1949

Legal Thinking in Three Dimensions

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Recommended Citation
Frank, Jerome N., "Legal Thinking in Three Dimensions" (1949). Faculty Scholarship Series. 4094.
https://digitalcommons.law.yale.edu/fss_papers/4094

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Said Bernard Shaw in his 1913 preface to his book, *The Quintessence of Ibsenism*, originally published in 1891: “In the pages which follow I have made no attempt to tamper with the work of the bygone man of thirty-five who wrote them. I have never admitted the right of an elderly author to alter the work of a young author, even when the young author happens to be himself.” I am no Shaw, but, in penning this preface to a new printing of a book I published in 1930, I echo his sentiments.

I confess, however, that I could not today write that book precisely as I wrote it eighteen years ago. For one thing, I seriously blundered when I offered my own definition of the word Law. Since that word drips with ambiguity, there were already at least a dozen defensible definitions. To add one more was vanity. Worse, I found myself promptly assailed by other Law-definers who, in turn, differed with one another. A more futile, time-consuming contest is scarcely imaginable. Accordingly, I promptly backed out of that silly word battle. In 1931, I published an article in which I said that, in any future writing on the subject-matter of this book, I would, when possible, shun the use of the word Law; instead I would state directly—without an intervening definition of that term—what I was writing about, namely (1) specific court decisions, (2) how little they are predictable and uniform, (3) the process by which they are made, and (4) how far, in the interest of justice to citizens, that process can and should be improved. I wish I had followed that procedure in this book. I trust that the reader, whenever he comes upon “Law,” will understand (as I said on pages 46 and 47) that I meant merely to talk of actual past decisions, or guesses about future decisions, of specific lawsuits.

I made another blunder, leading to misunderstandings, when I employed the phrase “legal realism” to label the position, concerning the work of the courts, which I took in this book. That phrase I had enthusiastically borrowed from my friend Karl Llewellyn. He had used it to designate the views of a number of American lawyers who, each in his own way, during the first two decades of this century had in their writings expressed doubts about one or another of the traditional notions of matters legal. But, in 1931, less than a year after this book appeared, I published an article stating regrets at the use of this label, because, among others things, “realism,” in philosophic discourse, has an accepted meaning.

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*Acknowledgement is gratefully made by the Law Review to Coward-McCann, Inc. for its permission to publish this article, which, except for rearrangement of footnote material, is a new Preface to the sixth printing, soon to appear, of FRANK, LAW AND THE MODERN MIND.
wholly unrelated to the views of the so-called "legal realists." I then suggested that the legal realists be called "constructive skeptics," and their attitude, "constructive skepticism."\(^3\)

There was a more cogent reason for regretting the use of "realists" as a method of ticketing these legal skeptics. The label enabled some of their critics to bracket the realists as a homogeneous "school," in virtual accord with one another on all or most subjects. This misconception—not certainly the result of any careful reading of their works—led to the specious charge that the "realistic school" embraced fantastically inconsistent ideas. Actually no such "school" existed. In the article mentioned above, I referred to one critic's use of this lumping-together method as follows: "It may be roughly described thus: (1) Jones disagrees with Smith about the tariff. (2) Robinson disagrees with Smith about the virtues of sauerkraut juice. (3) Since both Jones and Robinson disagree with Smith about something, it follows that (a) each disagrees with Smith about everything, and that (b) Jones and Robinson agree with one another about the tariff, the virtues of sauerkraut juice, the League of Nations, the quantity theory of money, vitalism, Bernard Shaw, Proust, Lucky Strikes, Communism, Will Rogers—and everything else. Llewellyn, Green, Cook, Yntema, Oliphant, Hutcheson, Bingham, and Frank in their several ways have expressed disagreement with conventional legal theory. Dickinson therefore assumes (a) that they disagree with that theory for identical reasons; and (b) that they agree with one another on their proposed substitutes for that theory. It is as if he were to assume that all men leaving Chicago at a given instant were going north and were bound for the same town. Dickinson has produced a composite photograph of the writers he is discussing. One sees, so to speak, the hair of Green, the eyebrows of Yntema, the teeth of Cook, the neck of Oliphant, the lips of Llewellyn... The picture is the image of an unreal imaginary creature, of a strange, misshapen, infertile, hybrid."

Actually, these so-called realists have but one common bond, a negative characteristic already noted: skepticism as to some of the conventional legal theories, a skepticism stimulated by a zeal to reform, in the interest of justice, some court-house ways. Despite the lack of homogeneity in their positive views, these "constructive skeptics," roughly speaking, do divide into two groups; however, there are marked differences, ignored by the critics, between the two groups.

The first group, of whom Llewellyn is perhaps the outstanding representative, I would call "rule skeptics." They aim at greater legal certainty. That is, they consider it socially desirable that lawyers should be able to predict to their clients the decisions in most lawsuits not yet commenced.

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3. In an article published in 1933, I suggested that the "realists" might be named "experimentalists."
They feel that, in too many instances, the layman cannot act with assurance as to how, if his acts become involved in a suit, the court will decide. As these skeptics see it, the trouble is that the formal legal rules enunciated in courts' opinions—sometimes called "paper rules"—too often prove unreliable as guides in the prediction of decisions. They believe that they can discover, behind the "paper rules," some "real rules" descriptive of uniformities or regularities in actual judicial behavior, and that those "real rules" will serve as more reliable prediction-instruments, yielding a large measure of workable predictability of the outcome of future suits. In this undertaking, the rule skeptics concentrate almost exclusively on upper-court opinions. They do not ask themselves whether their own or any other prediction-device will render it possible for a lawyer or layman to prophesy, before an ordinary suit is instituted or comes to trial in a trial court, how it will be decided. In other words, these rule skeptics seek means for making accurate guesses, not about decisions of trial courts, but about decisions of upper courts when trial-court decisions are appealed. These skeptics cold-shoulder the trial courts. Yet, in most instances, these skeptics do not inform their readers that they are writing chiefly of upper courts.

The second group I would call "fact skeptics." They, too, engaging in "rule skepticism," peer behind the "paper rules." Together with the rule skeptics, they have stimulated interest in factors, influencing upper-court decisions, of which, often, the opinions of those courts give no hint. But the fact skeptics go much further. Their primary interest is in the trial courts. No matter how precise or definite may be the formal legal rules, say these fact skeptics, no matter what the discoverable uniformities behind these formal rules, nevertheless it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in most (not all) lawsuits, not yet begun or not yet tried. The fact skeptics, thinking that therefore the pursuit of greatly increased legal certainty is, for the most part, futile—and that its pursuit, indeed, may well work injustice—aim rather at increased judicial justice. This group of fact skeptics includes, among others, Dean Leon Green, Max Radin, Thurman Arnold, William O. Douglas (now Mr. Justice Douglas), and perhaps E. M. Morgan.

Within each of these groups there is diversity of opinion as to many ideas. But I think it can be said that, generally, most of the rule skeptics, restricting themselves to the upper-court level, live in an artificial two-dimensional legal world, while the legal world of the fact skeptics is three-dimensional. Obviously, many events occurring in the fact skeptics' three-dimensional cosmos are out of sight, and therefore out of mind, in the rules skeptics' cosmos.

The critical anti-skeptics also live in the artificial upper-court world. Naturally, they have found less fault with the rule skeptics than with the
fact skeptics. The critics, for instance, said that Llewellyn was a bit wild, yet not wholly unsound, but that men like Dean Green grossly exaggerated the extent of legal uncertainty (i.e., the unpredictability of decisions). To my mind, the critics shoe the wrong foot: Both the rule skeptics and the critics grossly exaggerate the extent of legal certainty, because their own writings deal only with the prediction of upper-court decisions. The rule skeptics are, indeed, but the left-wing adherents of a tradition. It is from the tradition itself that the fact skeptics revolted.

As a reading of many pages of this book will disclose, I am one of the fact skeptics. The point there made may be summarized thus: If one accepts as correct the conventional description of how courts reach their decisions, then a decision of any lawsuit results from the application of a legal rule or rules to the facts of the suit. That sounds rather simple, and apparently renders it fairly easy to prophesy the decision, even of a case not yet commenced or tried, especially when, as often happens, the applicable rule is definite and precise (for instance, the rule about driving on the right side of the road). But, particularly when pivotal testimony at the trial is oral and conflicting, as it is in most lawsuits, the trial court's "finding" of the facts involves a multitude of elusive factors: First, the trial judge in a non-jury trial or the jury in a jury trial must learn about the facts from the witnesses; and witnesses, being humanly fallible, frequently make mistakes in observation of what they saw and heard, or in their recollections of what they observed, or in their court-room reports of those recollections. Second, the trial judges or juries, also human, may have prejudices—often unconscious, unknown even to themselves—for or against some of the witnesses, or the parties to the suit, or the lawyers.

Those prejudices, when they are racial, religious, political, or economic, may sometimes be surmised by others. But there are some hidden, unconscious biases of trial judges or jurors—such as, for example, plus or minus reactions to women, or unmarried women, or red-haired women, or brunettes, or men with deep voices or high-pitched voices, or fidgety men, or men who wear thick eyeglasses, or those who have pronounced gestures or nervous tics—biases of which no one can be aware. Concealed and highly idiosyncratic, such biases—peculiar to each individual judge or juror—cannot be formulated as uniformities or squeezed into regularized "behavior patterns." In that respect, neither judges nor jurors are standardized.

The chief obstacle to prophesying a trial-court decision is, then, the inability, thanks to these inscrutable factors, to foresee what a particular trial judge or jury will believe to be the facts. Consider, particularly, the perplexity of a lawyer asked to guess the outcome of a suit not yet com-

4. See especially pages 100-185, 268 note, and 302-309, which relate to trial-court doings.
menced: He must guess whether some of the witnesses will persuasively lie, or will honestly but persuasively give inaccurate testimony; as, usually, he does not even know the trial judge or jury who will try the case, he must also guess the reactions—to the witnesses, the parties and the lawyers—of an unknown trial judge or jury.

These difficulties have been overlooked by most of those (the rule skeptics included) who write on the subject of legal certainty or the prediction of decisions. They often call their writings "jurisprudence"; but, as they almost never consider juries and jury trials, one might chide them for forgetting "juriesprudence."

Moreover, most of them overlook another feature, not revealed in the conventional description of how courts decide cases, a feature unusually baffling: According to the conventional description, judging in a trial court is made up of two components which, initially distinct, are logically combined to produce a decision. Those components, it is said, are (1) the determination of the facts and (2) the determination of what rules should be applied to those facts. In reality, however, those components often are not distinct but intertwine in the thought processes of the trial judge or jury. The decision is frequently an undifferentiated composite which precedes any analysis or breakdown into facts and rules. Many a time, for all anyone can tell, a trial judge makes no such analysis or breakdown when rendering his decision unaccompanied by an explanation. But even when he publishes an explanation, it may be misdescriptive of the way in which the decision was reached. This baffling aspect of the decisional process, as it relates to the trial judge, is discussed in this book at pages 103-116 and 134-185. The impenetrability of the composite shows up strikingly in jury cases, discussed in pages 170-185 and 302-309. The interested reader will find this subject of the composite more extensively considered in my recently published article, Say It With Music;5 there I refer to the composite as a sort of gestalt.

Shutting their eyes to the actualities of trials, most of the lawyers who write for other lawyers or for laymen about the courts are victims of the Upper-Court Myth. They have deluded themselves and, alas, many non-lawyers, with two correlated false beliefs: (1) They believe that the major cause of legal uncertainty is uncertainty in the rules, so that if the legal rules—or the "real rules" behind the "paper rules"—are entirely clear and crisp, the doubts about future decisions largely vanish. (2) They believe that, on appeals, most mistakes made by trial courts can be rectified by the upper courts. In truth, as noted above, the major cause of legal uncertainty is fact-uncertainty—the unknowability, before the decision, of what the trial court will "find" as the facts, and the unknowability after the decision of the way in which it "found" those facts. If a trial court

5. 61 Harv. L. Rev. 921 (1948).
mistakenly takes as true the oral testimony of an honest but inaccurate witness or a lying witness, seldom can an upper court detect this mistake; it therefore usually adopts the facts as found by the trial court. It does so because the trial court saw and heard the witnesses testify, while the upper court has before it only a lifeless printed report of the testimony, a report that does not contain the witnesses' demeanor, which is often significantly revealing.

When a trial court, relying on inaccurate testimony, misapprehends the real facts, it decides an unreal, hypothetical case. An upper court is still more likely to do so; for, further removed from the real facts, it usually uses, perforce, the trial court's version of the facts as something "given." As the trial courts in most cases have an uncontrollable power ("discretion") to choose the facts—that is, to choose to believe one witness rather than another—those courts, not the upper courts, play the chief role in courthouse government. All of which goes to expose the fallacy of the Upper-Court Myth.

With this perspective, we get new light on the doctrine of following the precedents. This doctrine demands that, when a court has laid down—expressly or by implication—a rule in one case, the court should, except in unusual circumstances, apply that rule to later cases presenting substantially similar facts. That doctrine, as John Chipman Gray showed,6 may have less practical importance to the ordinary man than its more ardent advocates accord it. Yet no sane informed person will deny that, within appropriate limits, judicial adherence to precedents possesses such great value that to abandon it would be unthinkable. (What I regard as the virtue and the appropriate limits of the doctrine, I stated in 1942 in my opinion in Aero Spark Plug v. B. G. Corp.;7 as I there said, "courts should be exceedingly cautious in disturbing—at least retrospectively—precedents in reliance on which men may have importantly changed their positions." See also my article, Words and Music.8)

However, even when properly and conscientiously utilized, the practice of following the precedents cannot guarantee the stability and certainty it seems to promise to some of those who confine their scrutiny to upper-court decisions. For, in an upper court, ordinarily no fact-finding problem exists, as the facts are beyond dispute, having already been found by the trial court. The usual questions for the upper court are, then, these: Do the facts of the case now before the court sufficiently resemble those of an earlier case so that the rule of that case is applicable? If there is such a resemblance, should that rule now be applied or should it be modified or abandoned? Although able lawyers cannot always guess how an upper court will answer those questions, the educated guesses of those lawyers

7. 130 F.2d 290, 294-299 (2nd Cir. 1942).
are good in the majority of instances. When, in a trial court, the parties to a suit agree on the facts, so that the facts are undisputed, that court faces only those same questions; and again, usually, able lawyers can guess the answers.

But, to repeat, in most cases in the trial courts the parties do dispute about the facts, and the testimony concerning the facts is oral and conflicting. In any such case, what does it mean to say that the facts of a case are substantially similar to those of an earlier case? It means, at most, merely that the trial court regards the facts of the two cases as about the same. Since, however, no one knows what the trial court will find as the facts, no one can guess what precedent ought to be or will be followed either by the trial court or, if an appeal occurs, by the upper court. This weakness of the precedent doctrine becomes more obvious when one takes into account the "composite" factor, the intertwining of rules and facts in the trial court's decision.

This weakness will also infect any substitute precedent system, based on "real rules" which the rule skeptics may discover, by way of anthropology—i.e., the mores, customs, folkways—or psychology, or statistics, or studies of the political, economic, and social backgrounds of judges, or otherwise. For no rule can be hermetically sealed against the intrusion of false or inaccurate oral testimony which the trial judge or jury may believe.9

This weakness of the precedent doctrine is a recurrent theme of Chapters XII, XIII, and XIV. As shown by many passages,10 those chapters deal with trial-court decisions, particularly in cases involving oral testimony. Since the thesis was novel, maybe I was at fault in not so stating with greater emphasis. Had I done so, I might perhaps have forestalled the criticism made by some critics that, in my view, any court—even when the facts are undisputed or, as in many cases on appeal, indisputable—is and should be untrammeled by precedents or by the language of statutes. Of course, that was not my position.

Because, in almost any lawsuit, one side can raise an issue of fact, so that the decision will turn on the unforeseeable belief or disbelief of a trial judge or jury in some part of the conflicting oral testimony, it is astonishing that so sagacious a thinker as Roscoe Pound could say, and persuade many others to agree, that, when a case relates to "property" or "commercial or business transactions," the decision will usually be easily toretellable because it will result from a precise legal rule "authoritatively prescribed in advance and mechanically applied." This Poundian thesis (discussed on pages 207-213) has plausibility only as long as one refuses

9. If anyone has doubts on that score, let him read Corbin's masterful article, The Parole Evidence Rule, 55 Yale L. J. 603 (1944).

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to look at daily happenings in trial courts. As I put it in 1931, "In cases involving . . . promissory notes . . ." it is always possible to introduce some question of fact relating to fraud, negligence, mistake, alteration, or estoppel. In most contested cases,¹¹ one side or the other usually injects such a question. Suppose such a case is tried before a jury and, on the question of fact, 'goes to the jury.' Is it not absurd to say that the rules will then be mechanically applied? Anyone who has ever watched a jury trial knows that the rules often become a mere subsidiary detail, part of a meaningless but dignified liturgy recited by the judge in the physical presence of the jury and to which the jury pays scant heed. To say that fixed rules invariably govern property and commercial cases when the jury sits and decides is to deny the plain truth. The pulchritude of the plaintiff or his religion or his economic status or the manners of the respective attorneys, or the like, may well be the determining factor inducing the decision. And if a judge sits and decides without a jury and similar questions of fact are raised, will the crystallized unalterable rules, about identical . . . promissory notes, mechanically produce the decision? Surely not. Of course, if the judge writes an opinion, the stereotyped rules will appear in the opinion. But the judge will decide one way or the other on the 'facts,' and those 'facts' vary with the particular case and with the judge's impressions of those 'facts'—although the instrument in suit is a promissory note precisely like every other promissory note. The truth is that the talk about mechanical operation of rules in property, or commercial, or other cases is not at all a description of what really happens in courts in contested cases. It is a dogma based upon inadequate observation. For it fails to take into account the important circumstance that any future lawsuit about a piece of property or a commercial contract can be contested, and that, if it is contested, questions of fact can be raised involving the introduction of conflicting testimony . . . The 'facts,' as we have seen, may be crucial when, as is often the case, a question of 'fact' is injected into litigation . . . And those facts are, *inter alia*, a function of the attention of the judge. Certain kinds of witnesses may arouse his attention more than others. Or may arouse his antipathies or win his sympathy. The 'facts,' it must never be overlooked, are not objective. They are what the judge thinks they are. And what he thinks they are depends on what he hears and sees as the witnesses testify—which may not be, and often is not, what another judge would hear and see. Assume ('fictionally') the most complete rigidity of the rules relating to commercial transactions . . . Still, since the 'facts' are only what the judge thinks they are, the decision will vary with the judge's apprehension of the facts. The rules, that is, do not produce uniformity of decisions in what we have called 'contested'
cases, but only uniformity of that portion of opinions containing the rules. Judge Alpha may try a ‘contested’ case relating to a promissory note and decide for the holder. If Judge Beta tried the same case he might decide for the maker. The opinion of Judges Alpha and Beta would contain identical rules. That, and little more, is what truth there is in the dogma about the non-uniqueness of promissory notes in ‘contested’ cases."

The reader will probably recognize the cause of the misunderstanding of this book by some legal pundits: The traditionalists—right-wing and left-wing alike—assumed that most uncertainty in the legal realm stems from rule-uncertainty. They therefore concluded that, when a fact skeptic spoke of legal uncertainty, he, too, must have meant merely rule-uncertainty. Consequently, the traditionalists condemned, as hyperbolic distortions, my statements as to the large proportion of decisions which are unpredictable before suits are brought or tried.

The legal traditionalists' viewpoint has carried over to many educated non-lawyers, giving them a false and generally soothing impression of the operations of our court-house government. In this book, I tried—I hope in a manner understandable to intelligent laymen—to dissipate that false impression, because I felt that, in a democracy, the citizens have the right to know the truth about all parts of their government, and because, without public knowledge of the realities of court-house doings, essential reforms of those doings will not soon arrive.

This book contains no mention of Natural Law. But, as some Roman Catholics have read into it an implied criticism of the Scholastic (Thomistic) version of Natural Law, I want now to say this:12 I do not understand how any decent man today can refuse to adopt, as the basis of modern civilization, the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas. There are, he said, some primary principles, such as seek the common good, avoid harm to others, render to each his own; there are also a few secondary principles, such as not to kill, not to steal, to return goods held in trust. Now the Thomists freely acknowledge that the applications of those highly general and flexible principles—applications which necessarily take the form of man-made rules—must vary with time, place, and circumstances. Indeed, Brendan Brown, a Thomist, recently advocated a “scholastic pragmatism.” More important, Natural Law, Catholic or non-Catholic, yields, at best, a standard of justice and morality for critically evaluating the man-made rules, and, perhaps, for ensuring a moderate amount of certainty in those

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rules; but it furnishes no helpful standard for evaluating the fact-determinations of trial courts in most lawsuits, and no assistance in ensuring uniformity, certainty, or predictability in such determinations. Natural Law aims at justice, and at moderate certainty, in the man-made rules, that is, in the more or less abstract, generalized, human formulations of what men may or may not lawfully do. To be practically meaningful, however, judicial justice must be justice not merely in the abstract but in the concrete—in the courts' decisions of the numerous particular individual cases. A general rule against forgery, or a general rule against breaking contracts, is eminently just and fairly certain. But a court decision that a particular man, Campbell, committed forgery, or a court decision that a particular man, Wilcox, broke a contract, is surely unjust if in truth he did not so act, yet a trial court mistakenly believes he did, because of its belief in the reliability of oral testimony which does not match the actual facts. Thence arises the problem of achieving justice, certainty, and uniformity, in trial-court ascertainments of facts in divers individual lawsuits, a problem which can be solved, via Natural Law, only to the extent that Natural Law principles operate on and control the subjective, un-get-able, often unconscious, and unstandardized ingredients of trial-court fact-findings, when oral testimony is in conflict as to crucial issues of fact. I see no signs that those principles do so operate and control. So far as I know, Natural Law adherents—whether or not Catholics—have considered neither that problem nor the one of coping with the "composite" in trial-court decisions.

I should add that my reference in this book to "scholasticism" were superficial and unfair. I have since apologized; see my opinion in *Aero Spark Plug Co. v. B. G. Corp.*13 and my book *Fate and Freedom* (1945).14 I was also glib and unfair in some of my comments on Aristotle; I trust I have made amends in my books, *If Men Were Angels* (1942) and *Fate and Freedom*. What, in the present book, I said of logic I have supplemented in two articles, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*15 and *Say It With Music*.16

Much of the mood which permeates this book I later articulated, after I became a judge, in a judicial opinion relative to trial judges, delivered in 1943:17

"Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, 'bias' and 'partiality' be defined to mean the total absence of pre-

I invite the reader to read *FATE AND FREEDOM* (pp. 168-169, 206-220) if perchance he views Chapter XVIII of the present volume as expressive of irreligious sentiments.
15. 17 CORN. L. Q. 568 (1932).
conceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judgments. Without acquired 'slants,' pre-conceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem, he would go mad.

Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference. 'To live is to have a vocation, and to have a vocation is to have an ethics or scheme of values, and to have a scheme of values is to have a point of view, and to have a point of view is to have a prejudice or bias...'

An 'open mind,' in the sense of a mind containing no pre-conceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's descriptions of the feeble-minded. More directly to the point, every human society has a multitude of established attitudes, unquestioned postulates. Cosmically, they may seem parochial prejudices, but many of them represent the community's most cherished values and ideals. Such social pre-conceptions, the 'value judgments' which members of any given society take for granted and use as the unspoken axioms of thinking, find their way into that society's legal system, become what has been termed 'the valuation system of the law.' The judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system (although, of course, he has the right, at times, to urge that some of them be modified or abandoned). The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.

'In addition to those acquired social value judgments, every judge, however, unavoidably has many idiosyncratic 'leanings of the mind,' uniquely personal prejudices, which may interfere with his fairness at a trial. He may be stimulated by unconscious sympathies for, or antipathies to, some of the witnesses, lawyers or parties in a case before him. As Josiah Royce observed, 'Oddities of feature or of 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.'... Frankly to recognize the existence of such prejudices is the first step of wisdom. The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect. Much harm is done by the myth that man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine. The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices. Freely avowing that he is a human being, the judge can and should, through self-scrutiny, prevent the operation of this class of biases. This self-knowledge is needed in a judge because he is peculiarly exposed to emotional influences; the 'court room is a place of surging emotions... the parties are keyed up to the contest; often in open defiance; and the topics at issue are often calculated to stir up the sympathy, prejudice, or ridicule of the tribunal.' The judge's decision turns, often, on what he believes to be the facts of the case. As a fact-finder, he is himself a witness—a witness of the witnesses; he should, therefore, learn to avoid the errors which, because of prejudice, often affect those witnesses.

'But, just because his fact-finding is based on his estimates of the witnesses, of their reliability as reporters of what they saw and heard, it is his duty, while listening to and watching them, to form attitudes towards them. He must do his best to ascertain their motives, their biases, their dominating passions and interests, for only so can he judge of the accuracy of their narrations. He must also

18. KENNETH BURKE, PERMANENCE AND CHANGE 329 (1936).
shrewdly observe the strategems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions. His findings of fact may be erroneous, for, being human, he is not infallible; indeed, a judge who purports to be super-human is likely to be dominated by improper prejudices."

In If Men Were Angels, I have attempted to reply in some detail to most of the criticisms of Law and the Modern Mind. I shall here briefly consider a few of those criticisms.

The opening chapters pose this problem: Why do many lawyers and non-lawyers insist that legal certainty now does or can be made to exist to a far greater extent than it does or ever possibly could? Why this persistent longing for a patently unachievable legal stability? I put forward but one explanation, stating again and again that it was but partial. I enumerated fourteen other partial explanations. Some critics, nevertheless, maintained that I put mine forward as the sole explanation.

Kennedy (echoing Pound) said that I tried to explain "the uncertainty in law in terms of Freudian complexes." Of course I did nothing of the kind. I sought to uncover one of the roots of a yearning for an unattainable legal certainty. In doing so, I drew on some of the works on child psychology of Freud and Piaget, especially with reference to the young child's father-dependence and the grown-up's resultant tendency to hanker after father-substitutes. Some critics failed to note that I observed that my thesis related to our "quasi-patriarchal society," but would not hold as to one where the father is assigned a less disciplinary role vis-a-vis the young child. The suggestion that I spoke of "the child," as if that word indicated a constant, is answered on page 75 note. Although I repeatedly said that I considered psychology not a science but an art, and still in its infancy, some critics charged me with abject devotion to psychology as an "authoritative science." Llewellyn regarded my psychological discussion as distractingly superfluous. To some present-day readers, however, it may seem almost too obvious, now that Freud's disciples write articles for the popular magazines. But in 1930, there was novelty in the notions, particularly as applied to legal subjects, of "sublimation" and the reaction of the adult to his childhood problems concerning his father. Even now, such notions...
have not much influence on legal thinkers: As late as 1946, Simpson and
Field wrote that the psychological approach to the judging process, sug-
gested by me among others, was just a beginning and should be further
developed. Two non-lawyers have recently deemed my psychological thesis
still suggestive in non-legal fields; see Stevenson, *Ethics and Language*
(1944), and de Grazia, *The Political Community* (1948).

Kennedy and others have asserted that I was a devotee of "behavior-
istic" psychology. But in this book,24 I criticized a basic tenet of behavior-
ism and25 the efforts of the rule skeptic Oliphant to apply that veterinary's
psychology to matters legal; the next year (1931) I published an article
criticizing behaviorism in some detail. Pound has pigeon-holed me as a
psychological determinist; nothing in this book, however, faintly intimates
a belief in determinism. The discussion of science26 is patently anti-deter-
minist; and in two subsequent books, I elaborately attacked determinism,
Freudian, Marxist, and every other kind; see *Save America First* (1938)
and *Fate and Freedom*.

Many rule skeptics have urged the desirability and possibility of
creating a legal "science" built on the model of the natural sciences. Some
critics have ascribed that fatuous notion to me. The reader will see for
himself how groundless is that suggestion. I have been at pains in later
writings to point out, more in detail, what I consider the folly, and the
undesirability, of striving to create either a legal science or "social sciences."
Several critics have said that I depicted natural science as if it and its
"laws" can give men a finality and certainty not achievable in the legal
realm; those critics could not have read pages 98-99, 245-248, 285-288; the
distinction there made between science and the "scientific spirit," I devel-
oped in *Are Judges Human?*27 and also in *Fate and Freedom*.28

My reference to a "government of laws and not of men" evoked some
objections; my answer is contained in my more detailed consideration of
that phrase in *If Men Were Angels* (Chapter 12). In the present volume, I
welcomed the attack of the semanticists on word-magic and on the diseases
of language; but I also stated at some length my reasons for believing that
the prescriptions of the word-doctors are no cure-all for popular miscon-
ceptions of matters legal. One critic, however, called me a dogmatic
semanticist, and said, too, preposterously, that I believed language the
inveterate enemy of clear thinking. Anyone disposed to agree with critics
who claim that I delighted in chaos, legal or otherwise, or in incessant
change, should read pages 249-252, 361-362.

It has been said by Llewellyn, Pound, and others that I underesti-

25. P. 151.
27. *Supra* note 1, at 254-258.
mated the judicial uniformities resulting from the pressure of (1) the likeness in the legal education and in the professional experiences of lawyers who become judges plus (2) the common judicial tradition. But these pressures do not penetrate deep enough to produce similarities in those unique, idiosyncratic, sub-threshold biases and predilections, of the divers individual trial judges, which affect their reactions to witnesses, parties, and lawyers, and which terminate in fact-findings; and, of course, those pressures do not operate on jurors.29

Some critics have said that all the so-called "realists," including me, centered on the interests of the lawyer and did not consider the judge's point of view; other critics have made exactly the opposite criticism. I think it clear that this book tries, however inadequately, to envision how judging looks both to lawyers and to judges.

Because, in common with the other fact skeptics, I stressed the effects of many non-rule ingredients in the making of court decisions, several critics complained that I cynically sneered at legal rules, considered them unreal or useless. That criticism, I submit, is absurd. If a man says that there is hydrogen as well as oxygen in water, discussing both, surely he cannot be charged with denigrating the oxygen or with saying that it is unreal or useless. I have always heartily endorsed the aim of those who, following Holmes, point out that the rules (whether made by legislatures or judge-made) are embodiments of social policies, values, ideals, and who urge that, for that reason, the rules should be recurrently and informedly re-examined. I may add that, since, for the past seven years, I have sat on an upper court which concerns itself primarily with the rules and which has little to do with fact-finding, it should be plain that I regard the rules as significant.

But the rules, statutory or judge-made, are not self-operative. They are frustrated, inoperative, whenever, due to faulty fact-finding in trial courts, they are applied to non-existent facts. Is the highly moral rule against murder actually enforced when a court goes wrong on the facts and convicts an innocent man? What of the rule against fraud when a court, through a mistake of fact, decides that a fraud-doer was guiltless of fraud? To see to it that the legal rules express moral values is no mean task. But our judicial system does not fulfill its function in merely contriving or interpreting rules. In so far as, in individual lawsuits, the rules are not applied to actual facts, the system is imperfect.

Perfection is a fool's dream. With the best possible court-system men could invent, there would be no assurance that the actual facts would

29. This should serve to answer the economic determinists, with their sweeping, dogmatic, class-bias thesis. To a limited extent, this thesis sometimes has some partial validity. But, all else aside, it is useless as even a partial explanation of decisions in that vast multitude of lawsuits in which class-bias is wholly absent, e. g., suits between two economically equal "small" businessmen, or between two giant corporations, or between two members of the "proletarian class."
always be ascertained or approximated; since trial courts must be con
ducted by fallible human beings who must learn what they can of the
facts from witnesses, likewise humanly fallible, many unavoidable mistakes
would still occur. But avoidable court-room mistakes about the facts ought
to distress all men who believe in justice; and such mistakes—due not to
the rules but to needless deficiencies in trial-court fact-finding—cause
needless tragedies every day.

When I call them "needless," I am not even intimating that most
trial judges have less ability and integrity than upper-court judges. My
point is (1) that the job of trial judges is far more difficult and perplexing,
calls for a much wider range of talents than does upper-court judging, and
(2) that our trial methods, which trial judges are now obliged to condone,
are hopelessly antiquated. If our judicial system is to move as near as is
humanly practicable to adequacy in dispensing justice, I think we must, at
least, overhaul our methods of trial, and provide special training for future
trial judges.

The complacency of those who think such reforms unnecessary, who
think that our courts now rather competently protect legal rights, should
be deflated by the following comment, made in 1926 by our greatest judge,
Learned Hand, after a long period of service on the trial bench: "I must
say that as a litigant I should dread a lawsuit beyond almost anything else
short of sickness and death." That succinct revelation of the chanciness
of litigation should destroy the satisfaction with our courts likely to be
engendered by Cardozo's relatively placid picture of the judicial process.30
Unfortunately, Cardozo omitted the chancy character of trials from his
description. That description, superlative in respect of upper courts, is
bizarre if deemed to include an account of trial-court ways—as bizarre as
would be an account of manners at Buckingham Palace if taken as also a
true portrayal of rush-hour behavior in the New York subways. Cardozo,
most of his days an appellate court lawyer or appellate court judge, suffered
from a sort of occupational disease, appellate-court-itis. In the kind of
courtroom where he spent his professional life, the atmosphere is serene,
stratospheric. There, no witnesses intrude; lawyers alone address the
court, and they must do so with decorum, in an orderly, dignified manner.
Not so in the trial courtroom. Absent there the stratospheric hush. Such a
courtroom is, as Wigmore notes, "a place of . . . distracting episodes, and
sensational surprises." The drama there, full of interruptions, is turbu-
lently conducted, punctuated by constant clashes between counsel and
witnesses or between counsel. But in the upper court those clashes appear
only in reposeful, silent, printed pages. Cardozo, an upper-court dweller,
wrote nothing of the unserenity which characterizes trials. His books,

30. See selected writings of Benjamin N. Cardozo (1947) which includes The
Nature of the Judicial Process (1921) and The Growth of the Law (1924). See also
Frank, Cardozo and the Upper-Court Myth, 13 Law and Contemp. Prob. 369 (1948).
invaluable to students of appeal courts, have thus unfortunately helped to
distract public attention from our tragically backward trial practices.

In the light of the foregoing, the reader will understand why I was
surprised at the comments of some critics that in this book I encouraged
“anti-rationalism” and “anti-idealism”; devoted myself solely to what
happens in courts; and ignored not only the rational and moral elements
now operative in judicial decisions but also the possibility of bringing still
closer together the ideal and the actual in courtroom performances. The
truth is that, like most of the “constructive skeptics,” I was motivated by
an eager—perhaps too eager—desire to reform our judicial system, to inject,
so far as feasible, more reason and more justice into its daily workings.
To accomplish such reform, however, one needs to look at, not away from,
the non-rational and non-idealistic elements at play now in court-house
government. Some of those elements are disturbing. But one who calls
attention to defects should not be presumed to be delighting in defects.
The physician who publicizes the prevalence of a dangerous and preventa-
ble disease does not desire its perpetuation but its cure. There can be no
greater hindrance to the growth of rationality than the illusion that one
is rational when one is the dupe of illusions. Man can invent no better
way to balk any of his ideals than the delusion that they have already been
achieved. If we really cherish our ideals of democratic justice, we must not
be content with merely mouthing them.

Whatever the faults of the rule-skepticism sponsored by both rule
skeptics and fact skeptics, I think it has some markedly desirable con-
sequences. Provoking controversy and sometimes unfair retorts, nonetheless
it has subtly invaded much judicial thinking. It has contributed, in part,
to the liberation of many judges—including rigid legal concepts, caused
those judges to ground their reasoning on broader and more human rule-
preamises. I perceive, however, little improvement in court-house fact-
finding, and none that may be attributed to the fact-skepticism of the fact
skeptics. But perhaps here, too, controversy may, in time, translate itself
into new thought-habits. Perhaps the stirring of doubt concerning our
present unjust fact-finding methods will some day, before long, issue in
much needed improvements.

NOTE: If the reader has some questions about the notions expressed
in this book, he will perhaps find some of his questions answered in the
following articles and books I published after 1930:

Are Judges Human?: 80 University of Pennsylvania Law Review 17,
233 (1931)

What Courts Do In Fact, 26 Illinois Law Review 645, 761 (1932)

Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 Cornell
Law Quarterly 568 (1932)
Why Not a Clinical Lawyers' School?, 81 University of Pennsylvania Law Review 907 (1933)
What Constitutes a Good Legal Education?, 19 American Bar Association Journal 723 (1933)
Save America First (1938)
If Men Were Angels (1942)
Book Review, 54 Harvard Law Review 905 (1941)
White Collar Justice, Saturday Evening Post, July 17, 1943
Book Review, 52 Yale Law Journal 935 (1943)
Book Review, 57 Harvard Law Review 1120 (1944)
The Cult of the Robe, 28 Saturday Review of Literature 12 (1945)
Fate and Freedom (1945)
A Plea for Lawyer-Schools, 56 Yale Law Journal 1303 (1947)
A Sketch of An Influence, in the volume Interpretations of Modern Legal Philosophies 189 (1947)
Words and Music, 47 Columbia Law Review 1259 (1947)
Say It With Music, 61 Harvard Law Review 921 (1948)
Book Review, 15 University of Chicago Law Review 462 (1948)
Cardozo and the Upper-Court Myth, 13 Law and Contemporary Problems 369 (1948)