

# BOTH ENDS AGAINST THE MIDDLE

By JEROME FRANK †

## I

### THE IMMEDIATELY PRACTICAL

#### 1.

Twenty years ago, I published an article on the subject of legal education. I expanded it in a talk two years later. Hoping to gain converts, I have published that talk several times, under different titles, with slight variations. For the most part, my views, at least until very recently, received from legal educators either complete silence or rather vigorous rejoinders.

I would like to think that those rejoinders indicated something to which Dr. Oliver Wendell Holmes once referred: "A loud outcry on a slight touch reveals the weak spot in a profession, as well as in a patient." On the other hand, I remember that Dr. Holmes also said: "A writer rarely has as many enemies as it pleases him to believe. Self-love leads us to over-rate the numbers of our negative constituency." At any rate, with slightly diminishing aversion, recently my views have been discussed by some American and Canadian legal pedagogues; and, not long since, one of my bosses, Mr. Justice Jackson, expressed ideas about legal education quite like those I've often voiced.\*

#### 2.

Throughout this paper, I shall use "I" instead of apparently more impersonal terms. This use involves no egotism. On the contrary, it helps to remove a false air of Jovian infallibility, and to expose the more easily to criticism the personal notions here expressed.

I am an ardent friend of the university law schools. Precisely because I think they have done an exceptionally good job, I want them

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\* Some six months after this paper was read, Dean Levi delivered an address in which he seemed to promise that the University of Chicago Law School will adopt something of the sort of clinical teaching I have long advocated. See Levi, *What Can the Law Schools Do?*, 18 U. OF CHI. L. REV. 746 (1951).

to do still better, and I therefore venture to state what I deem their faults. But first I must acknowledge their virtues.

Those law schools have supplied leadership in our profession. Most practicing lawyers are so busy with the pressing daily tasks of practice that they have little time or energy to devote to contriving needed reforms of the legal status quo. Consequently, progress in lawyerdom has come, in considerable part, from the law schools.

Those schools fostered the judicial shift from a hostile to a generous attitude towards legislation. Recognition by the bar of the practical importance to lawyers of a knowledge of economics began in those schools. To Professor Wigmore of Northwestern and to Professor Morgan of Harvard we owe many improvements in the evidence rules; to Professor Borchard of Yale, the declaratory judgment statutes; to Dean Sturges, the increased interest among lawyers in arbitration; to Dean (now Judge) Charles E. Clark, many of the recent great reforms of the procedural rules. The law schools, then, play an outstanding, an indispensable, role in improving the administration of justice.

More important, it is in their law school days that future lawyers have the time and the urge to consider at length social and moral ideals and problems of justice. Ideals implanted in law students flower in later years.

But the law schools have insulated themselves and their students from intimate knowledge of large segments of the doings of courts and lawyers. As a consequence, they neither equip their students, as well as they could, to practice effectively, nor exercise leadership in bringing about much needed reforms in those segments of lawyerdom on which they have unwisely turned their backs.

### 3.

To put it bluntly, my fundamental criticism is that the law schools remain too much under the influence of Langdell. His avowed basic tenets were these: "First that Law is a science; second, that all materials of that science are contained in books." He said: "What qualifies a person to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law . . ." He declared that "the library is to us what the laboratory is to the chemist or the physicist . . ."

Under Langdell, Harvard Law School became an institution devoted to library law, with the library as its sole laboratory. Anything not discoverable in the library, anything outside the law books, was

not "scientific" and was therefore to be scorned. The principal implement of this alleged "science" was the so-called "case-book"—not, as its name implied, a collection of all the printed material relating to cases, but merely of judicial opinions, mostly those of upper courts.

Soon all the university law schools aped Harvard. All became library-law-schools. Essentially, most of them still are. True, the newer case books contain some matter other than court opinions, including matter taken from the so-called "social sciences." There are now also courses in, and case books on, legislation and the administrative process; jurisprudence is taught; and some other new features, which I shall mention later, have been added. Generally, however, there still persists the Langdellian aloofness from "experience in dealing with men," from first-hand observation, first-hand knowledge, of the work of courts and of lawyers.

#### 4.

In all fairness, it must be said that the Langdell method, especially as recently modified, has achieved signal success in equipping law students for actual practice in the upper courts. The reason is obvious: upper courts are, in essence, library-law courts. One can, therefore, without ever entering a courtroom, learn a great deal about the upper-court phases of the judicial process. The study of appellate court opinions, if coupled, as it now is in most law schools, with intensive study of the printed records and briefs in a few selected cases, will give the students fairly accurate understanding of how upper courts function. And arguments by the students in moot appellate courts have increased that understanding. So, too, has the teaching of some law teachers, who impart wisdom concerning the more subtle personal factors in appellate court operations.

Accordingly, the transition from the law schools to upper court practice or upper court judging is not too hard. Lawyers just out of law school often do amazingly well as advocates in cases on appeal. I have seen some of them lick the daylights out of eminent leaders of the bar. And law professors, having no experience in "practicing law," make first-rate appellate judges. Without much difficulty, anyone of my law clerks could take my place on the bench, and would better my performance.

In other words, so far as appellate courts are concerned, the insulation of the students from first-hand observation of lawyers and courts does little harm. That little harm is offset by the schools' magnificent probing of the appellate judicial process.

## 5.

But a huge gap does exist between the law schools' "library law" and the trial courts. Here I must dwell on something that should be obvious to every lawyer but that many lawyers and law teachers curiously neglect: trial courts differ in one major respect from upper courts.

An upper court, generally speaking, has one function; a trial court has two functions. The prime function of the upper court is to ensure, as far as possible, that the legal rules have been correctly interpreted and applied to the facts—as those facts have been "found" by the trial courts. The trial court, however, must not only interpret and apply the rules; it also has a task not usually performed by an upper court—that of "finding" the facts. This second or distinctive function allotted to the trial court—"finding" the facts—depends, in the great majority of cases, on a determination of the credibility of witnesses who testify orally and, ordinarily, disagree with one another. It is generally considered—and, I think, on the whole, correctly—that in determining which of the disagreeing witnesses are reliable and accurate, much significance should be accorded to the trial courts' observation of the demeanor of the several witnesses as they testify.

Since the upper court judges cannot see and hear the witnesses, they cannot, where the testimony was oral and in conflict, competently "find" the basic facts. Consequently, in such cases, the upper courts usually accept the trial courts' basic findings of fact—such as whether Joe Cain stabbed Sam Abel, or Will Meek promised to sell his house to Aleck Sharp, or Henry Gotrox who willed all his property to Susan Brighteyes was unduly under her influence, or Alfred Reckless was driving seventy miles an hour when he ran over little Bobby Mild. And, because, in the huge majority of cases, no dispute occurs as to the applicable legal rules, because most law suits are but "fact suits," most trial-court decisions are not appealed; and, on that account, the upper courts affirm a very large percentage of the few appealed cases.

Trial court decisions are therefore often final, principally because those courts possess an almost uncontrollable "fact discretion"—that is, a discretion in picking out those witnesses whose oral testimony is to be taken as true. Because of this "fact discretion," reference is sometimes made to the "sovereignty" of the trial courts.

Now no rules can govern the exercise of that discretion, that "sovereignty." I mean no rules—substantive or procedural—can tell a judge that an orally testifying witness should or should not be trusted. James Stephen said that only "exceptional cases . . . present any legal

difficulties" but that "no trial ever occurs" in which the trial judge is not required to "exercise the faculty" of telling "whether a witness is or is not lying." "This preeminently important power," Stephen continued, "is not to be learned out of books," since "no rules can be laid down for its acquisition." Henry Maine agreed, saying that there can be no rules by which a judge can attain the ability "to make allowance for the ignorance or timidity of witnesses, or to see through the confident and plausible liar."

It follows that the exercise of the trial courts' "fact discretion" or "sovereignty" is unruly. Also unruly—beyond control by rules—are factors which vitally affect trial court decisions, such factors as these: the mistakes made by witnesses in their observations of the facts as to which they testify; their mistakes in remembering those observations; their unconscious biases and prejudices; the unconscious prejudices of trial judges or jurors for or against particular witnesses, or litigants, or lawyers.

Nothing in print—nothing in the library that a law student reads—is able to capture or reflect those unruly factors. They are not to be found in court opinions or records or briefs. No more are many of the activities of lawyers when preparing for trial—the details of their oral interviews with witnesses and clients, or the like. All such things are off the beat of the library lawyer; they don't go on inside the library-laboratory.

## 6.

Due largely to the insufficiency of library-law school education—to the law schools' treatment of trial courts as if they were unwanted illegitimate children—very few of the ablest university law school graduates become trial lawyers. Most of them become either upper court lawyers or "office" lawyers.

It is argued, however, that the schools should not specialize in litigation. I thoroughly agree. There are other matters of which the students should learn: (1) Lawyers act as advisors to policy makers—in government, in business, in the management of labor unions. (2) The legislative process surely deserves the attention the schools now give it (although Professor Horack correctly says that too many law teachers ignore the "fact that there is no sharp line between the legislative and judicial process," since "much litigation begins in the legislative committee . . . , is transferred to the courts, and is ultimately decided by the Supreme Court.") (3) There are also large stretches of governmental administration which the courts seldom touch.

(4) Then, too, there is the work of lawyers in drafting instruments, in negotiations, in advising clients before litigation breaks out, and in preventing litigation.

Always, however, the shadow of possible litigation hangs over all those doings: legislation usually gets its meaning in law suits; administrative action, in one way or another, may be hauled into court; a lawyer's advice in anticipation of litigation, or its settlement, requires an educated guess as to what will happen, should a law suit occur.

Almost any product of a lawyer's office work—a contract, a will, a trust deed, a corporate charter, an administrative regulation—may at any time be subjected to the ordeal of litigation. Cravath is quoted as having wisely said that no lawyer who hasn't tried jury cases should be permitted to draft a reorganization agreement. I would say the same of a lawyer who acts as an adviser to policy-makers, for often the wisest policy meets defeat if incompetently defended in a trial court. The trial lawyer knows that many times the parol evidence rule and the statute of frauds do not protect from successful assaults the most carefully prepared written instruments. Oral testimony, honest, biased, or prejudiced, often plays havoc with the lawyer's paper work. The demeanor of adverse witnesses frequently counts for more with a trial judge or a jury than a solemn writing, whether it be a contract, an administrative regulation or a statute. Trials thus create hazards of which the mere library-trained office lawyer is insufficiently aware.

Accordingly, litigation, actual or potential, should be the concern of every lawyer. Indeed, in the last analysis, it is the existence of courts that justifies the existence of the legal profession. There have been lawyerless courts. A courtless, litigation-less legal profession is unthinkable.

Now, knowledge of litigation is superficial if it does not include knowledge of trials. The guess of the office lawyer about the effects of a possible law suit will be a badly educated guess, if he is acquainted solely with appellate practice. He will think of facts only as they show up in an appellate court opinion or an appellate record—after a trial court, in the course of deciding a case, has "found" them. But, usually, when a case is on appeal, the facts, because of the trial court's previous findings, have been simplified, have been purged of the complexities and doubts due to the conflicts in the oral testimony.

Moreover, the ways in which lawyers do much of their non-litigious office work can't be learned in the library. No books, and no instruction founded on books, will teach the art of negotiation or the art of dealing with clients. Books and talk about books do not convey the necessary "feel."

In sum, most law schools omit the contacts, the face-to-face relations, with flesh-and-blood human beings, including witnesses, clients, jurors, trial judges, administrators, members of legislative committees. Those personal contacts are at the center of lawyer's practice. Without an understanding of them, legal learning is a bloodless, fleshless skeleton. To put it differently, the legal rules and principles are pallid, devitalized, except in the context of personal relations.

Clearly, then, the law schools go astray when they still follow Langdell in considering the library the student's sole laboratory. It is, of course, one of his laboratories. But his chief laboratories should be the courts (particularly the trial courts), the legislative committees, the administrative agencies, and the law offices. Only a stubborn adherence to a seventy year old tradition in legal education explains the schools' snobbish disdain of those laboratories.

## 7.

One most unfortunate result of the schools' snobbish attitude to the trial courts has been the dissemination of the upper court myth—the hopelessly false belief that the upper courts are at the heart of the judicial system, that they can and will correct almost all the errors and blunders of the trial courts. I call that a myth, for this reason: Most trial court decisions are final and not reversible on appeal because, as I have said, they turn on determinations of fact based on trial court evaluations of credibility. Most trial court mistakes in evaluating oral testimony are therefore irremediable. The trial court decisions accordingly affect the lives of thousands of litigants, as upper court decisions do not. Wherefore the trial courts, not the upper courts, are at the heart of the judicial process. Their work is of paramount importance in the judicial administration of justice.

The law schools, however, shove off to the shadowy outer edges of attention what goes on in trial courts. This eventuates in a thought-system which treats upper court happenings as the usual, the normal, and treats the happenings peculiar to trials as unusual, exceptional, bizarre, and negligibly abnormal. This is upside-down legal thinking, since, in court-house government, trials are the usual, the normal. It is as if American agricultural schools were to teach their students that rainy weather is abnormal, of slight importance.

The legal thought-system of the law schools is flat, two-dimensional. Only by taking full account of trials can it become, as it should, three-dimensional. Thinking about a three-dimensional court-house world in two-dimensional terms creates systematic delusions. The

schools' thought-system seems sound only because it excludes the baffling facts that won't fit into it. That pat, tidy system should be smashed. To borrow a phrase from Whitehead, this can be done by making "observations beyond the boundaries of delusive completeness," observations which will "rescue the facts in the discard."

The law schools have been brilliant, constructive critics of appellate courts. As an upper court judge, I am glad to testify that articles in the law school journals prove incalculably helpful in deciding appealed cases. But the schools have done next to nothing in examining and criticizing these distinctive trial court happenings that are not capable of being reduced to rules.

Many of our methods in the conduct of trials are antiquated, demonstrably unjust, and badly in need of drastic reform. They bring about needless tragedies resulting from avoidable mistakes in ascertaining the facts in law suits. In criminal cases, these mistakes have sent too many innocent men to jail. In civil suits, they have too often unjustly ruined men financially or deprived them of their reputations.

If you think those comments undeservedly harsh, I invite you to remember that our trial methods induced Judge Learned Hand to feel that a law suit is to be dreaded "beyond almost anything short of sickness or death," and to say that "about trials hang a suspicion of trickery and a sense of result depending upon cajolery or worse." Yet, with a very few notable exceptions, law teachers have devoted no time to critical study of the trial practices that Judge Hand condemned, and to the avoidable tragedies they cause.

Those tragedies pose to the legal profession a moral problem of the first magnitude. No one can quarrel with lawyers who maintain that our profession should interest itself in moral problems not directly germane to our profession—for instance, those relative to housing or medical care. But a moral problem directly affecting the work of the courts is uniquely our responsibility, since lawyers alone have the skills requisite to its solution, so far as it can be solved. If we do not put our own house in order, we will look like meddling busybodies when we go about telling other professions how to run theirs.

Here the law schools ought to take the lead. This they could do by requiring first-hand observation of the trial courts, in that way bringing home to their students the gravity of this moral problem. Then, before too long, practical projects for reform would be forthcoming. But most law teachers shirk this problem—even most of those who, sometimes under theegis of Natural Law, say that moral values must occupy a key position in legal education. The schools are foregoing a splendid opportunity for moral leadership, thanks to their

almost obsessive interest in the legal rules and in the appellate phases of the judicial process.

## 8.

On account of that obsession, they provide no special training for the future trial judge, although trial court judging is far more complex and difficult than upper court judging.

One shocking consequence is that we have trial judges who confess—and doubtless others who act likewise without so confessing—that, in passing on the credibility of witnesses, they employ such outrageously stupid rules-of-thumb as these: a witness is indubitably lying if, when testifying, he blushes about the ears; or throws his head back; or shifts his gaze rapidly; or raises his right heel from the floor; or bites his lip; or twists his hands; or taps steadily on his chair. Think of the effects on citizens' lives and fortunes of decisions by such judges.

## 9.

The law schools have begun to move a few steps in the direction of actual practice outside the appellate courts. Some schools have courses in draftsmanship and in the negotiation of contracts. Some attempt to simulate trials and preparation for trials. That's good, as far as it goes, but it doesn't go very far. Such teaching is unnecessarily awkward and superficial.

In most of the simulated law school trials, the witnesses are make-believe witnesses. They do not testify to anything they saw and heard; they testify to what they're told they saw and heard. The whole business is play acting. In a recent article, describing a course in lawyer's "counselling," you will read that the role of the "client" was "played" by one of the professors. In another such article, the professor says frankly that "he had to manufacture the problems."

Why use fake witnesses and fake clients? Why this masquerading, this pretense? It sounds like children "playing house." No medical school has its students indulge in a child's game of "playing doctor," with make-believe patients who must "manufacture" their ailments.

This ersatz teaching—this shunning of real witnesses, real clients, real problems, real negotiations, this resort to play acting and imitations—resembles what would be the incompetent training of future ocean navigators, if restricted to sailing in small sailboats on fresh water ponds. A little of such teaching is all right, but certainly it's not enough. What would one say of a medical school where the students never saw an actual surgical operation, never watched a physician

diagnosing the conditions of actual patients and prescribing for them? Legal education is supposed to teach men what they are to do in actual court rooms and law offices. Why not have the students directly observe the real subject matter they're supposed to study, with teachers acting as enlightened interpreters of what the students observe?

How explain the law schools' use of psuedo-realities? The explanation, I think, is that the schools continue to be dominated by the Langdell tabu. Hypnotized by Langdell's ghost, they have a sort of reality-phobia, so that they act as if flesh-and-blood clients, with their real problems, were untouchable pariahs, so unclean or infected that contact with them would contaminate the students.

So powerful is this tabu that, last year, a prominent legal educator declared that a law student "should not be permitted to attend court" if unaccompanied by a teacher, lest the student, observing cases poorly tried, might acquire "bad habits." As most law schools have provided no guided tours of the courts, this means that, in general, the schools don't want their students to watch courts in action, until after graduation.

I concede that unguided student visits to court are not very satisfactory; they are simply better than not seeing courts at all. For many years, I have been urging that, as the veriest minimum of good sense, law teachers, experienced as trial lawyers, go to court with the students, and that those teachers, before, during and after the court sessions, call the students' attention to good and bad trial practices. I'm pleased to note that Dean Wright, of the University of Toronto Law School (expressly referring to my suggestion) reports that his school has now adopted it.

#### 10.

But the guided tour of the courts represents a feeble start in closing the gap in legal education. In order to close that gap, it must be recognized that it resulted from the law schools' complete abandonment of the old apprentice system. I have never advocated a return to that old system in its old form. I have, however, for some twenty years, advocated that the law schools, retaining most of their present teaching methods, readjust them by adopting a revised apprentice system of the following kind:

Each law school would build its teaching around a legal clinic. The clinic would be in charge of full-time professors who had had a varied experience in practicing law. The clinic would render its services for little or no fees. It would engage in "legal aid" and "public defense" work. It would also take on other important jobs, such as

trying cases for government officers, and giving advice to governmental agencies, legislative committees, and quasi-public bodies. The clinic's activities would thus include almost every kind of legal service rendered by law offices. Indeed, the clinic would be a law office. The students, as apprentices of the practicing-lawyer teachers, would engage in all its activities. The teacher-clinicians would discuss in detail with the student apprentices the more generalized aspects of the legal rules pertinent to the specific matters handled by the clinic. The teachers would, too, illuminate the defects in our trial methods and the need for reform; and would also sensitize the students to other moral problems of lawyerdom. Theory and practice would thus constantly intertwine.

In every field other than the legal, educators agree that the best education consists of learning by doing. In the law school clinics, the students, through active participation in the doings, would learn, among other things, the following: (a) The hazards of a jury trial; how juries decide cases; the irrational factors that frequently count with juries; the slight effect that the judge's instructions concerning the complicated legal rules often have on verdicts. (b) How legal rights are affected by lost papers, missing witnesses, perjury and witnesses' prejudices. (c) The effects of trial judges' fatigue, alertness, laziness, conscientiousness, patience, biases and open-mindedness. How legal rights may vary with the trial judge who happens to try the case, and with his varying and often unpredictable reactions to various kinds of witnesses and litigants. (d) By participating in the preparation of briefs, both for trial and upper courts, the student would learn about legal rules in the exciting context of live cases. (e) Again, in a living context, the student would be instructed in the methods used in negotiating contracts and in the settlement and prevention of litigation. (f) He would also learn "creative" draftsmanship—the handling of novel fact-materials thrown at the lawyer by his client, and sometimes worked out in negotiations with the lawyer representing the other party to the bargain. (g) He would learn, too, by close-up study, of administration in action and of legislation in action. He would come to know the realities behind "the legislative intention," the "purpose of the legislature."

Besides those teachers who serve in the clinics, there would be others who would give courses in more general subjects, including jurisprudence, ethics, legal history, and the social studies in their bearing on matters legal. But all the teaching would revolve about the clinic, which would be the hub of the school.

I am not impressed by the stock argument that the law schools have too little time, in three years, to teach what they now do and also

to add clinical teaching. For, in most schools, the greater part of the time is now spent in teaching a relatively simple technique—that of analyzing court opinions, “distinguishing cases,” studying and criticizing legal rules and doctrines as they are applied by courts to facts already “found.” Three years, or the bulk of them, is much too long for training in that technique. Intelligent students can learn it in a year, at most. Teach it to them intensively with respect to one or two subjects—say “contracts” and “torts”—and they’ll have no trouble in employing it with respect to other subjects.

The intelligent student grows bored when required to do that job in school over and over again, in a microscopic manner, and never with reference to a live client or a real law suit. More, this myopic “case method” can’t possibly, in three years, cover more than a small fraction of the legal field. The students should be obliged to read text books on dozens of legal topics, in that way acquiring at least a nodding acquaintance with their leading doctrines and special vocabularies.

Reduction of the number of subjects to which the case method is now applied, would leave ample time for clinical work; and, in that work, the students, with a lively interest, would have to study the legal rules with exceeding care.

Would teachers, by practicing in the clinics, lose the capacity or lack the time to teach? I have two answers: First, that has not been the experience of the medical schools. Second, the dean of Harvard Law School now practices on the side, with no adverse effect on his teaching.

Clinical teaching should not be confused with post-graduate apprenticeship in private law offices. That kind of apprenticeship has proved undesirable and inefficient for several reasons: Since it comes after the student has left the law school, his education in theory and in practice are artificially separated. Moreover, as pointed out by a Canadian law teacher who has seen post-graduate apprenticeship in operation, the “tempo and other conditions of modern life make it difficult for the busy practitioner to discharge his duty to train the student in the practice of law.”

One may, then, be skeptical when one hears that, even without required post-graduate apprenticeship, the student, after graduation, will quickly learn from older lawyers all that the school hasn’t taught him about practice. Perhaps sometimes he will, if at once he becomes associated with a law firm made up of experienced lawyers. But what of the graduates who, as many do, immediately embark on their own practice? They will victimize their first clients. Is it fair to allow young lawyers to make guinea pigs of unsuspecting clients?

## 11.

I have left out many details of my criticisms and suggestions. As to them, I ask leave to incorporate by reference some of my earlier writings.\*

## II

## THE HUMANITIES

## 1.

I trust the reader will pardon a highly personal note by way of a reply to one astonishing criticism of my suggestions. Several legal educators have said, in effect: "This man favors crude practicality to the exclusion of all else. He would have the law schools turn out mere technicians, legal garage mechanics, lawyers devoid of any interest in research, scholarship, or theory, or in speculation about ideals, morals, or in anything not strictly legal."

I could easily prove, by quotations from my writings over the past twenty years, that never have I taken that position, that, on the contrary, I have steadfastly opposed it. Repeatedly, after describing what I thought ugly legal realities at variance with professed legal ideals, I have tried, in my own feeble fashion, to assist in bringing about reforms designed to actualize some of those ideals.

Nor, I think, can I fairly be charged with antipathy to or concerning research or scholarship. I have done a bit of both, and have always encouraged my students to engage in such undertakings. As to theory, often in what I've published and always in my limited law school teaching, I have quoted Mr. Justice Holmes. "We have," he said, "too little theory in the law, rather than too much . . . The most important improvements . . . are improvements in theory. It is not to be feared impractical, for, to the competent, it simply means getting to the bottom of the subject. . . . To an imagination of any scope, the most far-reaching form of power is not money, it is the command of ideas."

Equally important is the detection of unacknowledged theories that govern men but of which they are unaware, since those hidden theories may have practical results, sometimes most undesirable. "Practical men," wrote J. M. Keynes, "who believe themselves to be quite exempt from any intellectual influences, are usually the slave of some defunct economist." The equivalent may be said of many "practical" lawyers.

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\* Citations will be furnished upon request to the author.

Theories, then, hidden or acknowledged, good or bad, may have immense practical significance. Theorizing may have other values, including the sheer pleasure of idly speculating. In passing it may be noted that, paradoxically, theories devised with utter disregard of utility, have often had later startling utilitarian effects. A good example is the invention of non-Euclidian geometries.

But, especially in the legal realm, theorizing unrelated to practice may be seriously misleading. To quote Mr. Justice Holmes again, "The practical is disagreeable, a mean and stony soil, but from that it is that all theory comes." So, I submit, legal theory that overlooks the practices of the trial courts is bound to be anemic. And that anemia may be pernicious anemia, because it may lead to arid abstractions—and thence to dogmatism. As Aristotle said, "Those whom devotion to abstract discussions has rendered unobservant are too ready to dogmatize on the basis of a few observations." He also said that "credit must be . . . given to theories only if they accord with the observed facts," and that the truth in practical matters "is judged from observation and life, for the decisive factor is found in them."

I might stop there in answering those who say I worship the crudely practical. But I am not content to stop there. I shall try to cut deeper.

## 2.

Legal education, at its best, should have three parts or provinces: (1) At one end is the province of the trial court, the trial lawyer and the office lawyer. (2) In the middle is the province of upper courts and upper court lawyers. (3) At the other end is the province in which lies the relation of courts and lawyers to matters commonly regarded as not legal—such matters as the so-called, badly miscalled, "social sciences," and the "humanities."

At a casual glance, one might perhaps suppose that the first province—that of the trial and office lawyer—is alone the home of the practical. But the middle (upper court) province is also the concern of practical lawyers. I shall try to show that the province at the other end—that which includes the apparently non-legal—is likewise, for lawyers, within the practical.

In the middle province—that of appellate courts—the law schools have done an excellent job, and are doing a constantly better one. I think, however, that they have failed in the provinces at either end. I have already mentioned their inadequacy at the first, or more obviously practical, end. I shall now indicate why I think they are deficient at the other ("non-legal") end—and why that deficiency affects their adequacy in the trial area.

## 3.

In the law school I attended as a student in the early part of the century, almost all the teachers discouraged law student interest in the social implications of what courts do. This was the more deplorable since a majority of the students, as undergraduates, had paid relatively little heed to the social studies, but had majored in the "liberal arts." Subsequently there began a movement (in which I eagerly joined) to alter the law schools' curricula so as to give marked consideration to the social studies. To a certain extent, this movement has succeeded.

Its aim was admirable. What we ambiguously call "law" is linked with economics, politics, cultural anthropology, and ethical ideals. The legal rules embody social policies or ideals, whether or not that fact is consciously recognized; and, as Mr. Justice Holmes often said, those policies and ideals should become ever more conscious. Also, we know too little of the social consequences of the existing legal rules or of the potential social consequences of proposed changes in those rules. There the social studies can be most helpful.

If I were to criticize the law schools in that respect, it would be for not, as yet, having gone far enough in exploiting the social studies—although I would caution that the products of those studies are most unlikely to be as reliable as some persons expect them to be, since the social studies are not, and inherently cannot be, "sciences," in the sense of yielding any considerable exactness or much in the way of precise predictions.

While, even so, this movement in the law schools—sometimes called the "social science approach"—has undoubtedly been valuable, it involved a serious danger, thanks to the circumstances which chanced to accompany it. For, almost concomitantly with its advent, there occurred a change in the interests of most undergraduates who entered the law schools. Today, most of these students have already acquired, in their pre-legal years, a substantial knowledge of the social studies. Today the trouble is almost the opposite of what it was in my law student days. Now altogether too large a proportion of law students have scant acquaintance with the "humanities." Judge Vanderbilt's recent stimulating *Report on Prelegal Education* confirms this comment. He reports that, these days, 63% of law students have had as their chief undergraduate interest the "social sciences," and only 10% had majored in the "humanities."

This unfortunate hole in the law students' pre-law-school training has rendered dangerous the "social science approach" in legal education, since that approach tends to be one-sided, and needs to be modified by attitudes gleaned from the "humanities." Let me explain.

## 4.

Imitating the less imaginative among the sociologists, some of the more extreme sponsors of the social studies in the law schools have attempted to carry over into those studies the quantitative methods of the physical sciences.

Arthur Koestler warns that the attitude thus engendered may deaden ethical judgments. "The transfer," he writes, "from the physical to the ethical level, of principles of quantitative measurement . . . has produced the most disastrous results"—as in the ruthless policies of the totalitarian governments. "Our quantitative criteria let us down just at the point where the pros and cons are balanced and ethical guidance is needed."

But even when the error of undue reliance on the quantitative has been avoided, the "social science" view, by magnifying the importance of social phenomena—i.e. mass phenomena—and of social or mass trends, has tended, injuriously, to reinforce the law schools' excessive preoccupation with the legal rules. For not only does emphasis on mass phenomena mean, necessarily, an emphasis on generalizations, but, in the legal realm, generalizations about society are of value primarily in testing the social effects of existing legal rules or of proposed changes in those rules. This is shown by the famous "Brandeis briefs." The facts in those briefs were general social facts, "mass" facts.

Both trial courts and upper courts ought often to pay attention to such general or "mass" facts. But the distinctive fact-finding function of trial courts relates to a quite different sort of facts—the individual facts of particular law suits, such as whether Robinson hit McCarthy, whether Artful agreed to sell his house to Guileless, whether old lady Rich was of sound mind when she signed her will. In trying to ascertain such specific facts, a trial court gets little or no help from "social facts," from generalizations about mass social phenomena. These generalizations relate, so to speak, to the social macrocosm. The trial courts' distinctive task of fact-finding relates to the individual microcosms.

The so-called "social science approach," then, may be harmful in that it tends to foster, among law teachers and their students, an indifference, and therefore, an insensitivity, to the unique particular features of particular law suits. And sensitivity to those uniquenesses is imperative, if the trial courts are to do real justice, to avoid cruel, callous injustices.

Those who most eagerly sponsor the "social science" view of matters legal are wont to proclaim that it brings to attention grave ethical issues and thus sharpens the sense of justice. Doubtless it does—with

reference to the legal rules. Paradoxically, however, it tends, by overvaluing the social background, to create a blindness to the foreground—to the concrete issues of fact in individual law suits—and thereby tends to blunt the sense of justice (or, as Edmond Cahn wisely calls it, the sense of injustice) with reference to the operations of trial courts. For, as I have said, in the faulty methods of trial court fact-finding lurks a major ethical problem which has been by-passed by those who devote themselves almost exclusively to the legal rules. Tragic injustices may result when a trial judge applies the best made—the most ethical—rule to facts he mistakenly “found,” facts that never actually occurred, spurious facts.

Of course, I am not so foolish as to deny the virtue, the validity, of generalizations. Whether in the natural sciences, or the social studies, or in the legal field, we cannot dispense with them. They are formulations of relations between particulars; and those relations have as much reality as the particulars, although of a different kind. To use philosophic terms, excessive “nominalism” and excessive “realism” are equally absurd.

Especially so, when it comes to human problems. Every man is a social being. Indeed, as John Dewey says, the words “individual” and “social” should be used not as nouns but as adjectives. Each of those words, says Dewey, “is a name for what is intrinsic in the constitution and development of human beings.”

The social studies underline the adjective “social.” That they do so is unexceptionable. But the resultant generalizations can be menacing, if incautiously applied in judging particular men in particular law suits. In such judging, the adjective “individual” ought always be underlined. When legal scholars, unduly fascinated by the social generalizations, ignore that adjective, they deserve the strictures of William James who regarded as “pernicious and immoral the talk of the sociological school about averages, . . . with its . . . undervaluing of individuals. . . .”

Some remarks of Aristotle are also apposite here. “Practical wisdom,” he wrote “is not concerned with universals only—it must also recognize particulars, . . . for practice is concerned with the particulars,” with “the ultimate particular facts.” So the “physician does not cure man, but some particular person.” So, too, it is with the trial judge. Like the physician, he employs “practical wisdom.” In the cases he hears and decides, he does not treat with man in general, or with types of men, but with particular persons—particular litigants and witnesses.

They have common attributes, to be sure. But each of them also has his unique, differentiated characteristics that ought not to be shoved into a pigeon-hole or taken as merely illustrations of an average. The personalities of individual men may perhaps be looked upon as variations on the theme of "man in general." But delicate comprehension of the individual variations is all-important in doing justice in trial courts.

Let me not be misunderstood. I heartily favor the use of the social studies in the law schools. Efforts along that line should increase and be much improved. However, as already indicated, I do earnestly criticize exaggerated, one-sided, use of those studies. Although the legal rules embody social policies, and although those policies ought to be based on the maximum attainable knowledge of the actual and potential workings of our society, nevertheless the judicial applications of those rule-embodied policies take place, for the most part, in trial court decisions in individual law suits relating to individual human beings. The legal rules, and the social policies they express, are generalities. They represent what may be termed the wholesale phase of the judges' work. But in deciding particular cases, trial judges do a retail business, one in which they must fit the general rules to the needs of their individual customers, the specific litigants. If that fitting is carelessly done, injustice ensues. Trial court decisions should not be mass-production commodities. They should be hand-made.

Take simple examples: No decent person denies the moral soundness of the rule against murder or the rule invalidating profits made by a fiduciary from his personal use of trust funds. But when, through a trial court's belief in mistaken testimony, an innocent man is convicted as a murderer, or an honest trustee is ordered to pay a large sum to his beneficiaries, then a tragic moral evil results, the administration of justice miscarries; the trial court's hand-made decision is a botch.

## 5.

If the trial judge is to do his job well, he must have a capacity for "empathy"—for "feeling himself into" the motives and moods of other persons, the witnesses and litigants, each with his own singularities. The judge should know that no man is a morality-play figure, a Mr. Worldly Wiseman or a Mr. Faithful, all of one piece. He should understand that each man is a unique bundle of varieties and inconspicuous. The trial judge should, too, understand himself, his own prejudices and varying moods as they affect his estimates of witnesses, and should make allowance for those prejudices and moods.

To quote old Sir Thomas Browne, he should "understand not only the varieties of men, but the variations of himself, and how many men he hath been"—and, I would add, how many men he is and will be.

Obviously, then, the trial judge's job calls for insights of a kind that the "social scientists" cannot supply, as their business is with generalities, abstractions, gross averages. The experts in those needed insights are the great literary artists—those who are poets, whether they write in verse or in prose, whether they be dramatists, novelists or essayists. They have poetic insights, a knowledge which, unlike that of the scientists, concerns the particular, the unique. Such "poetic" writers—for instance, Shakespeare, Montaigne or Pascal—furnish a needed corrective of generalizations in meeting individual human problems, the very sort of problems daily presented to trial judges.

Because, then, intensive study of trial court judging should loom large in legal education, the law schools—without abandoning the invaluable study of the social implications and effects of the legal rules—should encourage their students, and the undergraduates who will be their students, to become avid readers of "poetic" writings.

## 6.

A few years ago Professor Fred Rodell of Yale University invented a new course, that of teaching law students to write about legal subjects for non-lawyers. (I assisted him once in giving that course.) The results were gratifying. The students, obliged to translate into the American language what they had previously written in formal legal jargon, learned how much they had theretofore substituted legal stereotypes for hard thinking. They learned, too, to communicate more effectively with laymen, including future clients, as well as with judges, administrators, and members of legislative committees. In short, they improved their ability to make words behave.

But they learned something even more valuable. Obligated to peer behind words to the realities that words are used to symbolize, they discovered that language has inescapable limitations, that there are limits to what one can do with language, that there are moods and feelings which elude verbal expression. Honest writing about such moods and feelings must contain, expressly or implicitly, many asterisks.

That, above all, is what creative reading of "poetic" writing teaches. Listen to Pascal, a profound poetic philosopher as well as a noted mathematician. "The heart," he said, "has its reasons, which reason does not know . . . The heart has its own order, the intellect

has its own, which is by principle and demonstration. The heart has another (order) . . . We know truth not only by reason, but also by the heart . . . And reason must trust those intuitions of the heart." Then he made a comment which, for my present purposes, hits the center of the target: The intuitions "are felt rather than seen; there is the greatest difficulty in making them felt by those who do not perceive them." In intuitive judgments, one proceeds "without technical rules, for their expression is beyond all men."

Pascal, as a mathematician, was a master of logic. He saw that logic—as that word's etymology discloses—is a creature of language and that, accordingly, it shares the weakness of language. Such awareness should not induce us to abjure logic (reason). It should induce us to regard logic (reason) and emotions as polar aspects of a single process. We err, as Lancelot Whyte insists, when we divorce the two, treating each as a distinct entity, and when we then consider "reason" or "intellect" as unaffected by emotions. The "false dilemma," declares Demos, of choosing between "poesy" and reason "contains a threat to our civilization." From that dilemma, a language-created dilemma, "poetic" writings can rescue us. As Hayakawa says, the "great writers . . . thought earnestly, felt deeply, and observed accurately, the world of not-words."

In the spirit of Pascal, William James protested against the tradition that considers logic—"discursive thought"—"the sole avenue to truth." "We need often," he said, "to fall back on un verbalized life" which is "more of a revealer . . ." The philosopher Whitehead, famed for his early studies in logic, reached much the same conclusion. "The basis of experience is emotional," he wrote. "In respect to intuitions . . . language is peculiarly inadequate." And logic, he continued, has its dangers because it "presupposes linguistic adequacy" and thus excludes "direct intuitions" from "explicit attentions" in its formulas. From too much respect for the possibilities of language, there issues a demand for impossible clarity. "It is not true," said Whitehead, "that elements of experience are important in proportion to their clarity in consciousness . . . Insistence on clarity at all costs is based on sheer superstition as to the mode in which the human intellect functions. Our reasonings grasp at straws for premises and float on gossamer for deductions . . ."

Whitehead's brilliant disciple, Mrs. Langer, speaks of "wordless knowledge" and "non-logical truth." Language, she maintains, "is a very poor medium for expressing our emotional nature. It . . . fails miserably in any attempt to convey . . . the intricacies of inner experience, the interplay of feelings with thought and impressions."

Nor is intuition irrational. Much that we call "intuitive knowledge," she writes, is "itself perfectly rational, but not to be conceived through language." Such knowledge, she counsels, can be better expressed in the symbols of the arts. Similarly, the scientific philosopher, Sullivan, says in his essay on Beethoven: "We are conscious of so much that cannot be stated in the form of propositions; desire illumination on so many things that the language of logic is incompetent to deal with. And the miracle of art is that it can convey just those messages, satisfy just those needs."

Whitehead, in challenging the demand for clarity at all costs, was patently referring to Descartes who, in spite of his own fruitful intuitions, sought to eliminate imagination from all branches of science, reducing them all to mathematics which, he thought, alone possessed a language capable of expressing and communicating clear and precise ideas. Whitehead, thinking of the evil collateral effects of this Cartesian thesis, uttered this warning: "The folly of intelligent people, clear-headed and narrow-visioned, has precipitated many catastrophes."

Lawyers should never forget that warning. Logic in the hands of Cartesian-minded judges inflicts the cruelest injustices, and in the name of Justice. Such judges refuse to listen to the "reasons of the heart." They recall Pascal's remark: "This man is a mathematician . . . He would take me for a proposition."

Our ablest judges are in accord with Pascal, James and Whitehead. Mr. Justice Holmes, in a judicial opinion, wrote of the validity of an "intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . . which may lie beneath consciousness without losing their worth." Said a wise English judge, Lord Macmillan: "There is a danger even in logic in human affairs . . . I think there is a proneness in the legal mind to put too much reliance on the power of words." Judge Curtis Bok writes that, for him as a trial judge, "each case [is] a work of art, and not . . . a scientific demonstration . . . It is here, at the point of the greatest judging, that the law can cease to be a matter of rule . . . and reach the realm of intangibles. The law . . . is not scientific in the sense of a science whose rules are impersonal and beyond the reach of human emotions."

There you have it: *The judge, especially the trial judge, should, among other things, be an artist, quick with poetic insights. For such insights are moral insights.* Creative reading of "poetic" writing, by opening up vistas of the world of not-words, will stimulate such moral insights.

## 7.

I'm especially pleased to quote Judge Bok because the point I'm making applies with peculiar pertinence to the trial judge. Such a judge, in a non-jury case, after listening to orally-testifying witnesses whose stories disagree with one another, has a reaction in favor of one side or the other. Just why he believes some witnesses and disbelieves others, just why, on the "facts," he thinks the decision should go for the plaintiff or the defendant, he will often be at a loss to state precisely. His reaction, a composite (or "gestalt"), is often emotionally tinged in a way that is not explicable in words. It has deep intuitive roots, some of which he himself does not know and of which, therefore, he can give no complete verbal—logical—report. That is why many a trial judge resents any requirement that he make and publish "findings of fact". He feels that any such publication, because it is truncated, artificial, will misrepresent his mental processes.

I happen to believe that, nevertheless, the trial judge should always be obliged to make and publish such "findings". The best argument for so requiring is that the judge's effort to put in verbal form his intuitive responses to the events of the trial, will tend to compel the judge to safeguard himself against acting upon hasty impressions that will not stand up under his own critical scrutiny, a scrutiny imposed by the obligation to communicate to others. It is superficial to say derisively that his conscious verbal expression of his intuitions is but an *ex post facto* "rationalization". For, in that sense, the reasoning of the wisest men may be described as "rationalizing", since almost surely it flowed from an original intuition.

I wholly agree, however, that often a trial judge cannot state all his "real reasons", since some of them, especially as to the facts, are "reasons" of the "heart", the promptings of inexpressible, incommunicable intuitions—at their best, poetic insights, moral insights.

Because the trial judge's fact-premise, as reported in his "findings", is thus full of asterisks, his reasoning is equally so. He may have applied to the facts he "found" the most impeccable legal rule with the most faultless logic, yet often the soundness of his decision can't be tested by others, including appellate judges. For they can't tell whether his fact "findings" are correct—that is, whether he made a correct choice of the oral testimony to be believed. His "findings" often are inscrutably subjective.

Judge Hutcheson and others have described as "hunches" these inexpressible insights of the trial judge. Those who scoff at that notion overlook the fact that Aristotle, the first great master of formal logic,

although he did not use the word "hunch", highly esteemed the inarticulate hunches, in practical governmental affairs, of the experienced man. Those scoffers also overlook the fact that many eminent scientists have disclosed that their inventions and discoveries have been products of hunches, have acknowledged that their logic followed an "initial intuition".

Even those most precise and logical creatures, the mathematicians, have admitted that often they arrived at their creative inventions via hunches. The distinguished mathematician, Hadamard, in his fascinating little book, *The Psychology of Invention in the Mathematical Field*, states that there is "hardly any completely logical" mathematical discovery. "Some intervention of intuition is necessary . . . to initiate the logical work."

Then Hadamard goes on to tell us something surprising, something which bears on the problem of the trial judge. Several leading mathematicians, he says, have reported that their thinking, before they reach the stage of communication to others, is done without words. What is more significant, frequently they are baffled in their efforts at complete communication. "A majority of scientists," notes Hadamard, "think that the more complicated and difficult a question is, the more they feel they must control that dangerous ally," language, "and its sometimes dangerous precision." Frequently, he says, in the work of mathematical geniuses, "important links of the deduction may remain unknown to the thinker himself" because "some parts of the mental process develop so deeply in the unconscious" that they "remain hidden from the conscious self" and can not be communicated.

With mathematical genius thus stumped, we should not be disturbed by the fact that the trial judge is unable to make wholly explicit his far more tangled intuitions, his intuitive reactions, when the oral testimony is in conflict, as usually it is.

This difficulty in communicating is peculiar to the trial judge, since it stems from the trial courts' peculiar, distinctive job of fact-finding—of picking out those of the disagreeing, orally testifying, witnesses who are to be believed. The upper court judges do not encounter that difficulty. Virtually all treatises on "legal reasoning" are seriously deficient because they neglect the trial court, and consider solely the reasoning of upper courts. Dean Edward Levi's otherwise excellent recent volume, *An Introduction to Legal Reasoning*, will serve as an apt illustration of such a defect.

The law schools teach their students to study judicial opinions with a similar disregard of the trial courts and their peculiar communication difficulty. From such study, the student inevitably obtains mis-

leading, over-simplified, impressions of the judicial process. The student won't understand that process unless he is aware that most decisions of the trial courts were prompted by intuitive responses to the conflicting oral testimony, intuitions that judicial opinions, whether those of trial or upper courts, do not—can not—make fully manifest.

According to Hadamard, a like problem arises in the teaching of advanced mathematics. If a student of that subject restricts himself to studying a famous mathematical demonstration in its "entirely conscious form"—that is, in the form in which it has been logically stated for publication—he will not realize that, preceding the rigorously logical formulation, there had been an unconscious and intuitive period in the mental processes of the mathematician who contrived and published the demonstration. So with the law student. He should be taught to comprehend that logic "followed an initial intuition" in the mind of the trial judge. Otherwise, after the student becomes a lawyer, he will be sorely puzzled—and often cynical—if he tries a case and compares the decision with the events at the trial. And, should he become a trial judge, he will be sorely puzzled by his own mental operations.

Incidentally, what Hadamard tells us of mathematics, and Whitehead's warning about clarity, suggest that unimaginative, stereotyped, training in mathematics or logic may hinder rather than help the lawyer.

### 8.

Something else, in addition to a vivid knowledge of "poetic" writings will contribute to the future lawyer's education—an understanding of the nature of history-writing. Why will that enlighten the law student? Because a trial is an exercise in history writing. The trial court, like the historian, must attempt to reconstruct a segment of the past, because the facts in a law suit are departed history, past facts which the trial judge did not himself see or hear. The abler, more subtle, historians, such as Beard, Becker, Pirenne and Collingwood, teach the lawyer the perplexing obstacles to any reconstruction of the past: the unreliability of much testimony, the fallible subjectivities of witnesses, the missing documents, the effect of the prejudices of the historian in piecing together the available evidence.

### 9.

Can all that I have discussed here fit into teaching in legal clinics? I think so. Every teacher in such a clinic should himself be a devotee of poetic writings, quick with poetic-moral insights, sensitive to the

unique, keenly aware of the role of intuition, alive to the difficulties of historical reconstruction. In the legal clinic, there should be a fusion of all the divers "approaches". There should be "law in action" in the most comprehensive sense, including, among other things, the social studies in action, the "humanities" in action.

## 10.

Let me revert for a moment to the "social science" enthusiasts. They have severely criticized Langdellism. Yet, as I have said, most of these enthusiasts, with respect to the judicial process, imitate Langdell in concentrating attention on upper courts, in ignoring trials and trial courts. I think they do so because, were they carefully to observe trials, they would come upon emotionally upsetting uncertainties—and these enthusiasts are engaged, in a new fashion, in the old quest for unattainable legal certainty.

As part of that quest, some of them, contemptuous of legal terminology on the score of its inexactness, substitute a jargon they fatuously believe to be more exact. Borrowing from the more humorless among the "social scientists", they use a pseudo-scientific vocabulary, which seems precise only because of its drab, abstract, dehumanized, depersonalized character.

A similar trend exists in some contemporary literature. Lionel Trilling observes that, instead of saying of a man and woman, "They fell in love and got married," some modern writers say something like this: "Their libidinal impulses being reciprocal, they activated their individual erotic drives and integrated them within the same frame of reference." Not dissimilar locutions will be found in some current legal writings. When one reads them, one recalls Gilbert's satiric lines: "If this young man expresses himself in terms too deep for me, What a very singularly deep young man this deep young man must be."

Of course, all who adhere to the "social science approach" are not guilty of linguistic monstrosities; and sometimes our legal vocabulary will be improved by incorporating some sociological terms. But those who think that sociological lingo promises exactitude would do well to note that even the mathematicians, with their most precise language, consider that occasionally its precision may be "treacherous".

## 11.

Much of what I have said might be rephrased as follows: (1) Our society should be viewed, in part, as it is viewed by wise cultural anthropologists, like Sapir, Malinowski, or Ruth Benedict. The "social science approach," when properly used, gives us that view, an

essential one for lawyers, because much of what we ambiguously call "law"—including "international law" and "comparative law"—becomes intelligible only when seen from the perspective of cultural anthropology. (In the light of my previous discussion, it must be obvious that I do not mean that such a perspective entails any disregard of the moral values of our own civilization; on the contrary, it ought to supply a brightened appreciation of those values.) (2) Without neglecting the cultural-anthropologist's perspective, the individual humans in our society should be viewed as a wise psychologist or psychiatrist views them. It is such a psychologist's view that, in the law schools today, needs more attention.

For lawyerdom is, in great part, the realm of individual psychology. As our legal vocabulary shows, lawyers constantly cope with individual psychological problems. We lawyers talk, for example, of "intention", "motive", "mental cruelty", "undue influence". An English judge has said that "the state of a man's mind is [for a court] as much a fact as his digestion." Every day, trial judges, in trying to ascertain the facts in law suits, must endeavor to probe the minds of individual witnesses in order to determine their credibility. Trial lawyers act as psychologists when they strive to get at the hidden attitudes of the particular judges before whom they try and argue cases. The lives and fortunes of litigants depend upon the motivations and prejudices of specific witnesses, judges, jurors. To be effective as a court-house lawyer or on the bench is to be an effective individual psychologist. The same is true of the lawyer who conducts negotiations or appears before legislative committees.

Now our wisest psychologists—for example, William James, Sigmund Freud, or Erich Fromm—have been men with deep poetic insights. More to the point, for inspiration in their professional undertakings they have turned to the "poetic" writers. Let lawyers and judges go and do likewise. No trial judge who follows that example will employ the ridiculous rules of thumb for determining witnesses' credibility to which I earlier referred.

The practice of law is not a science but an art. Legal practitioners can learn much from the practitioners of literary art. I quote Whitehead once more: "All men enjoy flashes of insight beyond meanings already stabilized in etymology and grammar. Hence the role of literature in finding linguistic expressions for meanings as yet unexpressed."

## 12.

Do I propose, then, that a judge should be a literary man, should himself be a "poetic" writer? Not at all. Whether a judge writes

with grace and beauty matters comparatively little. It is his spirit that matters. I mean what Cardozo perhaps meant when, quoting Graham Wallas, he said that we need judges "with a touch in them of the qualities which make poets." Such judges will have a "piety for the unique." That piety opposes an "individualism" which treats human beings as but homogeneous units. Instead it dwells on individuality.

## 13.

Thus far I have singled out those portions of the "humanities" which stimulate penetrating intuitions, moral insights. Plainly, the "humanities" will yield far more.

A lawyer should be a cultivated man. He will indeed be merely a legal garage mechanic if ignorant of the interplay of legal and non-legal ideas. He should have a cognizance of the numerous legal concepts and attitudes that have stemmed from non-legal sources, from philosophy and science. Consider, for instance, the influence of Aristotle on the notion of "proximate cause." I have been distressed to discover that many law students have never heard of Susanna and the Elders, or of Judge Bridlegoose, or of Pericles' speech on democracy (according to Thucydides); don't know the meaning of "Occam's razor", or the "idols of the tribe", or "non-Euclidean thinking"; have no acquaintance with non-legal discussions of "fictions"; have read little or nothing of Plato, Aristotle, Aquinas or Kant; and look blank at the mention of Democritus, Lucretius, Pelagius, Leibnitz, Comte, C. S. Peirce, or even Bentham.

On the other hand, the law student should learn how legal concepts and attitudes have spread into other fields. He should know, for instance, the following: The scientific and philosophic idea of "cause" apparently came originally from the lawyers; so, too, the notion of "average". Perhaps, as Helen Silving suggests, one can trace to the lawyers the use of the word "facts" to signify "realities". The "Socratic method" was transplanted from the courts. The philosophic, legal, and scientific concepts of "natural law" have repeatedly interacted. Lawyers have made notable contributions to the "logic of discovery". Three lawyers were members of the small philosophic group that launched American pragmatism.

## CONCLUSION

I make a plea, then, for greater stress on the "humanities", both in pre-legal education and in the law schools. That plea could rest on sheer practicality, on the argument that men not steeped in "hu-

mane" learning will be neither first-rate lawyers nor first-rate judges. But that is not my whole argument, by any means. I say that, without such learning, a lawyer cannot be an effective participant in a vital civilization. Nor is a lawyer's life confined to his professional or his public activities. He has, or should have, many hours of private leisure. His private leisure will be far more fruitful, far more a source of personal happiness, well-being, if he has enriched his spirit by intimate creative knowledge of the "humanities".