeable, inscrutable, subjectivities of witnesses' reactions, what price predictable uniformities in decisions?

VII.

If witnesses are not to be likened to scientific observers, no more are trial judges or jurors, when they are observing the witnesses. As themselves witnesses of the witnesses, those judges and jurors may make mistakes similar to those of the testifying witnesses: They may misunderstand, or forget, such testimony. Think of the effect of inattentiveness alone: If a trial judge or jury fails to observe the demeanor of a witness testifying to a crucial fact, a subsequent reading of a written transcript of the testimony will be no cure. (The jury, moreover, seldom has even an opportunity to read the transcript.) A witness ignored or forgotten is not "psycho-

\(^8\) Barry, *supra* note 75, at 315.
\(^7\) Stephen, *op. cit. supra* note 56, at 44.
logically present”; his testimony is “psychologically” absent. Inattention may, then, mean that an important fact is not comprehended; it is therefore out of the case, for all practical purposes. Yet the “subtraction of a single fact may alter the applicability of one or more doctrines of substantive law.”

The trial judges or jurors, in passing on the credibility (or lack of credibility) of the witnesses, are powerfully influenced by their respective “idiosyncracies and personal prejudices” which are “inarticulate and unconscious”—but which usually no one can “ferret out”. You may call those prejudices “value standards”. But usually such “value standards” result from deeply hidden “egocentric distortions”, not correlated with “group-enforced value patterns”. One trial judge, without being aware of it, has a strong bias against a witness because the witness has a pug-nose, or a facial tic, or wears a bow-tie, or eye-glasses, or has red hair, or is an Italian, a Mason, a Catholic, or speaks with a southern accent. Another trial judge, again without being aware of it, may have a predisposition in favor of any witness having such an appearance or mannerism. Trial judges, as witness-observers, are not fungible, and their unique reactions are not negotiable.

Said Josiah Royce, writing of out-of-court individual reactions: “Oddities of feature or complexion, slight physical variations from the customary, a strange dress, a scar, a too-steady look, a limp, a loud or deep voice, any of these peculiarities . . . may be, to one, an object of fascinated curiosity; to another . . . , an intense irritation, an object of violent antipathy.”

Neither a “comparatively homogeneous outlook” nor a common background or professional education will wipe out the differences between trial judges in those prejudices, unknown to the judges themselves because they are at work far below the level of consciousness. With such varying attitudes towards particular witnesses, there can be no substantial identity of beliefs about the facts of cases and therefore no foreseeable uniformities in trial-court decisions.

Occasionally, a trial judge, conscious of one of his antipathies,

89 Smith, Components of Proof, 51 Yale L. J. 537, 569 (1942).
90 Royce, Race Questions, Provincialism and Other American Problems 47-52 (1908).
91 That is, varying “primary” (or “testimonial”) inferences.
reveals it. So we hear from one judge that any witness lies who has abnormally large ears; other judges regard as lying a witness who throws back his head, or wipes his hands, or shifts his gaze rapidly, or blushes, or bites his lips, or taps steadily on his armchair. If such a judge reports of record in deciding a case that he has used such an absurd rule-of-thumb, he may well be reversed.\textsuperscript{92} Seldom, however, does a judge make such a disclosure of record.\textsuperscript{93} In truth, most of those plus or minus prejudices are sub-threshold, unknown (as I said) to the trial judge himself. Wherefore, when they influence his view of the facts, he is not constrained by any "professional spirit" or "loyalty" to his office. And as, in any event, those prejudices remain unpublicized, he has no fear that, through being overruled by upper courts because of the impact on his decisions of those prejudices, he will lose "professional prestige". Still more obvious is the absence of any such professional restraints on jurors' prejudices for or against particular witnesses.

Those biases of jurors are undiscoverable, since juries usually return general verdicts which reveal nothing of what facts the jurors "found", for in any such verdict there is no express "finding". No one knows what is the jurors' real belief about the facts, or whether that belief accords with their verdict—or even whether the jurors heeded the evidence and formed any belief about the facts at all: they may have reached their verdict by drawing lots.\textsuperscript{94} The only "finding" is an assumed finding—uncommunicated, "private".

Many decisions by trial judges in juryless cases are equally opaque: In many jurisdictions, where trial judges are not obliged to make and publish "findings of fact", the judges enter laconic judgments minus any explanation; such judgments resemble general verdicts. What the judge, in such a case, actually believed cannot be discovered. His finding is then but an assumed finding. In any

\textsuperscript{92} Cf. Quercia v. United States, 289 U. S. 466, 468 (1933).

\textsuperscript{93} A trial judge’s “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; 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.” Broadcast Music Co. v. Havana Madrid Restaurant Corp., 175 F. 2d 77, 80 (2d Cir. 1949).

\textsuperscript{94} See, e.g., Goins v. State, 46 Ohio St. 457, 21 N. E. 476, 482 (1839); Thompson, Trials §§ 2601, 2602 (2d ed. 1912); Skidmore v. B. & O. R. Co., 167 F. 2d 54 (2d Cir. 1948).
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. So it is that many upper court opinions say: "There was testimony from which the trial court could reasonably have found that, etc."95

In any such case, for all that anyone knows or can discover, the trial court had no such finding or belief in mind. Actually the trial court may have believed witnesses who testified to facts that would not justify the decision under any conceivable rule. The assumed finding may therefore be the veriest myth.

Moreover, jurors (even in "special verdicts" or "fact verdicts"96) never say why they chose to believe one witness rather than another; very, very seldom does a trial judge, even when he makes express findings or writes an opinion. When a trial judge does publish "findings", they are but a report of his belief about the facts. He may (intentionally or unintentionally) misreport what he believes, in order to circumvent the precedents—in the interest of what he deems just, or very occasionally out of other less praiseworthy motives (induced by bribery or "pull"). No one except the trial judge knows whether, in his published "findings", he accurately reports or "fudges" (i.e., distorts) his belief, for no one else can disprove the accuracy of such a report of an inner "state of mind".97

Accordingly, instead of saying that the facts of a case, judicially, consist of the belief of the trial judge or jury, we should say they consist of either an "assumed" or "purported" belief.

The foregoing I think knocks the props out from under Cohen's notion that from published judicial opinions we can discover the "value standards" that influence decisions: (1) The witnesses make

95 For instances in which upper courts have said they were assuming the findings of a jury or trial judge, see United Clay Products Co. v. Linder, 119 F. 2d 456 (D. C. Cir. 1941); National Surety Co. v. Lincoln County, 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).

96 As to special verdicts, see Skidmore v. B. & O. R. Co., 167 F. 2d 54 (2d Cir. 1948).

97 As Cohen himself said, in a wholly different context, another person can seldom disprove an assertion about "one's state of mind." COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 37 (1933).
no such disclosures of their "value standards" in evaluating the events they observed. (2) The trial courts supply virtually no clues to their "value standards" in evaluating the witnesses; without such clues, it is usually impossible to formulate knowledge of "value patterns" in the fact findings of trial courts.

To be sure, sometimes trial judges and jurors have gross prejudices for or against some kinds of witnesses or litigants, prejudices so gross that their operations are detectably and predictibly "patterned"—as, for instance, the prejudice against Negroes in some parts of the South. But in the mine-run of law suits—that is, the great bulk of law suits—the prejudices of judges and jurors for or against particular individual witnesses, have no "large-scale social" character, and lack uniformity. They are distinctively individual, unconscious, un-get-at-able.

True, lawyers do sometimes become acquainted with gross biases of some individual trial judges. As I have said elsewhere: "Judge Brown is known as a former railroad lawyer who, fearful of showing favoritism, leans over backward and is likely to be unduly hostile to railroads. Judge Green was for years in the office of the City Corporation Counsel and is very liberal to municipalities. Judge Blue is markedly puritanical. . . . Armed with such information, lawyers try to have (or avoid having) certain kinds of cases tried before certain judges. Knowledge of that sort might be called 'rules for decision' by Judges Brown, Green, Blue. . . ." But most of the cases tried before such judges do not

58 Years ago Veblen said that it was an act of supererogation for an employer to bribe a federal judge in a labor dispute. If that was ever true, it is true no longer. Doubtless there are still some judges with uncontrolled anti-labor prejudices; there are also those with uncontrolled pro-labor prejudices. But most judges today manage to curb anti-or pro-biases of that particular kind.


100 I also said elsewhere: "The writer believes that it is the function of a lawyer, if possible, to anticipate, on the basis of past knowledge, that a police magistrate will exercise his discretion in accordance with the wishes of a particular politician who is friendly to opposing counsel, or that, in jurisdictions where justices of the peace rely for their fees on amounts collected from defendants, there is a likelihood that such officials will give judgments for plaintiffs. Or that Judge A has a known animosity to lawyer X which is likely to induce Judge A to decide against the client of lawyer X. Or that Judge Stupid is poorly educated, and knows and can understand few rules of law." For "such knowledge as well as knowledge of the" legal rules "is helpful in guessing or in bringing about specific decisions and therefore, if and to the extent available, should be acquired by any sane, sensible lawyer." Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 17, 41-42 (1931).
evoke those gross and knowable biases; in those cases, many unknown and unknowable, sub-threshold attitudes influence their decisions. Moreover, in most jury trials, the operative biases of the jurors cannot be learned even after the trials end.

What is more, I note again, before a law suit has begun, often no one knows whether the suit will be tried before a trial judge or a jury, or who will be the trial judge or the jurors. So that, even were it possible to know the less gross prejudices of particular judges or jurors with respect to particular witnesses, that knowledge would be of no avail in predicting the outcome of many a suit not yet commenced.101

Cohen is a sort of "left-wing" member of the "school of sociological jurisprudence". It is characteristic of this "school" that it stresses, most desirably, the social aspect of legal rules, but, most undesirably, at the expense of inattention to the less general, more individual aspects.102 Another "left-winger" who, like Cohen, has a marked interest in ethics, is Jerome Hall. He aims at a "sociology of law" which "will be a theoretical social science consisting of generalizations regarding social phenomena in so far as they refer to the contents, purposes, applications and effects of legal rules."103 This "sociology of law" is to be a division of what Hall calls "integrative jurisprudence", the "ultimate data" of which he terms a "socio-legal complex". He says that he uses this term because it "emphasizes that not private, but communicated, acknowledged, experience is relevant."104

His "jurisprudence", like Cohen's, thus shuts out, as irrelevant, the "private"—the "uncommunicated", and the "unacknowledged"—impulses and reactions of individual witnesses, trial judges, and

Cohen subsequently said substantially the same. See Cohen, Transcendental Nonsense and The Functional Approach, 35 Col. L. Rev. 808, 845 (1935). Mr. Justice Jackson has observed that "choices of tribunal are commonly used by all plaintiffs to get away from judges who are thought to be unsympathetic, and to get before judges who are considered more favorable ...." Miles v. Illinois Central R. Co., 315 U. S. 608, 705, 707 (1942).

101 Not only are decisions affected by prejudices for or against witnesses, but also by those for or against the lawyers and the litigants.

102 Found is sometimes an exception: He has, on occasions, turned his attention to some of the less general aspects.

103 Hall, Integrative Jurisprudence, Interpretations of Modern Legal Philosophies 312, 328 (1947).

104 Id. at 323. I shall later discuss the substitution of "private" for "subjective".
jurors. Unfortunately, the practical effects of those hidden impulses and reactions cannot be excluded from trials and trial-court decisions.\footnote{105} A “jurisprudence” that disregards them does not mesh with the realities in the largest area of court-house government—that of the trial courts. Cohen, Hall & Co. agree then, with Cardozo, that, although what I have described as trial-court “factsuits” do “make up the bulk of the business of the courts” and “are important for the litigants concerned in them”, yet the decisions in these suits lack significance for “jurisprudence” because they “leave jurisprudence where it stood before”, quite “untouched” by those decisions.\footnote{106}

Think of it. The “bulk” of cases—admittedly the cases that most importantly affect most citizens who litigate—must not be allowed to disturb the legal philosophers who think high thoughts as they dwell in the serene atmosphere of their “jurisprudence”. The ills of those numerous litigants are ostracized in those sacred precincts. What an example is set to ordinary lawyers by these philosophers who, declaring that they dote on ethics, will not soil their hands by dealing with those ills. These moral-legal philosophers regard the bulk of cases as unworthy of their attention; they look upon such cases as legal bastards outside the pale of legitimate high-minded moral concern. If they consider it beneath their dignity to attend to such matters, who will attend to them?

To my mind, that sort of ethics is dangerously inhumane. It recalls William James’ condemnation, as perniciously immoral, of “the talk of the contemporary sociological school about averages and general laws . . . with its obligatory undervaluing of the importance of individual differences. . . .”\footnote{107}

VIII.

As the words “subjective” and “objective” are ambiguous, I must, to preclude misunderstanding, outline what I intend by my use of those words. I do not use “subjective” to mean the “unreal”,

\footnote{105} As to Hall’s cavalier way of disposing of witnesses’ biases and mistakes, see note 81 supra.

\footnote{106} CARDOZO, THE JUDICIAL PROCESS 163, 164 (1924). For criticism, in this vein of Cardozo, with full recognition of the great value of his writings concerning upper courts, see Frank, Cardozo and The Upper-Court Myth, 13 LAW & CONTEMP. PROB. 369 (1949).

\footnote{107} JAMES, The Importance of Individuals, The Will to Believe 261-262 (1896).
or "objective" to mean the "real". By "subjectivity" I designate that which some persons prefer to label "relativity". Following, in a general way, the lead of Bertrand Russell, I use "subjective" to designate whatever results from limited, singular, particular, perspectives. In that sense, "objective" signifies the sum total of that which would come from all possible perspectives. The "subjective" then is a real but partial, restricted, view. On that basis, I suggest that men encounter at least the following kinds of "subjectivities":

1. The subjectivities which stem from the divergent social heritages of divers social groups, each with its restricted perspective.
2. The subjectivities due to the grammatical structures of basically different languages (e.g., the Hopi or Chinese as compared with the ordinary European-American), each having its restricted perspective.
3. The subjectivities which arise from differences in physical locations.
4. The subjectivities which derive from the unique attitudes and reactions of particular men, their unique individual perspectives.

The first and second (which are somewhat related) can be eliminated to some considerable extent; perhaps some day they will completely vanish. The third has already been successfully eliminated, in part, by modern physics (Einstein). The fourth is largely unconquerable. It will remain so, unless psychology develops in ways not now foreseeable. It is this kind which this paper emphasizes.

5. There is a fifth kind which must not be confused with

---

108 See, e.g., Weiss, Man’s Freedom 185 (1950): "But relativity is not the same as subjectivity. Values can vary from context to context and still be objective . . . ."


110 Others would call them different kinds of "relativities".

111 See Worf, Science and Linguistics, Hayakawa, Language in Action 302 (1940); Worf, Relation of Habitual Thought and Behavior, Language, Culture and Personality 75 (1941).

112 Einstein’s general relativity theory is actually an anti-relativity theory, for it seeks to overcome the effects of physical (loational relativity i.e. "subjectivity"). See Einstein and Infeld, The Evolution of Physics 166, 249 (1938). "Indeed, it is quite enough to know the results obtained by an observer in one C. S. [Coordinate System] to know those obtained by an observer in the other . . . . The general theory of relativity attempts to formulate physical laws for all C. S."

Imaged with the Permission of N.Y.U. Law Review
the fourth: the subjectivity which comes from the limited, finite, capacities of all mankind. (Bacon said that men are uniformly “mad”, and Santayana says that all of us are victims of “normal madness”.) As all men share these limitations, they are usually ignored. We usually consider “objective” that which, at least potentially, is common to all humans. Yet the finiteness of man (genus homo) necessarily gives him a restricted (anthropocentric) perspective, which forever bars him from knowing whether, and how far, his notions—from the crudest notions to the most refined scientific theories (“laws”)—transcend the status of “just so stories” when contrasted with what would show up as the totality

113 See FRANK, FATE AND FREEDOM 311-312 (1945): “Man is, inescapably, shut off from complete understanding of much that goes on in the world, even of what occurs in that restricted area which he inhabits, to say nothing of events in the immense areas outside his ken. For man’s knowledge of events comes to him through a limited number of physiological transmitting devices. We refer to them as the five senses, although the modern biologists say that there are from ten to twenty (and perhaps more) senses. By ingeniously made instruments, we have greatly amplified the range of information which we thus receive; and we made up for our deficiencies, to some extent, by translating impressions received by one sense organ into terms comprehensible by another. For instance, we cannot see, yet we now know much about, infra-red rays. Probably some aspects of nature exist to which no living organism is sensitive. Man lacks sense organs possessed by other animals, or has them in less adequate form. We have learned, with difficulty, something of what we call electricity, the electric fish (the ‘torpedo’) in all likelihood has an ‘electrical sense’ which supplies it with far better information about the electrical characteristics of the universe. How can we be sure that many animals are not closer to other phases of ‘true’ reality than we? ‘We cannot’, said old Sextus Empiricus, ‘ourselves judge between our own impressions and those of other animals, since we ourselves are involved in the dispute and are therefore rather in need of a judge than competent to pass judgment ourselves.’ We cannot justifiably ‘give our own sense impressions the preference over those of the so-called irrational animals.’ We may say our reason is superior; but our data may be, and probably are, in some respects comparatively defective. We may increase our knowledge by inventing more and more instruments for translating into terms of our sense organs stimuli which they do not directly transmit; but those translations, like all translations, will be unavoidably defective. Moreover, it is improbable that we shall ever, even in translated form, become aware of all that happens in the world about us. ‘We are’, says Julian Huxley, ‘but parochial creatures endowed with sense organs giving information about the agencies not found in our little environment . . . . When we begin trying to quit our anthropocentricity and discover what the world might be like if we had other organs of the body and mind for its assaying, we must flounder and bump.’ We can never be sure that nature corresponds to our beliefs about it . . . . There must, then, be stretches of the unknown, the behavior of which dribbles in on us constantly with effects we can never know or calculate.”

114 Freud, in a letter written in 1932, observing that his own psychological theories seem to amount to a “species of mythology,” asked Einstein, “But does
of all perspectives. While lacking "objectivity", because limited, the products (including emotions as well as cognitions) of this sort of "subjectivity" are nevertheless real. And they are sufficiently close to "objectivity" to enable man to survive and function.

This fifth kind of subjectivity is implicitly acknowledged in the word "inter-subjective", popular with some philosophers as a substitute for "objective". It is also implicit in other terminologies. Thus some persons substitute for "objective", the "public"; and for "subjective", the "private". "Public" is sometimes employed to mean that which potentially, among human beings, is completely communicable without any possibility of misunderstanding; sometimes it is used to mean that which is "commonly observable". (In this connection, note the relations between the words "common" and "communicate", and between the words "public" and "publica-

not every science lead ultimately to this—a sort of mythology? Is it otherwise with your physical science?" Many physicists have, in effect, agreed with this statement. See e.g., discussion in Cassirer, The Problem of Knowledge 104-117 (1950); cf. Santillana, The Development of Rationalism and Empiricism, 2 Internat. Encyc. of Unified Sciences 1, 26, 40, 47 (1941); Zilsel, Problems of Empiricism, id. at 53, 63, 81, 93.


See Sullivan, Aspects of Science, Second Series 101, 104 (1926): "Men have believed more than they need have done, and their picture of reality was an almost ludicrously homely rendering of it, but something was true about their picture, just as a child's map of Ireland may misrepresent every fact about that country except that it is an island."

115 In including emotions, I differ sharply from the so-called logical positivists.

116 For a criticism of the logical positivists from this viewpoint, stressing their infatuation with physics and their neglect of biology, see Jenkins, Logical Positivism, Critical Idealism, and The Concept of Man, 47 J. of Philosophy 677 (1950).

117 In his book op. cit. supra note 16, Cohen (p. 182) says that "objective" is usually used to signify "commonly observable". He also says (pp. 204-205) that even in physics, "we pass from one private world into a common world and beyond that into another private world" and that often in everyday life we manage to "escape the solipsism of the moment."

George, The Scientist in Action 113, 248, 285 (1938) writes of the "impersonal" by which he means the use of those qualities of human observers which are common to all. Scientific research is "done by using qualities which are common to all men, though subject to wide quantitative variations in different individuals. . . . The basis of science is therefore accessible knowledge", which "is based upon a property found in practice to be common to all men."

Cf. Zilsel, Problems of Empiricism, 2 Internat. Encyc. of Unified Science 53, 68-69 (1941): "In this business of investigating phenomena, natural scientists are faced with the task of separating constant relations, on which all observers can agree, from the variable and unstable aspects which are offered under different conditions or to different observers in a different way. . . . This is the sound basis for the distinction between objects and subjects."
tion". Note also the interchange of "public" and "common" in the words "republic" and "commonwealth").

I shall not here stop to evaluate the several notions summarized in the preceding paragraph. I happen not to agree with any of them, because I think all of them too naively anthropocentric. But they do help to light up this fact: The unique (idiosyncratic, singular, "private", non-negotiable) attitudes, moods and reactions of any particular man are obscure, usually undiscoverable by other men. Since they are hidden, "private", they defy attempts to reduce them to, or translate them into, knowable uniformities or regularities. Nevertheless, they are not unreal. They are real because they exist. They do not lack reality merely because they are products of special perspectives—unless one is prepared to say either (a) that nothing is "real" except the totality of all perspectives or (b) that the "real" consists of nothing but that on which all human beings (or some selected human beings) now, or some day may, agree.\footnote{To my mind, (b) is a totalitarian thesis.}

There is, too, an embarrassing ambiguity in the word "fact". "Facts" are both "subjective" and "objective":

1. Men meet aspects of experience which are tough, stubborn, which have hard cores completely independent of human responses to them. So we speak of "brute" or "hard" facts. Mr. Justice Holmes aptly described them as "Can't Helps", what men are "up against". Barry refers to them as "coercive" or "compulsive" experiences, and Kenneth Burke as "the recalcitrance of the materials" forced upon us in our thinking, feeling, acting. These "Can't Helps" do not come to us in the raw, for they are to some extent formed or patterned by our "sense organs", indeed by our entire organisms; however, as our organisms are not of our own making, the reports of the "external world" we receive through them are part of the stubbornness of experience.

2. But we do not mechanically and fixedly accept those reports. According to varying human needs and purposes, we go to work on them, select parts of them, interpret them. A human fact, as F.C.S. Schiller says, is a "fact-for-a-purpose-in-hand". Differing human purposes, confronting the same experience, result 118 There are those who disagree, e.g., some of the "logical positivists". For emphatic statements of their view, see HOBEN, THE NATURE OF LIVING MATTER cc. x, xi, xii, xxx (1931).
in different "facts". A hammer is not the same fact to a carpenter, a painter, a poet, a physicist, and a murderer. What men are "up to" affects their facts. Facts, in that sense, are somewhat "soft", being valuations of experience which alter with variations in men's interests. A fact, so regarded, is a selective human interpretation of—a point of view or attitude concerning, i.e., a theory or generalization about—some of the "Can't Helps". So the line between a "fact" and a "theory" or generalization is often shadowy: A "fact"—being a purposive selection or interpretation of some fragment of human experience—is a kind of "theory" or generalization; a "theory" or generalization is a kind of "fact". The "theory" that the earth is flat was once a "fact"; the "theory" that it is round is now a "fact".  

Approached in this way, the word "fact" has many shades of meaning. I shall not here try to give an exhaustive statement of all its possible meanings. For present purposes, suffice it to say that it may mean any one of the following:

(a) An event as it actually occurred in all its aspects, from every conceivable perspective, i.e., as it would appear to omniscience.

(b) All the limited aspects of that event which mankind—with its finite, limited capacities and perspective—is potentially capable of learning.

(c) Those still more limited aspects of that event which some particular man—with his particular limited perspective and fallibilities—actually did learn.  

(d) The report (accurate or inaccurate) made by that man to others of his recollection (accurate or inaccurate) of what he learned. (The report may be deliberately false.)

(e) The belief of some other man or men about that report.

(f) That selected portion of (c) or (d) or (e) which is regarded by some man or men as pertinent—relevant—to some particular and restricted human purpose.

Apply these several meanings to a "fact" in a law suit: As the witnesses are mere men, they can never know (a). They do not reach (b), but at best, only (c). The trial court cannot even reach (c). It must content itself with learning (d), thus arriving at (e).

---

120 For a more extensive discussion of this theme, see Frank, Fate and Freedom, Ch. 14 (1945). See also Weiss, Man's Freedom 19-22 (1950).

121 "Learn" includes emotions as well as "sense data" and "thought".
Out of (e), the trial court or upper court, using a legal rule as a relevance-cutter, carves (f).\textsuperscript{122}

IX.

I now come to one of the most seductive fallacies of Cohen & Co. Cohen implies that the “social forces”, at any particular time, have a substantially uniform influence on court decisions. Others talk of substantial uniformity in the “living law” (which rests on customs and mores), or in the community’s sense of justice (or injustice), or in the prevalent social moral attitudes or ideals. Disregarding the fact that, in our society, there are, as to many subjects, many warring customs, moral attitudes and ideals, let it be assumed, arguendo, that such uniformities are both dominant and knowable. The argument about the effect of such uniformities usually takes this form: Countless transactions, it is said, are governed by the “living law”; these transactions never develop into law suits, never come before the courts; consequently such transactions are not plagued by the uncertainties and unpredictibilities encountered in litigation. Litigation (so that argument goes) represents the unusual, the “pathological” or “sick” situations, when the smooth-running, socially accepted, norms disrupt, and the unsettled disputes go to the courts, which serve as “hospitals”.

But, as this argument itself makes plain, the “living law” does not affect litigation, except to the extent that a demonstrable correlation exists between (a) the out-of-court regularities and (b) what happens in the courts when the “sickness” of litigation breaks out. Let us assume that a correlation does exist, to a considerable degree, between the out-of-court regularities and the in-court regularities we call the legal rules. But then the vital question becomes this: Do (1) these in-court regularities, the legal rules, usually bring about anything like (2) regularities in court decisions?\textsuperscript{123} The answer is No—because of the vagaries of trial court fact finding.

Assuming now that the out-of-court uniformities are embodied in the legal rules and reflect community morals or ideals, let us

\textsuperscript{122} See infra p. 587 for a discussion of the function of a legal rule as a relevance-guide.

\textsuperscript{123} Cf. M. R. Cohen, Preface to Logic 133 (1944): “We look for correlations where we expect a real connection, and then we regard whatever small correlation we find as proof of our hypothesis.”
approach the problem in terms of morals or ideals. It then appears that, in fact-finding in particular law suits, those uniformities are balked by private, un-uniform, moral attitudes. I call them “moral” for this reason: If the unconscious, subthreshold, individual prejudices of particular trial judges or jurors towards particular witnesses (or lawyers or litigants) were consciously entertained and publicized, they would spell out as moral—or immoral or unimmoral—attitudes. They would then be open to criticism, and would perhaps be made to accord with acceptable community attitudes. But, they are concealed, publicly unscrutinized, uncommunicated. These secret, unconscious, private, idiosyncratic, “moral” norms or standards cut across—they fight with and nullify—the influence on fact-findings of the moral attitudes and ideals of the community which (we have assumed) are both knowable and uniform.

Here is a kind of rampant subjectivity ignored by legal thinkers (like Cohen) who minimize the difficulties of legal criticism and of prediction of decisions. These thinkers overlook the distinction between (1) the more or less “objective” (uniform) character of the norms embodied in the legal rules (whether “paper” or “real” rules) and, (2) the “subjective” character of the trial judges’ or juries’ responses to conflicting oral testimony. Why? Because those thinkers are thinking of cases in upper courts where the “facts” are ordinarily those “found” by the trial courts.

X.

Cohen, it will be remembered, says that “professional loyalty constitutes an effective check upon the exercise of legal discretion.” In making that statement, he joins in the common assumption that a court lacks discretion when the applicable legal rule is well settled and when, by its terms, it confers no discretion—e.g., the rule that there must be two witnesses to a will. That assumption is egregiously wrong. Cohen’s blithe acceptance of it accounts for his fundamental error. For no legal rule whatever is discretion-proof. Let me explain: I shall for the time being adopt (as Cohen does) the usual

---

124 These prejudices, note again, influence especially the “primary” or “testimonial” inferences.

125 For more extensive discussion of this point, from several angles, see Frank, Courts on Trial cc. 25, 26 (1949).

126 Cohen, Ethical System and Legal Ideals 242 (1933).
notion that, if a court does its duty, its decision necessarily results from the application of a rule to the facts of the case. On that basis, it must be true that, in court, no rule goes into operation except in its application to an appropriate set of facts. In short, every rule involves an "if". A rule is a conditional, or "if-then", statement referring to facts. It says, "If such and such are the facts, then this legal consequence follows." It says, for instance, "If a trustee, for his own purposes, uses trust funds, he must account for the profits", or "If a man, without provocation, kills another, the killer must be punished." To phrase the "if" more accurately, a rule says: "If the facts are proved to be thus and so, etc." Still more accurately phrased, it says: "If the trial judge or jury believes the facts to be thus and so, etc." To phrase the matter with complete accuracy, we should recognize that a rule says: "If the trial judge or jury, in an express finding, reports a purported belief that such are the facts, etc.", or, "Where there is no special finding, if there is some substantial (although contradicted) oral testimony which permits the assumption that the trial judge or jury reasonably believed those to be the facts, etc."

In other words, unless the facts are undisputed, the application of a legal rule, no matter how fixed and precise, requires a trial court's fact-determination—that is, a trial court's purported belief about the facts. Whenever the trial court, in arriving at such a determination, has to pass on the credibility of orally testifying witnesses who disagree with one another, the trial court must make a choice (real or purported) of the witnesses to be believed. According to several courts, this is the exercise of discretion. Accordingly, every legal rule confers discretion on the trial court whenever the facts are in controversy and the testimony is oral and conflicting.

Only in rare instances does an upper court interfere with a trial court's exercise of this "fact discretion" (or "credibility

127 This is true not only of the formal rules enunciated by the courts but also of those to which Cohen recurrently refers, i.e., the rules behind the formal rules. 128 Note that this relates especially to the "primary" or "testimonial" inferences. 129 See, e.g., Woey Ho v. United States, 109 Fed. 888, 890 (9th Cir. 1901); Nash v. Fries, 129 Wis. 120, 103 N. W. 210, 211 (1906).
This is so for a reason previously canvassed: Since the upper court judges do not see and hear the orally-testifying witnesses, they cannot competently review the choice made by the trial judge or jury of the testimony to be taken as true. Trial court "fact discretion" is, then, virtually uncontrolled in most suits: When there is some substantial oral testimony which, if regarded as true, supports the trial court's explicit or assumed finding of facts, the upper court usually accepts that finding, although there is other substantial contradictory oral testimony which, were it regarded as true, would upset that finding. Upper-court opinions often, in one way or another, say: "We ourselves would not have believed the witnesses on whose testimony the findings are based, but we must leave judgments of credibility to the trial court." The resultant extensive power of the trial court has been called its "sovereignty".

This virtually uncontrolled, and virtually uncontrollable, "fact discretion" or "sovereignty" has been overlooked by most legal thinkers. For instance, Morris Cohen (Felix Cohen's father) overlooked it when he stated: "Uncontrolled discretion of judges would make modern complex life unbearable." He forgot the "fact discretion" of trial judges, to say nothing of that of juries. One does not get rid of that discretion by labeling it "unbearable."

130 "Triers of fact in our tribunals are, with rare exceptions, free in the exercise of their honest judgment, to prefer the testimony of a single witness to that of many." Weller v. United States, 323 U.S. 606, 608 (1945).

131 That is, its purported or assumed "primary" (or "testimonial") inferences. In the case of the jury, this includes its "derivative" inferences if not irrational.

132 See, e.g., Kind v. Clark, 161 F. 2d 35, 46 (2d Cir. 1947); Mutual Life Ins. Co. v. Hamilton, 143 F. 2d 726, 732 (5th Cir. 1944); O'Connor v. Ludlam, 92 F. 2d 50, 56 (2d Cir. 1937). Thus a trial court's finding has been accepted although it relied on the testimony of a self-confessed perjurer. Fisher v. People, 20 Mich. 135 (1870); State v. Horwitz, 108 Conn. 53, 142 Atl. 470 (1928); Smith v. Gasper, 55 S. D. 592, 230 N. W. 20 (1930).

For the highly exceptional kind of case where the trial judge believes a witness whose testimony is obviously absurd especially in the light of undisputed documentary evidence, see Gindorff v. Prince, 189 F. 2d 877 (2d Cir. 1951).

133 Broadcast Music Co. v. Havana Madrid Restaurant Co., 175 F. 2d 77 (2d Cir. 1949); Colby v. Klune, 178 F. 2d 872, 874 (2d Cir. 1949).


135 In another context, Felix Cohen said: "Unfortunate as this state of affairs may be, we shall not cure it by pretending that it does not exist . . . ." Cohen, Ethical Systems and Legal Ideals 64 (1933).
As this "fact discretion" is exquisitely "unruly", and its operations inscrutable, "professional loyalty" exerts virtually no check upon its exercise. Yet it must be exercised whenever a litigant raises a disputed issue of fact and calls witnesses to testify orally on his behalf.

Pound, then, is in error in stating that some "parts of the administration of justice . . . not only prove susceptible of complete reduction to legal rules, but resist all attempts to deal with them in any other way"; and that, in cases relating to "property" or "commercial transactions", all discretion is excluded, and decisions conform to precise legal rules. For in any sort of law suit, oral testimony, under an appropriate fact-issue, may poke a hole in any rule. For example, a plaintiff may claim that he received a deed to land from the defendant but that the deed was lost or destroyed; the plaintiff may then offer oral testimony on that issue; if the trial court believes the plaintiff's witnesses—who may be lying or honestly mistaken—he becomes, by the decision, the legal owner of the land; the trial court's exercise of its "fact discretion" is final, even if it is actually mistaken. Again, in a suit on a written contract, a party may offer oral testimony that, according to the custom of the trade, the contract is not to be construed according to the apparent meaning of its words; if the trial judge or jury thinks his witnesses have testified correctly, the decision is final. Neither the parol evidence rule nor the Statute of Frauds serves to create immunity from such trial court discretion. Such trial court discretion has been successfully invoked in almost every conceivable kind of case, including suits on promissory notes, or patents or copyrights, to establish trusts, for accounting by trustees. No one is immune from litigation as to any of his supposed rights; and the decision in any such litigation may be made to turn entirely on the unforeseeable way a trial judge or a jury will use "fact discretion". Unpredictably, then, any man's

136 Certainly it does not in most jury trials.
139 Or purports to believe.
140 Or purports to think.
141 See, e.g., Corbin, The Parol Evidence Rule, 53 Yale L. J. 603 (1944).
142 Thomas Aquinas, at least once, recognized the existence of such discretion. See The Summa Theologica (Part II, Second Number, Question 70, Art. 2) (Translated by the Fathers of the Dominican Province, 1929).
supposed rights may at any time be at the mercy of the unpredictable "unruly" elements of the decisional process. ¹⁴³

XI.

Note once more that the traditional, conventional description or theory of how courts decide a case is this: The court applies a legal rule to the facts of the case as those facts are determined by the court. If we adhere to this theory, it follows that a court in determining the facts of a case has two tasks: First, the court must ascertain whether certain events occurred in the past. Second, from those events thus ascertained, the court must winnow out that portion (if any) of these events which is "relevant", i.e., possesses legal significance in terms of the applicable legal rule. This second task may be called the "interpretation of the facts".

The first task, when the crucial testimony is oral, is peculiarly that of the trial court, as it alone, never the upper court, can observe the witnesses' demeanor. That first task involves the exercise of the trial court's "fact discretion", which is largely immune from control by the upper courts. The second task—the "interpretation of the facts", the culling out of the relevant—can be performed fully as well by the upper courts, since it necessitates no observation of the demeanor of the witnesses. ¹⁴⁴

However, the trial judge initially performs the first task. He does not aimlessly gather evidence. The legal rule which he thinks

¹⁴³ "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 psycho-analyzing 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." LaTouraine Coffee Co. v. Lorraine Coffee Co., 157 F.2d 115, 119, 123, 124 (2d Cir. 1946) (dissenting opinion).

¹⁴⁴ I have previously noted that the upper court is able to review the "derivative inferences" of the trial court because those inferences require no observation of witnesses' demeanor. However, as I also noted, the upper court has but a limited power to reject a jury's "derivative inferences". But there is no such limitation on the upper court in deciding what facts are "relevant" in terms of the applicable legal rule.
applicable circumscribes the area of his inquiry. It tells him what to disregard, as not to his purpose, tells him what is and what is not relevant. It censors out data which, for purposes of that rule, are not pertinent: They are "impertinent". The rule has a selective emphasis, a constricting accent. Guided by the rule, the judge has a focused curiosity. He is supposed to cold-shoulder any data not within the rule-determined focus. When we say that evidence is "relevant", we mean that it bears on facts which bring a substantive legal rule into operation. Note that the word "relevant" derives from the French word "relever", which means, among other things, to "lift up, enhance, exalt". Related is the word "relief" as applied to sculpture, i.e., "the projection from a background" or the "elevation" above background: The sculptor lifts or elevates a part of the material, sinking the balance into the background, submerging it. The legal rule operates somewhat similarly. In this respect, a substantive legal rule resembles a theory, a conception, an abstraction, or an hypothesis, in other fields of thought. Like any of them, it is purposive, a "teleological instrument", a deliberately used blinder or screen or shutter-out of the distracting (of whatever leads away from the thinker's immediate pursuit), an inhibitor, a sifting implement, an ignoring device.

Occasionally, the trial judge need not engage in the first task (i.e., the ascertainment of the past events) because, by stipulation of the parties, the happening of those events is undisputed or indisputable. Then there is no room for "fact discretion". Then the judge need only engage in the second task—selecting the relevant facts. In such a case, if the applicable legal rule is both well-settled and precise (clear-cut), the second task becomes easy for the trial court and (if there is an appeal) for the upper court. So, too, does the prediction of the decision.

When, however, there is no stipulation, and the past events must be ascertained from oral testimony, the trial court's ascertainment of those events often is (for reasons previously considered) far from predictable. Nevertheless, in such a case, once the trial court has given its decision, the upper court's decision, if there is an appeal, often may be readily foreseeable. For, furnished with the trial court's finding of the past events, the upper court, in determining which of those ascertained events are "relevant",

145 Or a demurrer or motion to dismiss.
occupies a position like that occasionally occupied by a trial court when the parties have stipulated, i.e., the trial court's performance of the first task usually has the effect, so far as the upper court is concerned, of a stipulation which renders indisputable what happened in the past. There remains for the upper court the second task only—the selection, or culling out, of those facts which are relevant in light of the applicable legal rule.¹⁴⁶

Here we come to something of the utmost importance in criticizing the approach of Felix Cohen, et al.: In the majority of law suits, once the trial judge has performed the first task, the applicable legal rule is both well settled and clear cut. This means that, in most cases, if the trial court decisions are appealed, prediction of the upper court decisions is easy: Those courts will foreseeable apply a precise rule to facts which are in effect, for those courts, virtually the same as stipulated facts. Neither the facts nor the legal rule being in doubt, the outcome is obvious. This largely explains why only a small percentage of trial court decisions are appealed, and why most such decisions, when appealed, win affirmance.

More important for present purposes, it explains why decision-prediction in general seems easy to legal thinkers who, like Cohen, concentrate on upper court decisions. These thinkers, treating the function of trial courts and upper courts as if identical, regard the decisional process as primarily the second task (i.e., that of selecting the "relevant" facts in terms of the applicable legal rule). As a result, they neglect the difficulty of predicting what in most cases—where the testimony is oral—the trial courts will "find" to be the past events, those events from which the "relevant" facts are then selected.

To such thinkers, prediction difficulties are (1) encountered chiefly in a very small category of cases, those where doubt exists about the applicable legal rules, and therefore (2) center about the obstacles to foreseeing what facts the courts in those cases will pick out as "relevant". In those few cases—variously labelled "unusual" cases, or "new" cases, or "unprovided" cases, or instances of "gaps" in the legal rules—the doubt exists either because

¹⁴⁶ This is not a wholly accurate statement. For, as previously noted, the upper court (within limits previously described) may also revise the trial court's "derivative inferences". To that extent, the upper court may participate in ascertaining the past events from which the "relevant" facts are selected.
the pertinent rules have never been settled or because—thanks to newly emerging social needs or pressures or to altered judicial views of policy—the upper courts will or are likely to contrive new or revised legal rules. In any such case, conceded to be exceptional, decision-prediction requires a prophecy of the new rule the upper court will formulate. For the new rule provides a new guide to the relevant facts; facts which were irrelevant under the old rule are now relevant under the new.

Most legal thinkers—including Felix Cohen, Cardozo, Dickinson, Cook, Llewellyn and Levi—when they write of decision-prediction (or “legal certainty”)—deal almost exclusively with those “unusual”, “unprovided” cases. Those thinkers therefore erroneously write as if the principal obstacle to decision-prediction consists of the difficulty of foreseeing what the upper courts will formulate as the new rules in those few exceptional cases. Misled by this astonishing error, these thinkers conclude that legal certainty is to be measured by the fairly easy predictibility of upper court decisions in the numerous usual, unexceptional, law suits where the legal rules are well-settled and precise. As a consequence, these thinkers complacently announce that legal uncertainty (i.e., unpredictibility of decisions) is exceptional.

So if we examine carefully Cohen’s prediction technique, we see that it can have but a restricted scope—the prediction of appellate decisions of the few “unprovided” or “unusual” cases. Within that narrow area, that technique does make some considerable sense: (a) In contriving new rules, the “value attitudes” of judges are doubtless influential. (b) Sometimes, with study, one can “ferret out” the “value attitudes” of particular appellate judges. (c) Knowing those attitudes, one can sometimes predict the new rules they will contrive in the “unprovided” cases.

But whether a case, as it comes before an appellate court, is an “unusual” or “unprovided” case depends often on the way the trial court has “found” the facts: Suppose that there is some oral testimony by a witness, Sweary, which, if believed by the trial judge, will lead him to “find” the facts to be such that they do not fit into any settled legal rule. If he so “finds”, he and the upper court may face the necessity of formulating a new rule. Suppose, however, that the trial judge does not believe Sweary but, instead, be-

147 This statement will be somewhat qualified later; see section XII infra.
lieves\textsuperscript{148} the opposed testimony of another witness, with the result that the trial judge so “finds” the facts that they are banal, stereotyped, and fall within a well settled clear-cut rule. Then the case, for the trial judge and the upper court, will not be an “unusual” or “unprovided” case. The “usualness” or “unusualness” of a case thus frequently turns on the trial courts belief\textsuperscript{149} in one, rather than another, segment of the conflicting oral testimony.

With the three brief exceptions noted in the earlier sections of this paper, Cohen never condescends to a study of the distinctive function of trial courts. Thus, in discussing “legal cause”, he refers to the “standards” which are “applied to the situation”;\textsuperscript{150} without considering how, in any particular case, the court ascertains what the facts of the situation are. Again, Cohen quotes with approval from a learned article to the effect that, when a “wrongful act” or omission has occurred, the solution “depends upon a balancing of considerations which tend to show that it is, or is not, reasonable to treat the act as the cause of the harm. . . .”\textsuperscript{151} But how does the court know that the “act” in question really happened? In all such cases, unless (by stipulation, a motion to dismiss, or otherwise) the “act” is an admitted fact, it must be ascertained, usually, at least in part by a determination of the credibility of orally testifying witnesses—which requires recourse to trial-court fact-finding, with all its attendant uncertainties.

This, then, must never be forgotten: Most law suits are, at least in part, “fact suits”, the decisions of which turn on the way the trial courts exercise their “fact discretion”. Even when a trial court’s “findings” yield an “unprovided” case, ordinarily the exercise of that discretion supplies the material from which, subsequently, the upper court, in terms of the new rule it enunciates, winnows the “relevant” facts. Therefore, before the trial, a prediction of the upper court’s decision usually calls for a prediction of what will be the trial court’s “finding” of facts. Prediction even of the legal rule which the upper court will use can ordinarily not be made apart from a prediction of the trial court’s “finding”.

To sum up: (1) Most suits are “fact suits”. (2) Even of those exceptional cases that also involve troublesome questions

\textsuperscript{148} Or reports that he believes.

\textsuperscript{149} Or purported belief.

\textsuperscript{150} 59 \textit{Yale L. J.} at 253 (emphasis supplied).

\textsuperscript{151} \textit{Id.} at 256 (emphasis supplied).
concerning the applicable legal rule, the great majority are, in part, "fact suits". (3) In the overwhelming majority of suits, therefore, prediction of decisions involves, in whole or in part, a prophecy of the trial judges' or juries' beliefs\textsuperscript{152} about the facts. (4) Consequently, seldom can a prediction be successful unless one can foresee those beliefs. Is that usually possible? If it were, then ordinarily in most suits the lawyer for one or the other side must be venal, stupid or crazy.

I have suggested elsewhere\textsuperscript{153} "that a lawyer's ability successfully to predict a decision varies with the stage at which he is asked for his opinion: (1) When a client, having just signed a contract, asks what are his rights thereunder, at that time neither the client nor the other party to the contract has as yet taken any steps under the contract. The lawyer's prediction at this stage must include a hazardous guess as to what each of the parties will do or not do in the future. Frequently the prediction must 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 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. Especially is the guessing wobbly if the lawyer does not know who the judge will be, should the trial be jury-less; it is still more so, if there may be a jury trial, since the lawyer cannot know what persons will compose the jury. (3) After the trial, but before decision, the lawyer's prophecy may be better. For he is now estimating the reaction to the testimony of a known trial judge or a known jury, observed in action in the particular case. Yet, if the testimony was oral, that guessing is frequently not too easy. (4) After trial and a decision 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 as already 'found' by the trial judge or jury. At this stage, a competent, trained lawyer can often (not always) predict with accuracy."

\textsuperscript{152} Or purported beliefs.
\textsuperscript{153} FRANK, COURTS ON TRIAL 26 (1949).
Let us, however, suppose that an experienced lawyer could successfully predict that, in most of certain kinds of cases, where suit had not yet commenced, the judgments would be for the plaintiffs. Even so, as he could seldom foretell the approximate money amounts allowed in those judgments, his prophecies would have little practical worth. For a client will not often be satisfied to learn that he will probably get a judgment in his favor ranging from $10 to $10,000.

XII.

I must now qualify somewhat what I said in the preceding section: It would be unjust to Cohen, et al., to picture their idea of prediction-obstacles as wholly restricted to those obstacles which are met in the "unprovided" cases, i.e., cases where new rules emerge. For those thinkers take into account another kind of case, one in which the applicable legal rule is well known but is fuzzy, vague, unclear in its contours.

In such a case, the "interpretation of the facts"—the picking out of the "relevant"—is perplexing, and the prediction of the decision of the trial court or upper court is frequently not too easy, even if the past events are undisputed or indisputable. In such a case, the selection of the relevant facts requires an "interpretation of the legal rule". More, the "interpretation of the rule" affects the "interpretation of the facts"—and vice versa. To put it differently, the "interpretation" of the rule and its "application" to the relevant facts overlap. The rule molds the relevant facts, and the relevant facts mold the interpretation of the rule. Rules of that kind get their meaning in their application to the facts; the facts get their meaning in the applied interpretation of these rules. In that sense, the rules and the relevant facts cannot be separated neatly from one another. They fuse, interplay, intertwine, interlace.

An Austrian lawyer, Wurzel, in a treatise published in 1904, and translated into English in 1917,154 brilliantly pioneered in the exposition of this sort of interaction of rules and facts. Many Americans have contributed to this exposition,155 but surprisingly

154 WURZEL, METHODS OF JURIDICAL THINKING (1904) translated and reprinted in the volume, THE SCIENCE OF LEGAL METHOD 286 (1917).
155 See, e.g., Dewey, LOGICAL METHOD and LAW, 10 CORNELL L. Q. 17, 23 (1924); Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L. J. 333 (1933); Cook, SCIENTIFIC METHOD and THE LAW, 13 A.B.A.J. 303, 308 (1927); Paul, Dobson
those of them who wrote after 1904 or 1917 have not referred to Wurzel. Levi's excellent recent volume on "legal reasoning" parallels much that Wurzel said; and Felix Cohen's most recent discussion of this subject contains an idea that closely resembles Wurzel's notion of a legal concept as a sort of photograph with fuzzy edges.\footnote{v. Commissioner: The Strange Ways of Law and Fact, 57 Harv. L. Rev. 753 (1944); Levi, An Introduction to Legal Reasoning (1949); Oerfeld, Criminal Appeals in America 85 (1939); Isaacs, The Law and The Facts, 22 Col. L. Rev. 1 (1922); Morris, Law and Fact, 55 Harv. L. Rev. 1303 (1942); Green, Judge and Jury 270 (1930); Dickinson, Administrative Justice and the Supremacy of Law 52-55, 168-170, 203, 313-319 (1927). Compare Pound, Justice According to Law, 14 Col. L. Rev. 103, 104 (1914) with curious statements in Pound, Appellate Procedure in Civil Cases 28 (1941). For American discussion ante-dating Wurzel, see Thayer, A Preliminary Treatise on the Law of Evidence 183 ff., 249 ff. (1898); Fox, Law and Fact, 12 Harv. L. Rev. 545 (1899); Green, Mixed Questions of Law and Fact, 15 Harv. L. Rev. 281 (1901).}

Wurzel criticizes the assumption that judicial thinking employs exclusively the logic of "subsumption". According to this logic, says Wurzel, (1) a legal rule or concept has a fixed, ascertainable meaning; (2) in applying a rule, the judges make rigid deductions from this fixed meaning; (3) the "facts", also, the judge ascertains with precision; (4) only if the "facts", thus ascertained with precision, fit into the class of facts covered by the precise rule, or into one of its precise derivatives logically deduced from the precise rule, does the judge apply that rule.

But, says Wurzel, legal thinking does not, in truth, limit itself to that sort of logic. For, he maintains, a legal concept—i.e., a rule—is like a concept used in the "empirical sciences"; it is not a sharply defined entity, a fixed "schematic representation". A legal concept resembles "a photograph with vague and gradually vanishing outlines." At first it seems clear and distinct, because we "focused merely on the center, the picture proper." But then we discover that "it is impossible to tell definitely where the picture proper ends and the mere background begins. Thus every concept in the empirical sciences has its central image and besides it a zone of transition gradually vanishing into nothingness."

The lawyer should "realize that [legal] concepts which at first appear very clear and definite . . . turn out to be quite vague." This appears when a legal concept is extended to cover "boundary cases". When a legal concept is thus applied, the "process of arriving at a decision" does not consist of "subsumption of phenomena" under that concept; nor was the result "already comprised in the original content of the concept. On the contrary, when we called the concept into our consciousness, we never thought of the boundary cases, we thought only of the most typical cases . . . . The original concept is merely a thread around which new phenomena, similar but not alike, are crystallized. . . . The process, by which the concept is applied to the boundary case is not one of analysis, of separating the component parts of the concept and seeing which of the parts covers the case, but one of synthesis, by connecting the original concept with a new phenomenon and extending the concept so as to cover the latter."

This process is interesting because legal thinking strives for precision, but also "favors the extending process". This process Wurzel calls "projection", i.e., the "extension of a concept found in formulated law to phenomena which were not originally
Cohen and others (without so recognizing or acknowledging) have followed Wurzel in maintaining that the interacting, bilateral, process—the interweaving of rules and facts—involves the “value attitudes” of judges, attitudes which are often socially engendered.\textsuperscript{157} As undeniably those attitudes do play an important role in this phase of decision-making, there is wisdom in the assertion that prediction of decisions will improve if the judges’ “value attitudes” can be discovered.

Yet the limited utility of that discovery for prediction purposes appears again when we note the following: the interacting operation, the process of interweaving rules and facts, has to do with “relevance” as, for present purposes, I have defined it, \textit{i.e.}, the selection, from the past events already ascertained—principally through the trial court’s evaluation of witnesses’ credibility—of some limited facts which have legal significance in terms of the applicable legal rules. Now, as we saw, while the determination of past events through credibility evaluation is (where the testimony is oral) the unique function of the trial courts,\textsuperscript{157a} the task of thus culling out the “relevant” facts is not. The upper courts are therefore not bound by trial court conclusions as to such relevance. Accordingly, they devote much of their time to their own inter-acting interpretations of both rules and facts; indeed, this task constitutes one of the most important of upper court functions.

\textsuperscript{157} Wurzel says that the grounds for “projection” (\textit{i.e.}, for “deciding whether a transition phenomena ought to be joined to one or the other concept akin to it”) derive from “value judgments”, including ethical, economic, and social attitudes, of which the judge is not always fully conscious. It follows that, not infrequently, “the judge . . . has carried into his finding quite as much or more of himself than he has really discovered from the outside. This shows that he has really done something quite different from merely establishing facts.” For example, the “intention of the parties” to a business transaction often “did not proceed according to the forms of the . . . law. The judge will not be able to arrange the facts into one of these forms, and consequently cannot begin to apply the legal rule by subsuming the facts, until he has succeeded in reshaping the real facts relating to the intention of the parties, by utilizing his own attitude towards social life (his business experience, moral judgments, and the like), in such manner that he gets at last a state of facts fit to be placed into one of the accepted categories of business transactions.” So it is that the “subject-matters of projection” consist of neither “facts nor . . . rules.” \textit{Wurzel, op. cit. supra} note 154. 

\textsuperscript{157a} See note 146 \textit{supra}. 

\textsuperscript{157} contained in the concept (\ldots not demonstrably a part of the group of images forming the concept) without at the same time changing the nature of the concept as such.” Because of the nature of “projection”, because much legal thinking does not consist of “subsumption” of “facts” under concepts or rules, there exists a “transition zone between rules and facts”. \textit{Wurzel, op. cit. supra} note 154.
For that reason, studies (including Cohen's) of this kind of intertwining of rules and facts deal almost entirely with upper courts. Significantly, Wurzel in his treatise on the subject, frankly disregards trials: "We must," he writes, "exclude those cases where the facts themselves are doubtful and are not ascertained except in the course of a trial."

XIII.

There is, however, a very different sort of fusion of rules and facts, one which occurs in trial courts alone, and which Wurzel and the American writers on the interacting process (including Cohen) have never considered. A recognition of this sort of fusion in the trial courts compels a rejection of the conventional theory (which up to this point I have, with some qualifications, adopted in this paper) of a court's decision as a product of (1) the application of a legal rule to (2) the facts of the case. The conventional theory over-simplifies, artificializes and distorts the actual decisional operations of trial courts.

For the reaction of a trial court to conflicting oral testimony frequently does not start with a nice differentiation between rules and facts, but starts with an unanalyzed, undifferentiated, composite reaction—a "hunch" or unanalytic "gestalt" (a "whole"). There is very considerable reason to believe that juries often do not go beyond such composite (or gestalt) reactions in arriving at their verdicts.

Much the same has been said of many jury-less trial-judge decisions. Some trial judges have made it clear that, in jury-less cases, when they enter judgments without opinions or findings, they rest content with their unanalyzed gestals, and that even when they publish opinions or "findings" of fact, they merely "rationalize" their composite reactions, their intuitive "hunches" or gestals.158 Such a reaction (as we have seen) is often not analytic, logical, but a result of the interplay of numerous unconscious attitudes towards the witnesses, the litigants and the lawyers. And any such reaction of a particular trial judge or gestalt is usually unique,

158 As to the "gestalt" concept, see Koffka, Gestalt, 6 Encyc. of Soc. Sciences 642 (1931) for a statement, with citations, by one of its leading sponsors. The idea is akin to those of the "functional" anthropologists and of the "institutional" economists. It needs to be used with caution. I think it has been carried too far, for instance, in the notion of "patterns of culture" and in that of the completely "integrated" personality.
idiosyncratic, unlike that which another trial judge would experience. 169

The trial judge, however, when he publishes an explanation of his decision, purports to follow the conventional theory and to become analytic, logical. He "dissociates", separates, the facts which he "finds" from the legal rule which he purports to apply to those facts. In that manner, he seeks to justify his decision as a logical product. But (so we are informed by some eminent trial judges) a trial judge, in devising his explanation, often works backwards: He begins with the decision which—as a consequence of his intuitive composite reaction—he deems wise or just. He then so states the facts that, subsumed under an accepted legal rule, they make that decision appear logical and legally sound. 160 It is in this "rationalizing" effort that there may occur that "fudging" of the facts—usually unconscious or semi-conscious—to which I previously referred.

The trial judge's "findings", even if "fudged", will ordinarily be protected from successful attack on appeal, if the evidence was oral and conflicting: It will be protected by his "fact discretion", his "sovereign" right to believe some of the oral testimony and to disbelieve the rest; for his "finding" will stand up, if it comports with some substantial portion of the properly received oral testimony, since (as we saw) there is no way by which the upper court can discover whether he did or did not believe that testimony.

The conventional or logical theory of decision-making, in combination with published findings, may have some paradoxical results. To illustrate: A trial judge, seeking to effectuate his gestalt, may make and publish an unconsciously "fudged" finding which, in terms of a legal rule as he interprets it, justifies his decision in favor of the plaintiff. Suppose that the upper court interprets that rule differently. The upper court, accepting the trial judge's finding (because the testimony was oral), 161 applies to the finding that rule so interpreted—with the result that the upper court decides for the defendant. Had the trial court correctly anticipated the upper court's interpretation of the rule, he might have made a different finding—indeed one that would have necessitated no "fudging"—

160 Ibid.
161 That is, accepting at least his "testimonial inferences"
which would have led to an affirmance of his decision for the plaintiff.

Suppose that, during a trial, while the witnesses are testifying, the trial judge thinks that a particular substantive legal rule will be controlling, and that he interprets that rule in some particular way. With that rule, so interpreted, as his attention-guide, he fixes his attention primarily on the testimony and demeanor of the witnesses whose testimony bears on the existence or non-existence of those facts which are distinctly relevant to that rule; for that rule coaches him to center primarily on that particular testimony. Now suppose that, when he comes to decide the case, he concludes that his previous interpretation of that rule was wrong, or that some markedly different rule governs. The result may well be that he has no vivid recollection of the testimony of those witnesses which, on the basis of his revised notion of the controlling legal rule, is of crucial importance. If that testimony was not taken down by a stenographer, the trial judge cannot now put himself in a position to learn with accuracy that relatively neglected testimony. Even if the testimony was recorded by a stenographer, the judge, who, on our supposition, paid little heed to that part of the testimony, which has now become important, can get at that part only through the typewritten pages, an obviously inadequate substitute for careful observation of the demeanor of the witnesses while they were giving that crucial testimony. What is more, had he been aware, during the hearing, of the significance of the factual issue which he now first perceives, he might himself, by his own questioning of those witnesses, have elicited vital testimony which is not now available. Thus his mistaken notion, during the trial, of the pertinent legal rule may lead to his serious misapprehension of the facts. If, however, despite that misapprehension, he makes findings of fact which can be supported rationally by inferences from some substantial competent and relevant oral testimony, and if the legal rule he applies is correct, his finding, if the case is appealed, will ordinarily be accepted.

Suppose that, during the taking of the testimony, the trial judge has only a vague, hazy notion of what substantive legal rules are likely to be applicable. His attention, as a consequence, may lack focus, so that, when after the evidence is all in, he comes to decide the case, he may have no crisp recollection of what was said by those witnesses—and, more important, the demeanor of those wit-
nesses—who gave that testimony which, on his reflective consideration of the legal rules, now turns out to be peculiarly important. His fact-finding may, as a result, be seriously defective. Something of that sort may easily occur in the following circumstances: After the evidence is in, one of the parties moves to "conform his pleadings to the proof". Usually, a trial judge will grant such a motion. The result often is that the moving party has shifted somewhat the theory of his side of the case, i.e., he is now invoking a legal rule to which he had not theretofore directed the trial judge's attention. The judge, seeking to apply this substituted rule, may have difficulty in recollecting the demeanor of the witnesses who gave that relevant testimony.

Some judges, at least some of the time, have an excessive interest in certain legal rules or doctrines. Far from "fudging" the facts in order to do what they consider justice, they will, rather, in their fact-finding, deform the facts—will disregard the individual aspects of a particular case—in order firmly to establish, or vindicate, or introduce, a pet legal rule. In that way, the rule and the facts may inter-act undesirably. "In this connection, it is tempting, but unsound, to classify judges as those who are stimulated primarily by rules—i.e., the general aspects of cases—and those who are activated primarily by particulars. Such a classification recalls Maurois' description of the differences between Gladstone and Disraeli: 'Gladstone liked to choose an abstract principle and from that to deduce his preferences. Disraeli had a horror of abstract principles. He liked certain ideas because they appealed to his imagination. He left to action the care of putting them to the test. When Disraeli changed his views, he admitted the change and was ready to appear changeable; Gladstone fastened his constancy to blades of straw and thought they were planks. . . . Disraeli, the doctrinaire, prided himself on being an opportunist; Gladstone, the opportunist, prided himself on being a doctrinaire.' Whether such clear-cut differences between those two men actually existed may be doubted. But assuming that they did, it might be said that every judge is in part a Gladstone and in part a Disraeli. The percentage of those components seems to vary from judge to judge—and even in a particular judge from time to time."

162 Aero Spark Plug Co. v. B. G. Corp., 130 F. 2d 290, 298 n. 26 (2d Cir. 1942) (concurring opinion).
Because of the artificialities inhering in the ex post facto, analytic, logical "rationalizations" of their intuitive "hunches" or gestalts, some trial judges consider worse than useless any requirement that trial judges publish findings of fact. The position of these judges recalls the old story of the experienced judge who advised a new incumbent of the trial bench never to give his "reasons" for his decisions, since his decisions probably would always be right but his "reasons" would usually be wrong.

Trial judges, when they resent the requirement that they publish findings of fact, sense the inadequacy of the means of communicating, especially in words, the whole of one's unique individual reactions, and of one's emotional reactions in particular. Those judges sense the unbridgeable gulf between the writer (or speaker) and the reader (or listener). They experience "language frustration". Says Loewenberg, "From the cradle to the grave we experience two antagonistic forces in steady conflict: one, a drive to reach out to others through sounds—to make a connection across the deep chasm which separates human beings; the other, the awareness of how little . . . is transmitted to our fellow men. I call the first speech impulse, . . . the urge to speak. I call the second 'language frustration' or 'language distress', meaning all those inner experiences and responses which the speaker . . . suffers when he is conscious that he is unable to express himself so as to be understood by his fellow men."

Consider now a phase of something previously discussed: When not required to do otherwise, trial judges announce the great bulk of their decisions without publishing any findings of fact or any explanation whatever. When such an unexplained decision is appealed, the upper court, if the trial judge heard and saw the witnesses, will usually affirm, if any possible combination of legal rules and of facts (supported by some substantial oral evidence) will justify the decision. Yet the trial judge may have decided as he did, not on the basis of that view of the facts which the upper court imputes to him, but because he applied (1) to a very different view

---

103 See, e.g., McCLELLAN, FEDERAL RULES OF CRIMINAL PROCEDURE (Holtzoff ed. 1946).

104 Loewenberg, Speech Impulse and Language Frustration, 8 ETC 110 (1951). See also Johnson, Speech and Personality 6 ETC 84 (1949). Cf. M. R. COHEN, A PREFACE TO LOGIC 65 (1944): "The ultimate individual, the ultimate particularity, is inexpressible in words that are repeatable."
of the facts (2) an incorrect legal rule. His failure to publish his fact-finding thus causes affirmance of a decision which he would not have rendered, had he applied the correct rule to what he believed to be the facts.

Nevertheless, I happen to think that to require the publication of findings, although it offers no panacea, will do much good, because the very act of writing down his version of the facts tends to induce the trial judge carefully to scrutinize and criticize his motivations, and conscientiously to check his beliefs against the testimony.165

Since the subject of trial-court gestalts is exceedingly complex, I shall not explore it here in detail.166 But those gestalts should not be ignored. They immeasurably augment the unruliness, the un-get-at-ability, and therefore the unpredictability, of the decisional process in trial courts. Almost everything said in this paper about trial-court fact-finding should be revised by inclusion of the puzzling gestalt factor.

I should add that I do not mean even to intimate that most trial judges are less able and conscientious than upper court judges. The latter have an easier job.

XIV.

Cohen’s treatment of individual decisions—decisions in specific, individual, law suits—gives us the key to his conception of the proper moral approach to courthouse government: To him, the true significance of a decision does not consist of its effects upon the immediate parties to the suit, but of its larger social significance, its “systematic implications”, its place in the formulation of “systematic knowledge” of “judicial behavior”.167

---

165 See United States v. Farina, 184 F.2d 18, 23 (2d Cir. 1950), (dissenting opinion); United States v. Forness, 125 F.2d 928, 942 (2d Cir. 1942); Davis, Administrative Findings, Reasons and Stare Decisis, 38 CALIF. L. REV. 218, 221, 227 (1950); McAllister, The Big Case, 64 HARV. L. REV. 27, 57 (1951).

166 I refer the reader to what I have written elsewhere on the subject. See FRANK, COURTS ON TRIAL c. 12 (1949); Frank, Say It With Music, 61 HARV. L. REV. 921 (1948).

167 He makes it clear that by such “systematic knowledge” he does not mean system-making of the sort to which men like Williston have contributed. “The really creative thinkers of the future”, Cohen remarks, “will not devote themselves, in the manner of Williston, Wigmore, and their fellow masters, . . . to the systematic explanation of principles of ‘justice’ and ‘reason’ buttressed by ‘correct’ cases. Creative
The "systematic knowledge" of the "actual facts of judicial behavior" that Cohen seeks has, as we saw, to do with the relation of decisions to the "social forces" that "mold" them. And so he appraises decisions as "social events with social causes and consequences." 8 A decision," he says significantly, "is without significance at the moment when it is rendered. Only by probing behind the decisions to the [social] forces which it reflects, or projecting beyond the decision to the lines of its force upon the future do we come to understand the decision itself."

Of course, those wider aspects of a decision have a significance that deserves more emphasis and better understanding than it often receives. But are we to become so engrossed with the past social causes of a decision and its future general social results, that we lose sight of its practical consequences to the man who loses a suit through the trial court's mistaken notion of the facts? Suppose that, due to such a mistake, a decision in a criminal suit locks up an innocent man in jail for life, or a decision in a civil suit financially ruins him. Surely we are morally callous if we say: "Those consequences have little significance. We must soar above such immediate, petty considerations. We want to know the 'systematic implications' of the decision. We want to 'understand the decision' by probing behind it to the social forces which produced it and beyond it to its subsequent importance to society in general."

Cohen declares that "the decision that is 'peculiar' suffers erosion—unless it represents a new social force, in which case it ceases to be peculiar." As a precedent, as a possible precedential ingredient in a future decision, such a decision may be eroded. But if it derived from a wholly mistaken version of the facts, its evil effects on the defeated litigant will not, unfortunately, suffer erosion through the refusal of courts to follow it as a precedent in other later law-suits: The misery of the innocent man languishing in jail, or of the man financially ruined by a mistaken civil judgment, will

legal thought will more and more look behind the petty array of 'correct' cases to the actual facts of judicial behavior...." See 35 Col. L. Rev. at 883.

The reference to Wigmore is most unfair. If only Cohen had carefully read Wigmore's "Principles of Judicial Proof," he would have seen that Wigmore had a much livelier interest than does Cohen in the "unruly", unsystematic, phases of judicial activities.

168 35 Col. L. Rev. at 847.
169 Id. at 843.
170 The context shows he means "social forces".

HeinOnline -- 26 N.Y.U. L. Rev. 601 1951
Imaged with the Permission of N.Y.U. Law Review
not be extinguished, regardless of whether the decision, precedent-wise, is either (a) extinguished or (b) perpetuated (because it "represents a new social force").

Tragedies caused by decisions flowing from trial courts' fact-mistakes do indeed have social consequences. The jailing of innocent men, the ruination of others, brought about by such decisions, ramify socially, for they play havoc with the victims and their families. Society ought to take a lively interest in those social consequences. But Cohen betrays little or no such interest. His almost obsessive devotion to the way "social forces" operate in court-house government makes him almost entirely forgetful of the individual human beings on whom, via decisions based on spurious facts, those "forces" horribly impinge. If a person gets in the "path of a precedent" and is destroyed by it because of its application to facts wrongly "found", Cohen would have us avidly study the path, and give little heed to the maltreated man.

It must be added, in fairness, that at times Cohen has eloquently written of the oppressed with warm sympathy, and, in particular, of the denial of civil liberties to the lowly. But his discussions of decision-prediction contain no reference to such matters: he treats the two subjects as if unrelated. And, even when he writes of deprivations of civil liberties, his chief interest is seemingly not in the plight of particular, individual, deprived men, but in the dire effect of such individual deprivations on society at large.

Cohen strives to create a new kind of precedent system, a system more dynamic than the conventional one. If he succeeds, we will have a body of "real" rules behind the formal legal rules; and these rules, now latent but thus made patent, will be more flexible, less static, than the formal rules. They will embody consciously avowed and adaptable social ideals. So far, Cohen's program is admirable.

However, any system, just because it is a system, must center

171 See Cohen, Science and Politics in Plans for Puerto Rico, 13 J. of Social Issues 6 (1947); Cohen, Americanizing the White Man, an address before the Second Inter-American Conference on Indian Life (October 1948).
173 In a recent paper, arguing that "every case affects society," he asks, "What about the prisoner's wife and children, and their neighbors, and the parties to another case for which the one just decided will be a precedent?" Cohen, Book Review, 63 Harv. L. Rev. 1481, 1483 (1950). But he is speaking of any decision in a criminal suit—even one correctly decided—not about a decision convicting an innocent man.
on generalizations, abstractions. Now, to deny the immense worth of generalizations is absurd. A judiciary that did not keenly appreciate their worth would be uncivilized. But that worth has its limits. No one, so William James told us, can see further into a generalization than his own knowledge of detail extends. In courthouse government, excessive absorption in the generalizations (old style or a la Cohen), excessive absorption in tracing or shaping the "path of precedents", may become perniciously cruel when it induces, or helps to maintain, inattention to the fate of the individual litigants who lose specific law-suits through mistaken fact finding.

The generalizations represent the wholesale department of judicial business; the specific decisions, the retail. For the most part, the upper courts specialize in the wholesale department, the trial courts in the retail (i.e., fact-finding). The latter has far more significance for most citizens who enter our courts as litigants (whether in civil or criminal suits). Yet Cohen's "legal criticism" almost completely by-passes the judicial retail activities.

So, too, does his ethical evaluation. He thinks "that creative legal thought will more and more look behind the traditionally accepted principles of 'justice' and 'reason' to appraise in ethical terms"—what? The way decisions affect individual litigants? No. Cohen wants to "appraise the social values at stake in any choice between precedents." Not at all, you will notice, the consequences to the parties in each suit of the trial court's choice between witnesses, its choice between differing versions of the facts. That is why Cohen envisions decision-prediction as prediction of the "path of precedents".

Let us see what that means: Fish v. Fowl, a case relating to the consideration necessary for the making of a contract, was decided in 1920. Will it be followed as a precedent in the contract cases of Brains v. Brawn, and Fox v. Geese, that will come into court in 1952? As Cohen states the prediction problem, the predicter will be successful if he correctly answers two questions: (1) Assuming that the court in 1952 will adhere to the 1920 decision as a precedent, will it regard the facts of that case as sufficiently similar to the facts of the 1952 cases so that it will give those cases "the same

174 That I am a member of an upper court, largely busy with the generalizations, suggests that I am not unmindful of their worth.
175 33 Col. L. Rev. at 832.
treatment" as the 1920 case?\textsuperscript{176} (2) Even if the court regards the facts of that past and those future cases as substantially "similar", will it in 1952 adhere to, or modify, the rule of that past case?\textsuperscript{177} Let us suppose that, with Cohen's assistance, the predicter easily answers the second question. The rub is in the first question. Cohen does not perceive the prediction-hurdles the predicter must jump in answering it: The predicter will come a cropper unless, among other things, he can foresee what the trial court will believe to be the facts of the 1952 cases. Unless the predicter can foretell that belief, he lacks the basis indispensable to a prophesy as to whether the trial court and the upper court will consider "similar" the 1920 and the 1952 cases. And the predicter cannot foretell the trial court's belief about the facts of the 1952 cases unless, at a minimum, he knows—as he certainly does not—that the facts of those cases will not be disputed, and that the orally testifying witnesses will not disagree with one another.

Cohen leaves something else out in his ethical appraisal of the "choice between precedents". Suppose a dishonest judge, in the case of Bronze v. Silver, takes a bribe to decide in favor of Bronze. He makes a deliberately dishonest finding of facts. Unnoticed by the judge, this finding raises a doubt about the properly applicable rule. On appeal, the upper court, accepting the finding, affirms the decision, but lays down a new rule.\textsuperscript{178} The dishonesty of the trial judge remains unknown, and the decision in Bronze v. Silver becomes a precedent. That, actually, the findings of fact on which that decision rested were utterly dishonest, in no way impairs its precedential value, since the dishonesty is unknown. But the same is true of precedents resting on honest but thoroughly mistaken trial-court findings of fact.

In short, the actual facts of cases—the actual past events—have nothing to do with the precedential value of the decisions. When, then, an upper court, in considering whether a former decision is so substantially similar to a case now before it that the former decision is to be used as a precedent, the court does not compare the actual facts of the two cases, but only the facts as "found" in

\textsuperscript{176} See, e.g., \textit{Id.} at 844.

\textsuperscript{177} \textit{Id.} at 839.

\textsuperscript{178} Cf. the many precedents created by the judge who was later found to have been dishonest in Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514 (3d Cir. 1948).
those two cases. In either or both, the trial court may have found the facts erroneously. That is of no consequence for precedential purposes.

Absent any fact dispute, a seasoned lawyer ordinarily can predict the rule the court will use and, accordingly, the decisions. The cases with which Cohen is most concerned are (as we saw) in the minority—the relatively few where the applicable rule is in doubt, because it has never been settled or is fuzzy, or because it is anticipated that the judges (for one or more of a variety of reasons) may modify the rule. Usually the ultimate decision of such an exceptional case is not that of the trial court, but of an upper court. This goes to show (as we saw) that Cohen's thesis relates principally to upper-court decisions, and that the legal uncertainties at which he directs his prediction-apparatus are the rule-uncertainties brought about by such decisions. It may be that Cohen's prediction-techniques will considerably improve the prophesies of upper court decisions in that kind of case (i.e., where the past events never were in issue, or, as usual, are not in issue on appeal), although I doubt whether even such prophesies will ever approach perfection. For, all else aside, the chance composition of an appellate court (so my own experience as an appellate judge teaches me) not infrequently affects the rule the court applies.

More or less unwittingly, Cohen has disclosed that his concern is with the rule element in the decisional process, and therefore chiefly with upper-court decisions, so that, perforce, his thesis, so far as valid, must be restricted to appellate decisions: (1) In 1933, in his book, he wrote, "Perhaps, a preoccupation with the 'hard cases' which are sent to appellate courts for review and which alone fill the bulk of our reports, case-books, and treatises, have seriously distorted the views . . ." of those who have dwelt much on unpredictability.179 (2) In his book he also said: "Law . . . is a creature of uniformity, and in the human inadequacies of uniform rules are to be found the most pervasive of law's limitations."180 (3) In 1949, he wrote that some persons "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

179 COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 238 (1933).
180 Id. at 270.
when he has reversed the decision of a lower court.”

The italicized words show that Cohen was thinking of the restraint (on the “subjective” factors) imposed by the judicial office on a judge sitting in an appellate court—where the facts are usually “given” by the trial court. Typically, Cohen said nothing of the “subjective emotions” of trial judges and jurors when they engage in fact-finding and exercise “fact-discretion”.

Cognizant (at least semi-consciously) of these “subjective emotions”, operative in trial courts, and of what I’ve called “fact discretion”, older experienced trial lawyers are bolder than tyros, less deterred by a seemingly implacable precedent. They know that they may be able to circumvent such a precedent, that a favorable trial-court fact-determination may render that precedent inapplicable. “After you have been in practice a few years”, wrote Henry Taft, “you will be surprised to find out how many desperate cases can be won... Speaker Reed once said to me that some of the notable forensic victories he had were in cases where he had been advised that success was impossible; and Sir Matthew Hale in the earlier years of his practice had misgivings about undertaking causes he believed could not be sustained, but he became less conservative when case after case had been decided contrary to his prediction.”

If, like Cohen, you focus on upper courts, the trial court is on the fringes of your vision. The relation between decisions is, for you, the relation on which upper courts chiefly concentrate—the relation between the rules applicable to past and present decisions, in all of which the facts are “given”. Your emphasis is, then, necessarily on generalities, uniformities. But if you focus on trial courts, then the generalities, the uniformities, are on the fringes.

181 Cohen, Book Review, 63 HARV. L. REV. 1481 (1949) (emphasis supplied). I suspect that Cohen was here referring to me. For he has elsewhere said that I have changed my mind about legal uncertainties since I became a judge. See 59 YALE L. J. at 248. If it were important, I think I could show by my writings published in the years before 1941 (when I went on the bench) that Cohen’s statement is unfounded. See especially Frank, Are Judges Human? 80 U. of PA. L. REV. 17, 233 (1931); Frank, What Courts Do In Fact, 26 ILL. L. REV. 645, 761 (1932); Frank, Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 CORNELL L. Q. 568 (1932). See also discussion of those writings in FRANK, IF MEN WERE ANGELS 276-315 (1942).


183 That is, at least to the extent of the “testimonial inferences”.

You see them as but one of numerous elements in decision-making; the other elements, which now occupy the center, are variable, uncertain, unpredictable.

XV.

Cohen, as we saw, has scant interest in psychological studies of the unique personal characteristics of the men who participate in the making of court decisions. When he says that such studies have been neither "significant" nor "useful", he means that they lack significance or utility—for what purpose? For the purpose of predicting decisions through knowledge of "predictable uniformities". He misses the point: Many such studies, no matter how glib and superficial, do have significance and utility—precisely in that they help to show up the frequent absence of predictability as to the ways of individuals. Were Cohen to take into account the influences on fact findings, in the mine-run of law suits, of the unique individual psychological factors affecting the reactions of witnesses, and of trial judges and jurors as witnesses of witnesses, he would be obliged to acknowledge that they frustrate his hopes.

He, too, would probably come to acknowledge that our courts, for the most part, have done too little in the way of avowed "individualization" of cases. The stress (at least publicly) has been altogether too much on the rules and too little on bending those rules to fit the unique needs of specific litigants. Our courts, to be sure, have achieved such humane individualization surreptitiously—through the wide "fact discretion" of trial judges and juries. But surreptitious methods are neither wholesome nor democratic. Other legal systems—such as that of ancient Greece and of China—have done in the open what our courts do furtively. Instead of smuggling discretionary application of rules—to fit individual cases—into the decisions through the concealed back-door of fact-finding, we might well revise most of our rules so that they avowedly confer such discretion. Most rules would then candidly be treated as we now treat those few rules which, by their express terms, authorize discretion. Most rules would then be frankly recognized for what in many cases they actually now are: general guides to be adjusted to the particular circumstances of each case. The morals of our courthouse government would be improved tremendously by such

185 Frank, Courts on Trial 378-383 (1949).
frank, out-in-the-open, practices. For we would be rid of procedures that smack of something like hypocrisy, practices that pretend to do one thing and really do another. Even accomplishing good by stealth can be morally debilitating.\textsuperscript{186}

Pertinent here are some words of William James: “Abstract rules indeed can help; but they help less in proportion as our intuitions are more piercing. For every real dilemma is in strict literalness a unique situation; and the exact combination of ideals realized and ideals disappointed which each decision creates is always a universe without precedent, and for which no adequate previous rule exists.”\textsuperscript{187} Pertinent, too, are the remarks of Felix Cohen’s father, Morris Cohen, that “every legal system does violence to the finer social susceptibilities by its ignoring of individual differences. Hard and fast rules... make legalism a curse. Hence the best legal minds always recognize the necessity of equity... which comes into play with the sense of justice of the individual judge.”\textsuperscript{188}

I have long been advocating more straight-forward judicial practices frankly addressed to the needs of individual men, and have been critical of the notion that our courts must usually deal with human beings “classically” as if each were but an illustration of an average or type.\textsuperscript{189} I was therefore delighted when recently Cahn, in his book, \textit{The Sense of Injustice}, criticized those legal thinkers who have regarded men “as either a row of identical pegs on which to hang rights and interests or as mere particular instances of some conceptualized being called ‘Man’...”, and when he added that the “ultimate consumer [of judicial products] will always be some quite concrete individual.”\textsuperscript{190} Cahn, appropriately, turned for support to ancient and modern writers who shared his interest in the psychology of concrete individual human beings.

Cohen’s review of Cahn’s\textsuperscript{191} book is revelatory. He writes that Cahn foolishly objects to the use of abstractions in thinking about

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{186} Id. at 409-410.
\item \textsuperscript{187} \textit{JAMES, The Moral Philosopher and Moral Life, The Will to Believe} 208 (1896).
\item \textsuperscript{188} M. R. COHEN, \textit{PREFACE TO LOGIC} 80 (1944).
\item \textsuperscript{190} \textit{CAHN, THE SENSE OF INJUSTICE} 2 (1949).
\item \textsuperscript{191} Cohen, Book Review, 63 HARV. L. REV. 1481, 1482, 1484 (1950).
\end{itemize}
\end{footnotesize}
people: "let him consider that we all use abstractions when we think about anything." This is unfair, for Cahn shows that he knows full well the need of abstractions. What pretty plainly irritates Cohen is that, as he says, Cahn is one of the "psychologists who write on ethics". Since Cahn is not a professional psychologist, this signifies that Cohen has an antipathy to the exploration of ethical problems with the aid of all available insights into the ways in which divers men, as singular individuals, meet the joys and sorrows of existence.\textsuperscript{102} Seemingly, it is this antipathy which leads Cohen to remark, "like many others to whom modern psychology has appeared as a startling revelation, the author must need consign to the ashcans of outworn history all philosophers and jurists who had the misfortune to write before the discovery of adrenals and complexes". Again this is most unfair to Cahn, whose book abounds with reference to ancient thinkers and to psychological factors other than adrenals and complexes.

More to the point is this: Long before the advent of "modern psychology", there were many profound writers on ethics who used insights into the psychology of individuals. Aristotle admonished the student of ethics and government to study psychology. His \textit{Rhetoric}, full of psychological wisdom includes sage observations about the vagaries of judges. It contains a priceless description of young, middle-aged and old men; but Aristotle warns that he is writing about "men of a given type" and not of any "given individual because individuals are infinitely various." "None of the arts", he said, "theorize about individual cases", for that is not their business, since "individual cases are so infinitely various that no systematic knowledge about them is possible." He described what these days we call "hunches", explaining that a decision based on the hunch of an experienced man may be wiser than a logical decision by an inexperienced man. Also in Aristotle's writings, one will find the core of 20th-century "gestalt" psychology. Montaigne wrote pages on what today we call "psychosomatics" and the "unconscious"; untiringly, he inquired into the unique quirks of himself and others; the irrational individual quirks of

\textsuperscript{102} I trust no one will think that I believe that the "individual" should be regarded as separate and apart from society. Such social "nominalism" is pernicious. See \textsc{Frank}, \textsc{Courts on Trial} 396, 402 (1949) (where I stressed the difference between such "individualism" and "individuality"). See also \textsc{Frank}, \textsc{Fate and Freedom} 136-139, 211-212, 214-215, 266, 319 n. 21 (1945).
judges was one of his favorite subjects. Pascal, without so labeling it, described “rationalization”, and masterfully explored the intertwinnings of “feeling” and “intuition” with “reason”. Leibnitz used the concept of the “unconscious”, as later did Schopenhauer.

Francis Bacon, with his “idols of the tribe”, spoke often of how the emotions and wishes of an individual deflect his observations and his capacity for rational judgments. “Numberless are ... the ways, and sometimes inscrutable”, he said, “in which the affections color and affect the understanding”; in a decidedly “modern” manner he remarked that “a man’s disposition and the secret workings of his mind are better discovered when he is in trouble than at other times.” Sir Thomas Browne said, “Men are not the same through all divisions of their lives. Time, experience, self-reflection ... make men to differ from themselves as well as from other persons”; he advised that a man “should understand not only the varieties of men, but the variations of himself, and how many men he hath been.” Diderot wrote that “everything, even among the greatest sons of man, is incomplete, mixed, relative; everything is possible in the way of contradiction and limits; every virtue neighbors elements of incongenial alloy; all heroism may hide points of littleness; all genius has its days of shortened vision.”

Dr. Oliver Wendell Holmes said: “There is a great world of ideas we cannot voluntarily recall,—they are outside the limits of the will. But they sway our conscious thought as the unseen planets influence the movements of those within the sphere of vision. No man knows how much he knows—or how many ideas he has—any more than how many blood globules roll in his veins. Sometimes accident brings back here and there one, but the mind is full of irrevocable remembrances and unthinkable thoughts, which take part in all its judgments as indestructible forces.”

“Modern psychology”, has made some substantial progress. But it is not a science, only an art—and still in its infancy or adolescence. Moreover, too many psychologists share with Cohen an excessive hankering for uniformities, a hankering which leads to a shunting off to one side an interest in individuals. The psycho-analysts as a group proclaim that interest. As David Riesman has

193 DR. O. W. HOLMES, MEDICAL ESSAYS 300 (1861).
194 See FRANK, LAW AND THE MODERN MIND 21, 163, 359-360 (1930); FRANK, COURTS ON TRIAL 46, 250 n. 7 (1949); Roth v. Goldman, 172 F.2d 788, 790 n. 17 (2d Cir. 1949).
said somewhere, they "care so much about unimportant people that they are willing to spend years ... listening to the talk of these people, to their silences, to their antagonisms." Yet, it seems that even some analysts manifest (a la Cohen) a greater desire to work out "principles" than to meet the needs of their patients. Forgetting what the ancient Greek physicians and Aristotle taught, they have apparently become unmindful of the precept, "The physician must generalize the disease and individualize the patient." Wanting in empathy for individual patients, some psychoanalysts compensate "by applying therapeutic rules mechanically", and publish descriptions of the way those rules function "in terms of an ideal situation", disregarding the fact that "what is supposed to happen in theory far too often fails to happen in practice." When a member of their own group said that the "analyst's own ... personality can affect the welfare of the patient", one analyst replied (in a manner somewhat resembling Cohen's) that such an argument might lead to "nihilism." It has been said of some of them that their "theoretical pre-occupation makes them oblivious to the immediate reality of their patients, as well as to the problem of improving ... [their] procedures."

Of such all-too-human failings of some psychologists we must beware; and we must take note, too, that disagreement is rife among the "schools" of psychology. Yet this much is clear: the wiser psychologists, as a result of patient and devoted study of individuals, have discovered (or rediscovered) to what a large extent each human being is unique. To such psychologists the legal profession should give heed. For the jobs of lawyers and judges are basically psychological; at every turn, they must try, as best they can, to understand what motivates the varieties of individual men, what "goes on in their minds." An ethical approach to our daily legal tasks as lawyers and judges entails penetrating psychological insights into the behavior of individuals, ourselves as well as others.

196 Dr. O. W. HOLMES, MEDICAL ESSAYS 275 (1861).
197 Blumberg, supra note 195, at 493.
198 Id. at 493.
199 Id. at 491.
200 Ibid.
Much irrationality will be revealed as we seek such insights. Nevertheless, the effort to gain them is not (as some charge) a symptom of devotion to the irrational. "No paradox of modern thought is more tragic than this, that the discovery and analysis of the unconscious, which is a triumph of conscious intelligence, should come to be viewed as a humiliation of intelligence, a reason for idolizing the dark powers." Enlightened trial judges will not be afraid to acknowledge that those "dark powers" exist; those judges will avail themselves of all promising aids, offered by the psychologists, to deep understandings of individual human beings, while recognizing that such understandings can never be perfect.

That I have used the word "behavior" betokens no belief in "behavioristic psychology", which I think both naive and dogmatically deterministic. But I do protest against the fashion, followed by Cohen, of lumping together, under the label "belly-ache theory", or the like, all suggestions that "subjective emotions" do influence decisions. It is ridiculous, of course, to think that decisions are merely or chiefly a function of the judges' state of digestion or indigestion. Rational as well as non-rational factors affect decisions; and most of the non-rational factors are not alimentary. However, the digestive conditions of a witness, a judge or a juror, may sometimes have consequences: a bad night's sleep, caused by a "belly-ache", may diminish his attention, distort his observations, or weaken his memory.

XVI.

Cohen makes much of a "scientific approach" to the study of the behavior of courts. How "scientific" is he in refusing to study the uncertain elements which make his theory untenable? If he were rigorously "scientific", he would ask whether by his techniques, even when perfected, it will ever be possible to predict the reactions of an individual trial judge or some individual jurors to witnesses.

201 MULLER, SCIENCE AND CRITICISM 149 (1943).
201b They can probably be better than the lawyers' or laymen's understandings of trial judges or jurors ever will be, since (as previously explained) judges and jurors cannot be (and probably never will be) subjected to similar probings.
203 Others use similar labels, such as "gastronomical jurisprudence".
who have never been seen or heard by the particular judge or by those particular jurors, in an ordinary every-day "fact suit" involving no dramatic issues (i.e., not a case of rape or murder, or one stimulating racial prejudices, or relating to labor unions or to a rich man versus a poor one, etc.).

In his 1950 paper, presumably to justify his refusal to consider the unpredictable particular elements in such a case, Cohen purports to be "scientific" by resorting to the analogy of a concept which has been fruitful in modern physics, the concept of a "field". To explain the behavior of individual electrical "charges" or "particles", Maxwell, one of the greatest 19th century physicists, contrived this concept of a "field" of "forces". Cohen believes that this idea, applied to judicial behavior, will help to predict specific court decisions. He begins his 1950 paper—entitled *Field Theory and Judicial Logic*—by quoting the following comment by Einstein and Infeld about Maxwell's "field" concept:204 "A new concept appears in physics, the most important since Newton's time: the field. It needed a great scientific imagination to realize that it is not the charges nor the particles but the field in the space between the charges and the particles which is essential for the description of physical phenomena." As Cohen also quotes Kurt Lewin,205 who has most enthusiastically exploited this "field" concept in psychology, it will repay us to summarize Lewin's views of the prediction of the conduct of particular individuals.206

Lewin contrasts "Aristotelian" physics and "modern" physics. For Aristotle's physics, says Lewin, the "membership in a given class was of critical importance." Consequently, what did not fit into a class was "exceptional", and therefore not "lawful", i.e., did not behave according to, was not "governed by", a "law" of physics. To Aristotle, that which occurred always or frequently was "lawful"; that which occurred "only once" was not "lawful" but a matter of chance. The individual event, being unique, was thus "unlawful", i.e., not "governed by law". Science could not cope with it. It followed that there could be no science of the unique, the single event, the individual. This "Aristotelian" concept of scientific "lawfulness", says Lewin, had a "quasi-statistical character." It

204 EINSTEIN AND INFELD, THE EVOLUTION OF PHYSICS 259 (1938).
205 59 YALE L. J. at 250.
206 LEWIN, A DYNAMIC THEORY OF PERSONALITY (1935); LEWIN, PRINCIPLES OF TOPOLOGICAL PSYCHOLOGY (1936).
rested on numerical frequency (or averages) and excluded the "infrequent" or the "particular event". But, says Lewin, "modern physics" regards every particular, concrete, individual event as "lawful", i.e., explicable in terms of, or governed by, "laws". Modern physics is "quantitatively exact, and pure mathematical, functional relations now take the place" of classifications based on characteristics common to membership in a class. It rejects "the spirit of statistics founded on frequency." Every particular event is now deemed "lawful", and "the concept of lawfulness has been detached from that of regularity." "Modern" physics, says Lewin, insists on the "complete absence of exceptions" but does not equate that absence with frequency of occurrence. Its aim is to "predict individual cases."

Now, Lewin continues, psychology is still largely like Aristotelian physics. It must take on the methods of modern physics. It must regard individuals in terms of functional relations; it must envisage an individual's behavior as a function of a "field" of "psychical forces". Lewin, taking over from modern mathematical physics the study of the non-metrical aspects of space, called "topology", proposes a "psychological topology". The "totality of facts which determine the behavior of an individual at a certain moment" is his psychological "life space". The "life space" includes the individual person and his "psychological environment". By discovering his "life space", psychology can "explain the behavior of a certain person at a certain time"—and thereby can predict that behavior. This it can do by learning the "mutual relations of the factors in a concrete situation, . . . the momentary condition of the individual and the structure of the psychological situation." It can, so Lewin maintains, thus answer this question, "Why, in a given momentary situation, that is, with a given person (P) in a certain state and in a certain environment (E), does precisely this behavior (B) result? The problem is to represent the behavior (event) as a function of the momentary total situation \[ B = f/ (PE) \]."

Here, on the basis of an analogy borrowed from "modern physics", is a promise that the conduct of a particular man, at a particular moment, can be nicely predicted. To Cohen, this promise and this method of fulfilling it are most attractive. He not only cites Lewin with approval, but he exploits Lewin's notion
of a "life space". Speaking of the necessity, in predicting decisions, of an "exploration of group-enforced value patterns", Cohen says that "such an exploration might indicate how it happens that when anybody enters the life space of a public office, bringing to it a certain momentum and energy, the life space of his office will impose its geodesics upon him . . . Just so, the man who dons the judicial robe . . . finds that the pressure of his office space compels him to follow paths that, from outside the office-space, once appeared absurd."207 And, in his discussion of the "paths" of precedents, he adopts Lewin's conception of a "topological psychology".208

The "field" idea, even in physics, is an analogy or metaphor.209 I do not suggest that, on that account, we should undervalue it, since analogical or metaphorical thinking is essential.210 But metaphors, used incautiously, become thought-snares.211 The carry-over into the study of human behavior of any metaphor from physics, without many qualifications, has its obvious dangers, for the metaphor may easily mislead when so transplanted in a different thought-area. Such transplanting of the "field" metaphor is especially to be distrusted, since a leading physicist-philosopher, Bridgman, has warned of some marked defects of the "field" concept which have appeared in physics itself.212

But forget those cautions, for the time being. Even if one agrees with Lewin's interpretation both of Aristotle's physics and of "modern" physics, one may well doubt whether Lewin or

---

207 59 YALE L. J. at 251.
209 "Faraday's suggestion of lines . . . of forces . . . was a metaphor" which was "justified in its day by the fruitful analogies to which it led." M. R. COHEN, A PREFACE TO LOGIC 84 (1944).
210 To "eliminate all metaphors is impossible." They are "necessary for the apprehension and communication of new ideas." Id. at 83.
211 We must note not only "the power" but also "the snares of metaphorical illumination in science." Id. at 84. See, e.g., Pfeiffer, Brains and Calculating Machines, 19 AM. SCHOLAR 21, 30 (1950): To say "the brain is like a calculating machine" is not the same as saying "the brain is a calculating machine." "The first sentence is a simile, the second a metaphor. And metaphors are bad science." This attempted rejection of metaphors in science, however, I believe, is unsound.
212 See BRIDGMAN, THE LOGIC OF MODERN PHYSICS 56-59, 136-137, 145-147 (1927); cf. DAUNT, ELECTRONS IN ACTION 50-56 (1946). See article by O'Neill, Science Editor, in New York Herald Tribune, Dec. 3, 1950 for late news about the neutron which has been visualized "as an introverted charged particle, one that turned its field inside itself."

HeinOnline -- 26 N.Y.U. L. Rev. 615 1951
Imaged with the Permission of N.Y.U. Law Review
Cohen or their followers will ever be able, in most instances, to predict, by any scientific "laws", the particular conduct of most particular men at particular moments. The variables are altogether too numerous. Lewin, himself, acknowledged that, even with the physical and social environment identical, the "psychological situation" may nevertheless be "fundamentally different...for men of different personality" and "even for the same man in different conditions". More, he admitted that "alien influences", "influences from outside" the "psychological life space", introduce serious obstacles to prediction. As two of Lewin's disciples say,\(^{213}\) such an achievement as Lewin seems to promise is possible "only insofar as we can exclude the intruding effects of alien factors..." These alien factors... throw askew all our predictions based upon our analysis of [a man's] psychological field." Psychologists cannot "make complete predictions about the future behavior of the individual unless the alien factors can also be predicted. That is the reason that psychologists cannot be expected to provide concrete predictions; all that they can do is to provide conditional predictions, i.e., if such and such conditions prevail, the person will do so and so. The prediction of whether or not such conditions are likely to prevail is not the task of the psychologist, but of the doctor, the economist, the sociologist, the biologist, etc.\(^{214}\) In


\(^{214}\) Even Brown, op. cit. supra note 208, at 299, 300, 472, a more ardent advocate of the "field" analogy, writes: "For purposes of exact prediction one must characterize field-theoretically the whole personality of the individual. One must know the distribution of forces, the reality dimension of the field in which his locomotion is occurring, and the structure of the person. For a really precise sociology, this would also be necessary. But for many problems, such as the macroproblems of sociology,... we can treat individuals as point-regions. Consequently, at the present time a scientific sociology may be easier of accomplishment than a scientific psychology.... But the physicist has a great advantage over the psychologist in that he can isolate and control many variables in experiment, and hence build approximate theories in terms of part-to-part causality. The psychologist's manipulatory powers are much more limited than those of the physicist... [who] is able to metricize his forces, i.e., he is able to assign a fundamental measurement to them, while the psychologist must for the present deal with his forces non-metrically." Happily, however, says Brown, op. cit. supra note 208, at 48-49, 476, "modern mathematics comes to our rescue" with topology which "investigates the non-metrical aspects of space, particularly the connections between different spatial regions." It "gives us the mathematics to set up theories about psychological problems, where fundamental measurement is impossible at the present time.... With topology, geometry becomes truly the science of positional relationships.... For psychological purposes, one might
other words, one needs an unattainable store of knowledge to make such a concrete prediction. One must, then, still agree with Aristotle that *there can be no “science” of the unique, the individual.*

Accepting still for the moment the legitimacy of borrowing the “field” analogy from physics, we can discern that Lewin’s thesis has an even more serious blemish (and one which Cohen’s thesis shares). It disregards a striking characteristic of recent physics, a characteristic which differentiates it from Newtonian or “classical” physics, *i.e.*, the fact that, so far as the physicist can tell, the individual physical particles are “lawless”, unpredictable in their behavior. They do not behave with regularity, but in random fashion. As a consequence, most of the “laws” of modern, post-classical physics are “crowd laws” *i.e.*, formulations of the statistical average behavior of huge numbers of those individual particles.

Interestingly enough, it was Maxwell, contriver of the “field” concept, who first began to call attention to the significance of the unforeseeable conduct of those particles. He remarked on the unique, individual, disjunctive aspects of experience, and referred to the “singular points” of existence, the points where equations do not fit. At a “singular point”, he thought, influences that usually are negligible may assume a dominant importance. There was need, he said, for more “study of the singularities and instabilities, rather than the continuities and stabilities of things.” He stated that “the limit of our faculties forces us to abandon the exact history of each atom and to be content with estimating the average condition of a group of atoms.” This would require, he noted, the acceptance of the “existence of a certain kind of contingency as a self-evident truth.”

Criticizing the ideas of historians, like Buckle, who were trying to establish a science of history by using statistical averages, Maxwell urged that they define topology as the science which investigates the ‘belongingness’ of spatial regions, and then connectively with other regions.” Brown apparently believes that, in the future, psychology will become metrical.

---

215 “The logic of universals—the only basis that a machine can be constructed on—leads to the prediction of universals but never to a prediction of a single whole particular”. For “... an event in its fullness can never be predicted.” Ransom, God Without Thunder 239 (1930).

216 Lewin calls it “post-Gallilean physics”.

217 He expanded Faraday’s metaphor.

218 Quoted by Sullivan, Aspects of Science 47-48 (1926).

219 “The conception of a statistical knowledge of nature was first clearly enunciated by Maxwell...” M. R. Cohen, A Preface to Logic 139 (1944).
should consider “instability”, since “it is manifest that the existence of unstable conditions renders impossible the prediction of future events, if our knowledge of the present state is only approximate and not accurate.”

The later development of physics has confirmed these remarks. Einstein and Infeld, like many other modern physicists, tell us that “we cannot foretell the course of a single electron”, that its future course is unknowable; that today physicists say, “We care nothing for individuals”; that there “is not the slightest trace of a law governing their individual behavior.”

The physicist Irving Langmuir said a few years ago that many physical phenomena are “subject to the laws of chance” and therefore unpredictable. He observed that the “classical” physicist discovered clean-cut invariable “laws” because he “naturally chose as the subjects for his studies those fields which promised greatest success in his hunt for those laws”, and accomplished his purpose “by working with phenomena which depended upon the behavior of enormous numbers of atoms rather than upon individual atoms”; in that way, the effects produced by individual atoms averaged out, became imperceptible, were disregarded—and smooth “laws” resulted.

It seems clear, then, that “post-classical” modern physics is no more capable than “Aristotelian physics” of predicting the behavior of individual particles. The trouble with Lewin, Cohen, et al., is that they have not sufficiently allowed for recent changes in the conceptions of physicists. To men like Lewin and Cohen, one may perhaps apply Bertrand Russell’s comment on psychologists—that they “are apt to assume an old-fashioned physics which make their problems look easier than they are.”

If, following the dubious example of Lewin and Cohen, we

---

220 For fuller quotations of these remarks, see FRANK, FATE AND FREEDOM 150, 156 (1945); Frank, Book Review, 15 U. of Chi. L. Rev. 462, 470 (1948).
221 EINSTEIN AND INFELD, THE EVOLUTION OF PHYSICS 297-300 (1938). However, there is a basic difference between Einstein and some other eminent physicists (such as Schroedinger and Langmuir). The latter, unlike Einstein, do not accept the notion of “absolute causality” behind the random movements of the individual particles. See FRANK, FATE AND FREEDOM 148 ff. (1945). As to Einstein’s recent attempt through a “unitary field theory”, to eliminate the obstacles to his theoretic notion of “reality”, see INFELD, ON EINSTEIN’S NEW THEORY, 19 AM. SCHOLAR 423 (1950).
222 Langmuir, SCIENCE, COMMON SENSE AND DECENCY, 43 SCIENCE NEWS LETTER 3 (1943).
223 RUSSELL, ANALYSIS OF MATTER 138 (1927).
borrow the "field" metaphor from physics, we will conclude that it will not enable us to predict what individual trial judges or juries will do. Rather we will say that the reaction to the experience at a trial of such a judge or jury, in an ordinary suit, resembles a single electron whose future course "we cannot foretell", and that such a suit is usually in an "unstable condition" which renders prediction of its outcome impossible.

Even so ardent an exploiter of the "field" analogy as Brown, concedes, for a moment, that developments in physics compel a doubt about the ability to predict perfectly an individual man's behavior. "The realization that strict dynamic causality or predictability does not exist in certain microphysical processes raises the doubt", he says. "Since certain such processes are undoubtedly involved in brain physiology, we may say that the chances are that we shall never be able to predict every 'act of choice' of humans"; \(^{224}\) and he notes that "operationally there is no difference between 'free' and unpredictable behavior."\(^{225}\) What, then, of the ability to predict the "act of choice" when a trial judge or jury exercises "fact discretion", the choice to believe one witness rather than another?

But we need not rely on modern physics and physicists in reaching the conclusion that there is unpredictable indeterminacy in human reactions. The physical analogy should not lead us to regard men as mere physical particles. If we do so, we adopt a bleak view of human life. Individual men have individual human initiatives, spontaneities which bring about unexpected, unanticipatable, diverse un-uniform responses to identical experiences.

Of course, all the responses of any man do not always escape prediction. As Weiss says, "The acts and ways of men are to some extent predictable. . . . A man beyond the reach of all prediction would have to break every pattern, including the pattern of breaking patterns. . . . All of us can be counted on to some extent. . . . But no one is . . . completely predictable. . . . No matter how comprehensive and detailed science may be, it will never enable us to know fully the nature and acts of men. . . . They are not merely beyond the reach of the sciences we now have; they are beyond the reach of an absolutely perfect, and ideal science. . . . Predictions

\(^{224}\) Brown, op. cit. supra note 208, at 336.

\(^{225}\) Id. at 335 (emphasis supplied).
refer to generalized, classified, abstract situations, . . . whereas what happens is specific, concrete, the product of unduplicable, definite, temporal activities, . . . making concrete what before was only possible. All attempts to say exactly what will be are blocked by the fact that what will happen is more concrete and detailed than any prediction could possibly say. . . . We cannot in advance tell just what concrete results will be produced, not because our minds are too weak but because those results have no concrete natures to be known in advance of their occurrence."

Cohen quotes Lewin with approval. Yet, unlike Lewin, Cohen is apparently unwilling to abandon averages in the quest of individual decision-prediction. And many persons who agree with Cohen about decision-prediction have avidly seized on the analogy of the modern physicists’ average or “crowd laws”. These persons think that, by looking at a multitude of court decisions, we can obtain averages, so that most of the differences between decisions of divers specific law suits will wash out; regularities or uniformities then can be discovered, and predictions of specific future decisions will be possible. But that would be true only if the persons constructing the average knew at least this: The relation between (1) the actual past facts of each law suit, the decision of which went into the average, and (2) the facts as “found” by the trial court in each such case. No one, however, can know (1) and therefore no one can ascertain its relation to (2). Moreover, in the usual trial, the “average” factors—the regularities or uniformities—mingle with the unpredictable, unknowable, non-average, reactions to the oral testimony of the trial judge or jury, and balk prediction of the decision.

The method of averages is, of course, related to the mathematical theory of probability. In 1877, Jevons, in his Principles of Science, wrote: “Attempts to apply the theory of probability to the results of judicial proceedings have proved of little value, simply because the conditions are far too intricate.” He quoted La Place who earlier had said, “all the emotions, the most diverse interests and circumstances, complicate questions relating to such a subject, to the point where [in terms of probable decisions] they are almost always insoluble.” Jevons continued, “Men acting on a jury or giving evidence before a court, are subject to so many com-

226 Weiss, Man’s Freedom 3-5 (1950).
plex influences that no mathematical formulas can be framed to express the real conditions." As to judges and jurymen, he remarked that "there are subtle effects of character and manner and strength of mind which defy analysis."227

Cohen should not need to be reminded of the inutility of statistical averages in trying to foresee particular decisions. For his father, M. R. Cohen, had said228 that a "statistical law" does "not enable us to predict individual instances"; that such "laws apply not to individual instances but only to large groups over a long run"; that "while events . . . are individualized, . . . statistics are concerned with the fungible aspects of things"; and that "no number of rules . . . can exhaustively determine the fulness of individual existence."

Before lawyers fall for individual predictions by statistics, they should consider the case of the social psychologists: Zestful to prophesy the behavior of individuals, many of these psychologists have made themselves masters of statistical techniques. But in personnel work, and elsewhere, they have not succeeded in their aim of foreseeing what an individual person will do in particular future situations, because of the baffling number of variable, unforeseeable factors.229

Fascinated by the successful employment of modern mathematics in the physical sciences, Cohen (paraphrasing Plato) writes hopefully of the day when "mathematicians become lawyers or

228 M. R. Cohen, A Preface to Logic 130, 131, 144, 149, 150 (1944).
229 See, e.g., Horst, Prediction of Personal Adjustment 83, 243, 244, 245 (1945): "The main problem in dealing with the analytical formulations of so-called dynamic and configurational phenomena is not the setting up of the equations. It is entirely possible to work out a rather general form of function which will have enough parameters and be sufficiently flexible for almost any hypothesis. The chief difficulty is that if the equations be formulated with sufficient generality and flexibility, there may be so many unknowns to solve that the number of cases available may not be adequate to give reliable values for the unknown . . . Direct application of this method breaks down, however, when the number of possible configurations becomes so large that no sample is large enough to provide an experience table. . . . These statistical procedures have in common the operation involving a sacrifice of information about the individual configurations. This sacrifice is made in order to obtain broad enough classes to assure an adequate number of cases from the trial sample in each class. It is an artifact to treat thousands of different configurations as belonging to a single class, supposedly homogeneous. If the classes are too broad and too heterogeneous, the statistician will make many bad guesses."
lawyers mathematicians." This notion is dangerous. Pascal, himself a distinguished mathematician, saw this danger when he said, "This man is a good mathematician. . . . He would take me for a proposition." Aristotle (who in this respect diverged from Plato) also saw this danger when he distinguished "legal" and "equitable" justice. "Legal justice", in transactions "between man and man", he said, rests on mathematical equality, according to which "it makes no difference whether it is a good or a bad man" who has violated a legal rule. But, he said, "equitable justice" is a "correction of legal justice" and a "better kind" of justice. It mercifully considers the unique individual circumstances which demand a departure from the rigid rules.

For a democracy, Aristotle is a better guide than Plato. Plato, who exalted mathematics, sought an exact science of government conceived after the manner of mathematics. Correlatively, his ideal state was totalitarian; he detested democracy for its flexibility. Aristotle, far more interested as a scientist in living organisms than in physics and mathematics, was correlatively more sympathetic to political democracy. It is no accident that Aristotle underscored flexible "equity", that his formulations of the nature of "equity" have influenced courts and legal thinkers throughout the Western world.

The belief in the possibility of mathematicizing psychology usually accompanies the yearning to predict precisely the conduct of individual human beings in all circumstances. This belief, therefore, is often a concomitant of a thoroughly deterministic philosophy,

---

230 59 YALE L.J. at 272.

231 PASCAL, PENSEES No. 36 (1670). See also DE BROGLIE, MATTER AND LIGHT 280-282 (1939): "The spirit of geometry is needed, for without it we could give no precision to our ideas and arguments. But there is need also for the spirit of intuition; it is required to recall to us without ceasing that reality is too fluid and too rich to be contained in its entirety within the strict and abstract framework of our ideas."

232 See SABINE, A HISTORY OF POLITICAL THEORY cc. 3, 4 (1937); cf. FITZ, THE PLATO, THE PLATONIC LEGEND, especially 225-262 (1934). Taylor writes: "We must remember that though mathematics was by no means the only science cultivated in the Academy, it was that which appealed most to Plato himself, and that in which the Academy exercised the most thoroughgoing influence on later developments. . . . We naturally expect to find traces of this special preoccupation with the philosophy of mathematics which is characteristic of the work of the school. . . . For a real comprehension of Plato's thought it is indispensable to have a grasp of the modern logic of arithmetic." TAYLOR, PLATO 504, 505 (2d ed. 1927). The quotations of Aristotle are from his NICOMACHEAN ETHICS 1131 et seq. (Ross transl.).

233 See Usatorre v. The Victoria, 172 F.2d 434, n. 11-16 (2d Cir. 1949).
one which deems illusory any measure of real choice for human beings.\textsuperscript{234} Persons with such a mathematicizing inclination frequently find satisfaction in such expressions as "social engineering" or "legal engineering", expressions which indicate that human beings should be treated (\textit{a la} Plato) as the totalitarians treat them—as inert things to be manipulated or rigidly controlled.

I do not at all mean that Cohen suggests such a mathematical or totalitarian "science" of government \textit{a la} Plato.\textsuperscript{234} Yet Cohen, in his dangerous neglect of the unique individual, is closer to Plato's thinking than to Aristotle's. I say this despite the fact that, when Cohen writes of the application of mathematics to legal thinking, he has in mind chiefly Einstein's mathematical achievements in overcoming what I have labelled "physical subjectivity". For see how Cohen wants to utilize those achievements. "The real importance of Einstein", says Cohen,\textsuperscript{235} "is his development of formulae by which many different accounts of the same physical event may be correlated with each other, so that from the position and direction of an event in any physical system we can calculate its position and direction in any other system." Cohen believes it will be possible, in some such way, to mathematicize the judicial process. That is, he hopes we can use differing human perspectives inter-changeably, that we can work out "translations from any perspective to any other perspective."\textsuperscript{236} So, Cohen seems to say, if we know the "value field" of a particular trial judge, we can some day, by "translation", discover a method of discounting, and thereby predicting, the way in which his "value field" will affect his version of the facts of a case.\textsuperscript{237} Cohen suggests that such an accomplishment is "no empty dream", although today this job of "translating" is done "roughly, rudely and implicitly."\textsuperscript{238} Perhaps it can be said that Cohen's belief in the possibility of such "translations" is but another form of the fatuous belief that all the "private", hidden, idiosyncratic reactions of any man can be made public" \textit{i.e.}, that this kind of "subjectivity" now ineluctible, some day will be eliminated.\textsuperscript{239}

\textsuperscript{234} See, e.g., \textsc{Brown}, \textit{op. cit. supra} note 208, at 25.
\textsuperscript{235} \textsc{Cf. Cohen, Ethical Systems and Legal Ideals} 230, 235 (1933).
\textsuperscript{236} 59 \textsc{Yale L. J.} at 243 (1950).
\textsuperscript{237} \textit{Id.} at 243, 244, 271.
\textsuperscript{238} \textit{Id.} at 243, 244.
\textsuperscript{239} \textsc{Taylor, op. cit. supra} note 232, at 326 ff., discusses Plato's idea of a "public world" and "private worlds".
Such a resort to mathematics, in the belief that in that way one can thus be rid of the effects of individual reactions, may perhaps betoken a fear of the unique because of its unforseeability. The hope of eliminating those effects by science, of being able ultimately to treat them as if non-existent for prediction purposes, may be a fear-inspired form of self-delusion.

It may occur to someone to say that the "field" concept in physics is historically related to that of the "gestalt" concept in psychology; that Lewin and others combine the two concepts as the foundation of a "science" of predicting individual behavior; and that therefore I am inconsistent in using the "gestalt" concept and in nevertheless asserting that such a science is impossible. My answer is that the unanalyzable individual "gestalts" of particular trial judges or jurors, when reacting to the particular witnesses in particular law suits, are unique, "private", not fully communicable to other persons, and not predictable.

Cohen's unwisdom in incautiously borrowing analogies from mathematics and physics may be further shown by noting how that practice could be turned against him: (1) The development in modern mathematics of the invaluable idea of non-Euclidean geometry has induced discussion of two-dimensional, three-dimensional, and multi-dimensional creatures, each sort with its own peculiar perspective. Einstein and Infeld say that if "two-dimensional creatures" were to meet new experiences that would not fit into the two-dimensional geometry they had learned, they would "certainly make every possible effort to hold on to it", by inventing all sorts of ingenious, complicated two-dimensional explanations of its divergence from those new experiences. So (forgetting for the moment

\[ \text{\footnotesize 240 See Cassirer, The Problem of Knowledge 102, 212, 213 (1950); See Brown, op. cit. supra note 208, at 65, as to the application of the "gestalt" or "organismic" view, in biology.} \]

\[ \text{\footnotesize 241 The idea of non-Euclidean (or postulational) thinking has spread beyond the realm of mathematics and physics, and not merely by way of analogy. For it involves a new, liberating, understanding of the nature of axioms in any realm of thought, as not "self-evident" truths but as assumptions which can be challenged and revised in the light of their consequences. See, e.g., Frank, Fate and Freedom 298-308 (1945).} \]

\[ \text{\footnotesize 242 Einstein and Infeld, op. cit. supra note 221, at 237-239. The struggle in science to save old theories by inventing complicated qualifications has often been told. Illustrative are the stories of the Ptolemaic theory, that of phlogiston, that of the ether, and that of several Newtonian theories. See e.g., Sullivan, Aspects of} \]
the dangers of borrowing mathematical analogies) we might say this of Cohen, et al.: Confining themselves to observation of upper courts, their legal thinking is two-dimensional; when, occasionally, they consider specific trial-court decisions, and thus gaze at a three-dimensional legal world, they invent complicated excuses for the failure of their two-dimensional prediction apparatus to produce predictions of such decisions. (2) This also may be suggested by physical analogies: Einstein and Infeld say that "classical" physics, relying on Euclidean concepts, is valid as a special or limiting instance, *i.e.*, is valid if restricted in its application. Similarly, we may say that the conventional theory of decision-making and of decision-prediction holds good whenever the complexities of trial-court fact-disputes (caused by credibility difficulties) are absent—as when, in a trial, the facts are undisputed or when a case comes into an upper court (the facts having already been "found" by the trial court). The error of Cohen & Co. is that they apply this theory to the decisions in trials where the credibility difficulty is painfully present; they forget that usually, in such cases, the trial courts' fact-findings will bind the upper courts, and they never consider the trial courts' gestalts.

This attitude of Cohen & Co. recalls what William James said of thinkers who insist that invariably nature is orderly and fully comprehensible by man: They are expressing, said James, their "sense of how pleasant... [their]... intellect would feel if it had a nature of that sort to deal with." When that mood dominates...
such persons, they pay no attention to unique, unruly, unpredictable, individual happenings.

XVII.

Let us take stock. The following striking features emerge from our survey of trials:

(1) Witnesses do not uniformly react to the past events about which they testify. (2) In most trials, the witnesses orally tell conflicting stories to the trial court concerning those events. (3) In any such case, for decision purposes, what we call the "facts" of a case, derives, at best, from the trial judge's or jury's belief as to the reliability of the stories told by some, rather than others, of the disagreeing witnesses. (4) There are few uniformities in the formation of those beliefs of trial judges or juries, and no rules to aid them in forming those beliefs. (5) Those beliefs determine the fate of most litigants because, in the very few cases that are appealed, the upper courts usually accept the trial court's beliefs, since those beliefs involve trial-court "fact-discretion" with which the upper courts seldom interfere. (6) To make matters more complicated, those beliefs are often but purported beliefs, since the "gestalt" element obscures the real beliefs. (7) Moreover, the beliefs, real or purported, are often not reported to anyone. If such a trial-court belief is not reported, and if the trial court's decision is appealed, usually the upper court will fictionally assume that the trial court had a belief, based on some selected part of the conflicting oral testimony, which will justify the trial court's decision.

If you put together all these items, you must conclude that those who glibly talk of predicting future decisions, in cases as yet untried, have grossly exaggerated litigation-certainty.

XVIII.

Consider an impeccable legal rule, one that is reasonable and wholly satisfactory from an ethical viewpoint, e.g., the rule condemning murder or the rule prohibiting a trustee from realizing personal gain from the use of trust funds. If, due to mistaken trial-court fact-finding, such a rule is "enforced" by being "applied" to spurious facts (i.e., facts that never happened) so that a man is hanged for a murder he didn't commit, or another man is adjudged to pay $25,000 for the act of misusing trust funds which actually he

245 At least so far as they relate to "testimonial" inferences.
diedn't misuse—then what? Then, in reality, the rule is wrongly enforced, misapplied, with outrageously unjust human consequences, from which upper courts can seldom give relief.248

It is amazing that Cohen, of all persons, should not be interested actively and persistently in such unfortunate products of such court operations. For, in his book, he criticizes severely, and with ample justification, philosophers and legal thinkers who (a) dwell on the "contents" of legal rules, and (b) neglect to question the consequences of those rules when they get into action. In short, a wide chasm stretches between Cohen's preachments about legal criticism and his own practices as a legal critic.

Let us, once more, in Cohen's own words, describe his preachments: "The potentialities of law"—remember he defines "law" as rules—are never "irrelevant to legal criticism."247 The "valuation of law in terms of its expressed content is, in short, inadequate and fallacious . . . because . . . it neglects such important legal-ethical problems as . . . the nature of their enforcement."248 The "valuation of law in terms of its expressed content breaks down in crucial cases, simply because the actual effects . . . are ignored."249

"Abstraction is necessary in all thought. [But] . . . what renders a given standard of valuation inadequate is not its mere abstractness but the fact that the abstraction involved is not exhaustive or representative of all the values implicated in law." And this fault seems definitely ascribable "to standards which, abstracting from all the results of law, evaluate either the form or the expressed content or the purpose of law. . . ."250 Valuably, "there has arisen in this country and in this century the call for an analysis of anciently ignored discrepancies"251 between 'law in action', between what courts

240 See In re Fried, 161 F.2d 453, 462-464 (2d Cir. 1947); United States v. Forness, 125 F.2d 928, 942-943 (2d Cir. 1942); McAllister, The Big Case, 64 HARRY L. REV. 26, 56 (1950); Frank, Cardozo and the Upper-Court Myth, 13 LAW & CONTEMP. PROB. 369, 382 (1948).

247 COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 69 (1933).

248 Id. at 63.

249 Id. at 65.

250 Id. at 55.

251 Here Cohen overlooks Aristotle, who, in his "Rhetoric", elaborately described these discrepancies in the actual conduct of trials. See discussion in Frank, Modern and Ancient Legal Pragmatism, 25 NOTRE DAME L. REV. 460, 485-488 (1950). See also ARISTOTLE, POLITICS, 1292b, 12 ff: "In many states, the constitution . . . although not democratic . . . may be administered democratically, and conversely in other states the established constitution may incline to democracy, but may be administered in an oligarchical spirit. This most often happens after a revolution. . . ."
are saying and what courts are doing. . . .”252 Without “a clear vision of these discrepancies, law dissipates its forces . . ., and stimulates new evils. . . .”253 “To identify result and purpose is to dim our vision of that omnipresent human fallibility which separates hope from achievement.”254 There should be “an insistence upon the ethical primacy of actual legal results. . . .”255 “Omniscience, even in the narrow field of legal techniques, is denied to man, and numerous indeed are the cases where jural purposes have completely miscarried through miscalculations of legal technique.”256 It is essential to stress “the undeniable and forgotten fact that in order to value anything intelligently we must know what it is.”257 The “first condition” of “intelligent judgment” is “that we know what we are talking about.”258 We should “therefore dismiss as untrue all claims for the attainment of certainty in legal criticism which dispense with the arduous task of discovering what law does and can do.”259 “Most errors of juristic criticism arise from an illicit simplification of questions that we ought to face.”260 Proposed criteria of such criticism “must face the scientific test of empirical confirmation”,261 a “testing . . . in the light of immediate observation.”262 “If you want to understand something, observe it in action; . . . [this] approach leads to an appraisal . . . of human beings who are affected by law.”263 Although the maintenance of “peace is an enduring human ideal, a first requirement of the good life and one particularly susceptible of achievement through law, . . . there is no truth in the supposition that peace . . . constitutes a valid and adequate norm for all activity.”264 It is “a fallacy to infer that the settling of . . . disputes is the sole norm of law. It is the right

252 COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 237 (1933). Pound, who invented the description of “law in books” as opposed to “law in action”, has often himself ignored the distinction.
253 Id. at 63.
254 Id. at 68 n. 12.
255 Ibid.
256 Id. at 67.
257 Id. at 51.
258 Id. at 51-52.
259 Id. at 53.
260 Id. at 287.
261 Id. at 121.
262 Id. at 124.
263 1 MOD. L. REV. at 8 (1937).
264 COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 75 (1933).
settling of conflicts . . . which the law ought to secure."265 “No greater service can be performed on behalf of noble ideals than to free them from the extravagant pretensions with which they have been encumbered by followers more loving than wise.”266

See, then, what Cohen thus sagaciously asserts: We should evaluate all legal rules by their practical human consequences; the mere content or purpose of a rule, no matter how splendid, will not alone suffice, but the actual effects of its enforcement, the actual results in action, are what counts; not the settling of disputes, but their “right settling”, is the proper standard in appraising the work of the courts; faulty “legal technique”, caused by human fallibilities, has produced “numerous cases” of miscarriage of admirable “jural purposes”.

How do these comments square with Cohen’s practices as a legal critic—with his unwillingness to recognize the human consequences, the impact on the “good life”, of mistakes traceable to the “legal techniques” of trial court fact-findings? How does Cohen explain his steadfast refusal to test his own criteria of legal criticism by “empirical confirmation”, through “immediate observation” of trial courts in action and through noting the relation of their actions, in finding facts, to their decisions and to those of upper courts? Why, when evaluating “judicial behavior”, does he not—taking to heart his own wise words that “in order to value anything intelligently we must know what it is”—learn, by extensive observing, what it is that happens in trials when witnesses disagree?

Borchard’s Convicting The Innocent, appeared in 1932; its revelations should have stimulated Cohen, in the light of observations of actual court doings, to re-examine his conceptions of “judicial behavior”. Why did not Cohen discuss Borchard’s revelations in Cohen’s own book published in 1933, or his articles published in 1935, 1937 and 1950? Why has he failed to see that errors in his own “juristic criticism” are bound to arise from his “illicit simplification of questions”, which he “ought to face”, but doesn’t? Why does he not, on behalf of the noble moral ideals, concerning the judicial process, which he sponsors, “free them from the extravagant pretensions with which they have been encumbered by followers more loving than wise?”

265 Id. at 89.
266 Id. at 72.
One can but surmise. Perhaps this is the answer: (1) He wants to believe it possible to work out a "systematic knowledge of legal decisions" based on the predictable "uniformities" of "judicial behavior". He therefore feels it unbearable to contemplate that—because of disputes about facts and the lack of uniformities in the exercise of trial-court "fact discretion", and in the "gestalts" of trial judges and juries—most future decisions are inherently unpredictable. (2) That feeling evokes in him a stubborn refusal to admit, to himself or to others, that the unpredictability of most decisions, before trial, results (a) principally from the incurable unknowability, in advance, of trial-court fact-findings (or gestalts) in most law suits, and (b) not from rule-uncertainty, i.e., from the vagueness of some precedents or doubts as to what precedents the courts will apply. For, were it true (as he has brought himself to believe) that the latter is the only or the chief source of legal uncertainty, then such uncertainty would not now be disturbingly pervasive, and could, by his prediction-device, be reduced to a still smaller compass, thereby making possible the creation of "systematic knowledge of decisions". (3) Accordingly, he refuses to observe what trial courts actually do, because of his more or less unconscious fear that such observation would compel him to recognize the vast extent and immense consequences of litigation-uncertainty—and therefore of legal uncertainty in general. (4) On that account, he has blinded himself to the existence of the moral problem posed by the vagaries and vicissitudes of trials, and flings a "sneeze word"—"mystic"—at those who try to call those vagaries and vicissitudes to his attention.  

Cohen, alas, is not unique in underscoring the role of morals in legal criticism while neglecting trials and trial courts. Even Pound, who has not always neglected them, said but a few years ago: "If it is not possible wholly to exclude the subjective personal element" in the judicial process, "the history of law shows we can go very far toward doing it."  

But how far have we gone in excluding the "personal element" in judicial fact-finding? Have we done

---

267 Obviously, Cohen intended the word "mystic" to be denigrative. This device of using pejoratives to describe the views of those with whom one disagrees, Cohen himself seems to deplore. See, e.g., 59 Yale L. J. at 244. For a fuller discussion of such "epithetical jurisprudence", see Frank, Epithetical Jurisprudence and The S.E.C., 18 N.Y.U.L. Q. Rev. 317 (1941).

so in our use of the jury?\textsuperscript{269} Have we, in our law schools or elsewhere, trained future trial judges to become aware of their unconscious "personal" prejudices with respect to witnesses and, thus aware, to overcome those prejudices?

No decent, sensible man will deny that to ethicize the legal rules is essential. But that need has already won widespread recognition. It is far more important today to publicize the almost completely neglected need to ethicize the process of finding facts in our trial courts.

XIX.

Since, whatever the reason, Cohen has effectively blinded himself to the moral problem that stems from defective fact-finding, and so has made himself largely unaware of that problem, he should be absolved from any charge of direct moral irresponsibility in deliberately minimizing its gravity. But, he should now courageously confront it, since he is eminent as a legal thinker concerned with morals.\textsuperscript{270}

I strongly incline to believe that, because of ineradicable human frailties, nothing like a complete solution can ever be contrived; that men must accept (as they do some accidents causing death) the unavoidability of some of the tragedies caused by mistaken trial-court fact-finding. However, I do believe that many of those tragedies could be avoided, by eliminating (or reducing the effects of) some of their causes, so that, to some extent at least, we need not continue to justify Learned Hand's comment, "I must say that, as a litigant, I should dread a law suit beyond almost anything short of sickness and death."\textsuperscript{271} To that end, I have elsewhere suggested the following reforms:

1. Reduce the excesses of the present fighting method of conducting trials:
   (a) Have the government accept more responsibility for seeing that all practically available, important, evidence is introduced at a trial of a civil suit.

\textsuperscript{269} Pound has praised juries for their "lawlessness", their ability to make legal rules to suit themselves. See Pound, \textit{Law In Books and Law In Action}, 44 Am. L. Rev. 12, 18-19 (1910).

\textsuperscript{270} A similar statement should be made concerning Jerome Hall, who also minimizes the problem and who is also a legal thinker much concerned with moral problems, see notes 81, 103, 104 \textit{supra}.

\textsuperscript{271} Hand, \textit{The Deficiencies of Trials to Reach The Heart of The Matter}, 3 Lectures on Legal Topics 89, 105 (1926).
(b) Have trial judges play a more active part in examining witnesses.
(c) Require court-room examination of witnesses to be more humane and intelligent.
(d) Use non-partisan "testimonial experts", called by the judge, to testify concerning the detectible fallibilities of witnesses, circumspectly employ "lie-detectors".
(e) Discard most of the exclusionary evidence rules.
(f) Provide liberal pre-trial "discovery" for defendants in criminal cases.

2. Reform legal education by moving it far closer to courthouse and law-office actualities, largely through the use of the apprentice method of teaching.

3. Provide and require special education for future trial judges, such education to include intensive psychological self-exploration by each prospective trial judge.

4. Provide and require special education for future prosecutors which, among other things, will emphasize the obligation of a prosecutor to obtain and to bring out all important evidence, including that which favors the accused.

5. Provide and require special education for the police so that they will be unwilling to use the "third degree".

6. Have judges abandon their official robes, conduct trials less formally, and in general give up "robe-ism".

7. Require trial judges in all cases to publish special findings of fact.

8. Abandon jury trials except in major criminal cases.

9. At any rate, while we have the jury system, overhaul it:
(a) Require fact-verdicts (special verdicts) in all jury trials.
(b) Use informed "special" juries.
(c) Educate men in the schools for jury service.

10. Encourage the openly disclosed individualization of law suits by trial judges; to that end, revise most of the legal rules so that they avowedly grant such individualizing power to trial judges, instead of achieving individualization surreptitiously as we now largely do.

11. Reduce the formality of appeals by permitting the trial judge to sit with the upper court on an appeal from his decision, but without a vote.

12. Have talking movies of trials.

13. Teach the non-lawyers to recognize that trial courts have more importance than upper courts.\textsuperscript{272}

I suggested those reforms most tentatively. For far better minds than mine are needed to meet the problem effectively. As Felix Cohen has such a mind, I urge him to join in that undertaking.

He, of all men, should not complain that the problem may, in

\textsuperscript{272} See \textsc{Frank}, \textit{Courts on Trial} 422-423. The details of these reforms are discussed in the earlier pages of that book.
part, be insoluble. For, in his book he quotes, with applause, these wise words of Bentham: "It is always something to see where the difficulty lies, although it should be insuperable; and to point out the only means by which the best solution can be given, although that solution should not be as satisfactory as one wishes. . . . By showing the real uncertainty of the most conclusive arguments that can be offered on the subject, it will prevent us from giving to less conclusive arguments more than their due weight; it will enable us to unravel the web of sophistry, and to humble the pride of declamation: it will be of service, insofar as the caution that accompanies a salutary doubt is preferable to the rashness that may be the result of a misconception." 

273 COHEN, op. cit. supra note 252, at 288.
274 BENTHAM, I WORKS 178 (1843).