

IV

In conclusion, it should be noted that the above criticisms do not, in any way, vitiate Professor Machlup's public policy recommendations concerning the basing point system and systematic freight absorption. These recommendations should be accepted and S.1008 (in its original form) defeated in the Senate, because: 1) the bill would, from an economic point of view, legalize a pricing system which facilitates collusion in concentrated industries, results in wasteful cross-hauling of commodities, and distorts the optimum location of both primary producers and fabricators; and 2) the bill would, from a legal point of view, deprive Section 2a of the Clayton Act (as amended by the Robinson-Patman Act) and Section 5 of the Federal Trade Commission Act of whatever effectiveness they now possess in combatting price discrimination the effect of which is to substantially lessen competition. If any legislation is enacted to clarify the law as presently interpreted in the courts, it should be some bill such as S.1008 with the Carroll amendment included as a safeguard against the lessening of competition. In no case should the burden of proof placed on the Federal Trade Commission in its prosecution of offenders be made any more onerous than it now is.

As far as the outlook for the future is concerned, let us realize that, regardless of the outcome of the legislative battle over basing points, a mere abolition of this pricing technique is not likely to prove a panacea for the monopoly problem in our concentrated industries. Abolition of basing point pricing and/or freight absorption in such industries should be but the first step in a comprehensive attack on *structural* impediments to effective and vigorous competition. If we are to succeed with a program of that sort, however, our antitrust agencies shall have to be equipped with more potent weapons than they now possess. The Sherman Act is a blunt axe—a relic from a paleolithic age. To meet the industrial challenge of today, the anti-trust agencies must be provided with a set of fine surgical instruments.

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LEGAL PHILOSOPHY FROM PLATO TO HEGEL. By Huntington Cairns. Baltimore: The John Hopkins Press, 1949. Pp. xvi, 567. \$7.50.

I have long thought that "legal philosophy" or "jurisprudence" would frighten fewer people away if it were more attractively labeled; "thorough-going-talk-about-government" is a descriptive phrase I once suggested.¹ This remarkable book makes the phrase apt, for Cairns here reports, with painstaking fidelity, much of what thirteen thorough-going, renowned thinkers

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1. Frank, Book Review, 52 YALE L. J. 934 (1943).

have thought—or said they thought—about that subject. So carefully has Cairns wrought these reports that no one interested in hard thinking about government in general, or in the legal views of any of these thinkers in particular, can get along without this book.

Cairns demonstrates himself an astute scholar and a sagacious commentator. I have tested the chapter on Aristotle, for instance, and found the quotations, paraphrases, summaries and citations meticulously accurate. The studies of Leibniz and Hume are, in my opinion, incomparable. And the entire book is replete with incidental penetrating observations about “law,” government, justice, philosophy and science.

Palmer has complained that Cairns does not offer “an integrating philosophy” or “indicate any particular confidence in any kind of jurisprudence or philosophy.”² To my mind, this kind of neutrality—which Cairns frankly avows³—constitutes one of this book’s virtues. Cairns does not nudge his readers, does not insist that they accept his preferences. When he does so, he will be writing a different book, one he promises soon to write, and one which all people interested in government will look forward to reading. What he does do, now and then, is perceptively to suggest the bearing of these thirteen philosophies on our contemporary ideas and problems.

Although I do not agree with Palmer’s complaint, I have one of my own. Cairns states that “in the interests of space,” he was “obliged for the most part to forego discussion of biographical details and analysis of the cultural influences which may have shaped the philosopher’s attitude toward particular problems. . . .” “I have not,” he says, “treated their ideas as historical facts, but as propositions to be judged on their own merits.”⁴ This space-saving apology seems odd, for some of the chapters had previously appeared in legal periodicals which would surely have allowed Cairns more room if he had asked for it. If this impersonalized and un-historical exposition was caused by lack of space, then I think Cairns should have published his work in two volumes, perhaps one now and one later. For I think that his omissions create misleading impressions.

To read the writings of a long-departed thinker, without a substantial knowledge of his character and of the problems of his day that evoked his thinking, is often to misread. Misreading, to be sure, may be unintentionally educational. The usual line is that devils quote Scripture to devilish ends. But angelic men sometimes promote wisdom by misunderstandingly—angelically—quoting devils. One could write an interesting treatise on the stimulating effects (sometimes good, sometimes bad) of misunderstood ideas: Misin-

2. Palmer, Book Review, 35 AM. BAR ASSN. J. 397, 398 (1949).

3. Preface, p. x.

4. *Ibid.*

terpretation of Adam Smith has, on the whole, been unfortunate; Thomas Jefferson, as Daniel Boorstin has ably shown, both profited and suffered from being misinterpreted.⁵ But Cairns did not intend to provide provocative misunderstandings.

Frequently, reliable information of the kind to which I refer cannot be obtained even of a present-day foreign culture. Mr. Justice Holmes, speaking of the difficulty American courts experience in reviewing decisions by the courts of Puerto Rico, said: "When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphases, tacit assumptions, unwritten practices, a thousand inferences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books."⁶ The task of recapturing the cultural influences at work in a past period is correspondingly harder, at times impossible. Simkhovitch has pointed out that "because we 'understand' things in our own way . . . , we imagine that we 'understand' concepts, ideas or words that belong to a foreign culture or a different plane of thought. That is not the case. Our understanding is only 'our' understanding. . . ." And Anatole France warned that "To live is to change, and the posthumous life of our written-down thoughts is not free from the rule; they only continue to exist on condition that they become more and more different from what they were when they issued from our minds. Whatsoever in the future may be admired in us, will have become altogether alien from us."

I grant that too much has been made of cultural influences by those enslaved by the notion of a dominant Time Spirit (*Zeitgeist*).⁷ And I con-

5. BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* (1948).

6. *Diaz v. Gonzalez*, 261 U. S. 102, 105-106 (1923).

7. See FRANK, *FATE AND FREEDOM*, Chapter 7 (1945).

"Desirous of discovering the sources of a thinker's thoughts, and sure that with relative ease they can be discovered," I have written elsewhere, "the intelligentsia have invented the notion of the Spirit of The Age (Time Spirit, *Zeit Geist*). Is this not a lazy man's device? In a given era, often there are dozens of 'spirits'; the bias of a particular historian leads him to choose some particular 'spirit' for emphasis and to ignore others. To shift the metaphor, in any so-called 'historical period,' there are currents and counter-currents, not a single drift in one direction; the casual observer sees only the current at the surface; a more careful observer peers deeper down, but may erroneously single out one of the sub-surface currents as alone important. To use still another metaphor, the symphony of history is full of discords. To put it still another way: while thought-fashions mold thinking, fashions compete with one another; and enterprising thinkers change the fashions. Influences are often undiscoverable. Sometimes they skip many centuries: Sixteenth-century Copernicus reads what Aristarchus had written some 1800 years earlier, and rejects the notion, thoroughly accepted in his own time, that the sun moves about the earth. Seventeenth-century Harrington, inspired by fourth-century B. C. Aristotle and sixteenth-century Machiavelli, contrives a political theory which shocks his contemporaries but which, via John Adams, comes in the eighteenth century to America, where Daniel Webster takes it up in the nineteenth. What accounts for such

cede that a thinker may project himself, in part at least, beyond his immediate milieu, and thus transmit thoughts that, in that sense, are timeless.

As I have said elsewhere: "Who, in most instances, can describe with accuracy the 'influences' which move men? What they have read often has some effect. But men, particularly when creative, do not merely reproduce the thoughts of others. Those thoughts may be provocative, stimulative. The stimulus, however, may result not in imitation but in originality. It is the pedant lacking originality himself, who assumes that there is nothing new under the sun, that new ideas are simply the mathematical equivalent of older ideas. Creation is more chemical than mechanical or mathematical. There are psychological, as well as biological, 'sports' and mutations. Coleridge reads the narratives of English sea voyages; there emerges, as Lowes has shown, a poem, containing, it is true, precise phrases taken from those old tales, but built into a work of art which is far more than the mere product of those borrowed words. Veblen, as Dorfman discloses, scans the pages of anthropologists and sociologists; no one would say that his *The Theory of the Leisure Class* is any mere copy of what his predecessors had said, although their ideas undoubtedly goaded his thinking. New wine goes into old bottles, but the important fact is not the antiquity of the bottles. More than that, often the bottles themselves are new and only the antique labels remain."⁸

Nevertheless, I believe that Cairns errs in excessively detaching thinkers from their times and characters.⁹ Occasionally he does sketch in a bit of a thinker's "background." These rare sketches are the best proof of the point I am making. Indeed, Cairns, by blaming his failure further to trace

revivals? Who knows?" Frank, *A Sketch of An Influence*, in the volume *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 189, 218.

8. FRANK, IF MEN WERE ANGELS 234 (1942). I have criticized Pound for his tendency to pigeon-hole thinkers according to their historical periods. See Frank, Book Review, 52 *YALE L. J.* 934 (1943). And see FRANK, *A SKETCH OF AN INFLUENCE*, in the volume *INTERPRETATIONS OF LEGAL PHILOSOPHIES* 189, 218-222 (1947).

9. Cairns, discussing Natural Law, of course recognizes that many legal rules and institutions must be appraised according to time, place and circumstances. Is not the same true of philosophies?

Trilling, "The Sense of The Past," in his book, *The Liberal Imagination* 181 (1950), exploits this theme. "In the existence of every work of literature of the past, its historicity, its *pastness*," he writes, "is a factor of great importance. . . . Side by side with the formal elements of the work, and modifying these elements, there is the element of history, which . . . must be taken into account." He warns that "it is only if we are aware of the reality of the past as past that we can feel it alive and present. If, for example, we try to make Shakespeare literally contemporaneous, we make him monstrous. He is contemporaneous only if we know how much a man of his own age he was; he is relevant to us only if we see his distance from us. . . . In the pastness of these works lies the assurance of their validity and relevance." It would be unfair to Trilling to assume from this excerpt that he is a slave to the notion of an all-powerful Time Spirit. "The poet, it is true," he says, "is an effect of his environment, but we must remember that he is no less a cause. He may be used as a barometer, but let us not forget that he is also part of the weather."

cultural influences on the need to save space, indicates his belief that such tracings are desirable, their difficulty notwithstanding. He and I differ, apparently, only in that I believe that to omit them is to badly mar an otherwise outstanding work.

To me, it seems that man's legal philosophy—so far as it is his own and not merely borrowed verbiage—usually is somewhat in step with his general world-outlook; and that outlook, in turn, usually more or less reflects his personality. His legal philosophy, then, to the extent that it is original and articulate, derives from the clash of his personality with the governmental problems of his times and with the ideas of other legal philosophers with which he is acquainted. To neglect either the individual or the social context of any vital legal philosophizing is to depersonalize it—and thus to deform it. Comprehension of another calls for empathy. "I do not," said that generous and understanding genius, Montaigne, "make the common mistake of judging another according to what I myself am. I readily believe that in others are things different from those that are in me. . . . In imagination, I enter into their skin; I like and honor them all the more because they are different from me." True, completely to enter into the perspective of another is impossible. In the first place, the other is mutable, not a constant entity, and many of his motivations may be concealed. Second, each of us, unavoidably, interprets, to some extent, the ideas of others (except, maybe, mathematical ideas) according to his own character, personality and temperament.¹⁰ But, although perfect comprehension is seldom possible, to try to approximate it is desirable.

To comprehend another's ideas, then, one must, at least in part, "re-personalize" them. That is much easier to do if they are first "personalized."¹¹ I find it a fault in Cairns that, for all his faithful reporting of the words of his thirteen worthies, he has not sufficiently "personalized" their philosophies. His reporting is too textual, too little contextual.¹² These days, we regard it foolish to construe the wording of most statutes apart from their histories and the intentions (so far as ascertainable) of their authors. And so, too, I think, with the wording of a philosophy.

A good illustration of Cairns' fault is his treatment of Cicero. My guess is that nowhere can you find a more competent analysis of, and guide to, Cicero's formal legal writings on matters legal and governmental. Yet I think Cairns leaves a misleading impression, an impression that would have been

10. On the limitations of empathy, cf. ZILSEL, PROBLEMS OF EMPIRICISM, INTERNAT. ENCYC. OF UNIFIED SCIENCE, Vol. II, No. 8, 53, 80-81 (1941).

11. The approach and much of the terminology here are borrowed from KALLEN, ART AND FREEDOM I, 16-18 (1942).

12. Because James and Dewey have stressed the contextual method of interpreting other philosophers, it is sometimes suggested that that method is peculiar to the pragmatists. Not so. See, e.g., RUSSELL, A HISTORY OF WESTERN PHILOSOPHY, *passim* (1945).

corrected if he had discussed Cicero's illuminating private correspondence. Montaigne wrote pertinently that he was fond of reading Cicero's private letters, "not only because they contain very full information on the history and affairs of his time, but much more because they disclose his private opinions. For I have a particular curiosity to know the soul and the genuine opinions of my authors. From the samples of their writings which they exhibit on the stage of the world we may form an opinion of their talents indeed, but not of their morals or of themselves. . . . I never read an author, especially one who treats of virtue and duties, without carefully endeavoring to find out what kind of a man he was."

Cairns remarks that Cicero was the "leading practicing lawyer of his day." That he was. But—so some modern commentators like Schulz¹³ maintain—not as one learned in the legal rules (a *jurisconsult*). Cicero was, rather, an advocate (orator), a sort of Clarence Darrow, a trial lawyer, not what we would today call an "office lawyer." In addition, he was an active politician. When, however, he philosophized about "law," he usually soared far above his activities as a trial lawyer or politician.

Cairns apparently regards that soaring as a virtue.¹⁴ Now I agree that legal philosophy should not confine itself to what courts and other agencies of government have done and are doing; it should include what they can do and what they ought to do.¹⁵ But the study of the possible and the desirable is likely to be idle unless guided, to some extent at least, by the existent. And it is surely singular how little, in his formal legal philosophizing, Cicero referred to what, from intimate, personal experiences, he knew went on in trials and in practical politics.¹⁶ The clue to that omission is probably to be found in Cicero's character. As a trial lawyer, his aim was success. He boasted—but not in his philosophic treatises—of his ability, by using a lawyer's wiles, to win suits for wicked men who, on the "facts" and the "law," should have lost. As a politician, he was often unpleasantly opportunistic, willing, when it suited him, to forget the Constitution which he purported to esteem highly. In the case of Cataline's accomplices, it would seem that Cicero persuaded the Senate to over-rule the Constitution in ordering the death of the accused without the trials to which (so most scholars today believe) they were constitutionally entitled. Defending Cassius' patently illegal conduct in raising an army, Cicero said that Cassius had acted according to a decree from Jupiter. Of these aspects of Cicero's nature, Cairns says nothing. The nearest he comes to them is in his characterization of Cicero's theory of interpretation (of docu-

13. SCHULZ, *ROMAN LEGAL SCIENCE*, 43-45, 53-55, 74-75 (1946).

14. P. 131-132.

15. See FRANK, *COURTS ON TRIAL*, *passim* (1949).

16. His early treatise, *RHETORICAL INVENTION* (which he seems to have modelled on ARISTOTLE'S *RHETORIC*) does discuss some of the wiles of the orator.

ments and laws) as "frankly opportunistic," with success, not justice, as "its sole object."¹⁷ Perhaps my judgment of Cicero is too harsh. Yet surely Cairns errs in not briefly reporting the facts on which a judgment may be based. And surely Cairns permits false inferences by not weighing Cicero's deeds against Cicero's words. For Cicero's formal legal philosophizing was on the highest moral plane; it identified the legal and the moral; it enthroned ethics in a "position of dominance over law and jurisprudence."¹⁸

Cairns says: "With Cicero jurisprudence embraced an humanitarian ideal. . . . At the center of his thinking was the belief that civil law, if it were true law, was not merely the external expression of a dominant class, but a realization of the rules of justice and reason. The effect of this principle is plainly apparent in his theory of rights. . . . When the masses were oppressed by the strong, they appealed for protection to some one man who managed by establishing equitable conditions to hold the higher and the lower classes in equality of rights. This was also the reason for making constitutional law. For what people have always sought is equality before the law."¹⁹ All that sounds noble. But what, in terms of Cicero's practical politics, did "equality of rights" mean? It meant that, when the Roman masses, sunk in misery, struggled for better economic conditions, Cicero remained indifferent. Haskell and others have shown that the Republic, lauded by Cicero, was destroyed in part because of the greed and selfishness of the upper classes with whom Cicero allied himself. With the death of the Republic, Cicero became a time-server, seeking his own security and political advancement. Montaigne put it well: ". . . outside his learning, there was no great excellence in his soul; . . . of weakness and ambitious vanity he had much."²⁰

Those facts are, I think, essential to a moderately clear understanding of Cicero's philosophy. I concede that noble moral ideas merit attention even if uttered by one whose own morals are not too nice. We would be in a sorry way if we considered only those ideas which emanated from men who led thoroughly blameless lives. Had Hitler uttered a profoundly wise and moral idea, it would have been folly to reject it because of his evil character. Montaigne sagely said that he would "not ignore . . . the praiseworthy qualities" in his "adversaries." "Should we not," he asked, "dare to say of a thief that he has a fine leg? And because she is a prostitute, must she also be syphilitic? . . . For my part, I can easily say: 'That thing he does wickedly, and this

17. P. 159-160.

18. P. 162.

19. P. 161-162.

20. To quote Montaigne again: "Those whom Fortune . . . has made to pass their lives in some eminent station can by their public actions show what they are." This is reminiscent of Aristotle: "For many men can practice virtue in their personal affairs, but are unable to do so in their relations with others. For this reason, the saying of Bias seems to be apt: 'Office will reveal the man.'"

thing virtuously' . . ." At the same time, it is important to recognize when noble ideas serve as smoke-screens for dubious conduct. If Hitler had uttered a profoundly wise and moral idea, would it not have been folly to refrain from peering behind it to discern his motives?

Especially today is it important to peer behind Cicero's formal words,²¹ because today those words are being quoted by some men who, like Cicero, exploit high moral sentiments while condoning actual practices—in the courts and other phases of government—that are thoroughly immoral and unjust.²²

The sort of defect I find in Cairns' Cicero chapter, I also find in his chapter on Plato.²³ It shows a thorough study of the subject. But, surprisingly, Cairns does not refer to the increasing number of writers who contend that Plato—detesting the Athenian democracy of the Periclean age, and markedly preferring the caste society of Sparta—propagandized for what today we call a totalitarian state.²⁴ Even if Cairns wholly disagreed with that conception of Plato, he should, I think, have discussed it. Instead, Cairns implies that Plato loved liberty, by noting that Milton—remembered always for his passionate defense of freedom in his *Areopagitica*, published in 1644, where he severely criticized Plato's advocacy of rigid censorship—"borrowed many . . . ideas from the *Republic* and the *Laws*" for his pamphlet, *The Ready and Easy Way to Establish a Free Commonwealth*, published in 1660. Cairns does not point out that this pamphlet, probably written in despair when the Restoration was inevitable, expressed a thorough distrust of the electorate. It proposed, for example, a Senate composed of men elected for life. Gooch calls this 1660 pamphlet "the supreme condemnation of the political thinker. The noblest champion of liberty to which the age gave birth pleaded for a yoke heavier than that against which he had fought so zealously."²⁵

21. Compare the discoveries made by Bentham, Thomas Jefferson and James Wilson when they peered behind Blackstone's words. See, e.g., FRANK, A SKETCH OF AN INFLUENCE, in the volume, INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES, 189, 191, 205, 216-217, 228-229, 230, 231 (1947).

22. See FRANK, COURTS ON TRIAL, 34-35, 350-351 (1949).

23. I made the following criticism in brief, not long after this chapter was published in 56 HARV. L. REV. 359 (1946). See Frank, Book Review, 57 HARV. L. REV. 1120, 1127 n. 25 (1944).

24. See, e.g., SABINE, HISTORY OF POLITICAL THEORY, 41, 81-86 (1937); CATLIN, THE STORY OF POLITICAL PHILOSOPHERS, 51 *et seq.* (1933); CROSSMAN, PLATO TODAY (1937); DURANT, THE LIFE OF GREECE, 523 (1939); FITE, THE PLATONIC LEGEND (1934); Frank, Book Review, 52 YALE L. J. 934, 937 n. 11 (1943); Frank, Book Review, 57 YALE L. J. 1120, 1127-1128 and n. 27 (1944); FRANK, IF MEN WERE ANGELS 192; FRANK, FATE AND FREEDOM, 119, 319 n. (1945) *cf.* Corwin, Book Review, 54 HARV. L. REV. 533 (1941); FIELD, PLATO AND HIS CONTEMPORARIES (1930).

For opposing views of Plato, see, e.g., McILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN, 34-35 (1940); Morrow, *Plato and The Rule of Law*, 50 PHILOSOPH. REV. 105, 106, 126 (1941).

25. Gooch continues: "We are tempted to quote the author of the '*Areopagitica*' against himself. 'To sequester ourselves out of the world into Utopian politics which cannot be drawn into use will never mend our condition.' 'Can one read it,' asked John

Cairns would also have done well to note some valuable suggestions of Popper, one of the harshest Plato critics.²⁶ Future students of Plato as a legal philosopher must, it seems to me, either accept Popper's suggestions (at least in part) or refute them. Let me outline a couple:

Popper claims that Plato, deriding the idea that all laws are man-made ("conventional"), falsely described all who sponsored that idea as if they believed that man-made laws are "arbitrary," with one set of laws no better morally than another. Plato, says Popper, deliberately misdescribed the views of some Greeks (such as Protagoras) that the man-made laws need not be "arbitrary" or amoral, and that they are man-made in the sense that men—not nature or God—are morally responsible for making and improving those laws.²⁷

Popper notes that Plato, in his *Crito* and *Apology*, portrayed, for the most part faithfully, the true Socrates as eagerly democratic—although (or because) he was a critic of democracy. But Popper charges that the Socrates found in many other dialogues of Plato is Plato himself, using the expressions of a fake Socrates to put over anti-democratic propaganda.²⁸ Popper warns that we must "realize that those who, deceived by the identification of high-sounding words, exalt Plato's reputation as a teacher of morals and announce to the world that his ethics are the nearest approach to Christianity before Christ, are preparing the way for totalitarianism and especially for a totalitarian, anti-Christian, interpretation of Christianity."²⁹

As with Plato and Cicero, Cairns' chapter on Fichte is splendid for what it includes, but to be criticized, I think, for what it leaves out. Discussing Fichte's writings on international relations, between 1796 and 1913, Cairns says that Fichte's thought during this period was by no means consistent, and that the period was one of great political turmoil. But Cairns does not reveal

Adams more than a century later, 'without shuddering? An assembly of senators for life? If no better system of government was proposed, no wonder the people recalled the Royal Family.'" GOOCH, *POLITICAL THOUGHT IN ENGLAND FROM BACON TO HALIFAX*, 110 (1914).

26. POPPER, *THE OPEN SOCIETY*, Vol. I (1945).

27. Popper himself advocates that position. But he rejects the notion that "all regularities of our social life" are "normative and man-imposed. On the contrary, there are important natural laws of social life also. It is just the fact that in social life we meet with both kinds of laws, natural and normative, which makes it so important to distinguish them clearly." Among the "natural laws of social life" he includes "psychological and socio-psychological regularities of human behavior" and "sociological laws, connected with the functioning of social institutions. . . . In institutions, normative laws and sociological, i.e., natural laws, are closely interwoven, and it is therefore impossible to understand the functioning of institutions without being able to distinguish between these two." *Op. cit. supra* note 26, at 56-57.

28. Contrast Cairns description, at 54, of Socrates' trial with that given by Popper, *op. cit. supra* note 26, at 169-171. See Popper's explanation of Plato's attitude toward Socrates, *op. cit. supra* note 26, at 171-176.

29. POPPER, *op. cit. supra* note 26, at 91.

the nature of Fichte's twisting and turnings, except to say that "Fichte's juristic thought is the bridge from Kant, which is to say from Rousseau, to Hegel; its beginning is a theory of the individual and his natural rights, its close a doctrine of state socialism and the national state, which would, he thought, culminate in the future in a Christian world community."

Now I submit that, to evaluate Fichte's thoughts, one should know that he began as a pro-French cosmopolitan; that he went through a sort of anarchistic phase; that he once said that the fatherland of a "truly educated Christian European" is Europe; that subsequently, when Prussia went to war with France, he became a super-patriotic German. In that phase, he helped ardently to create that vicious German nationalism—with its inculcation of the subordination of the individual to the State—which, becoming, with Hegel's assistance, the core of German education, culminated in the horrible orgy of submission to a dictatorship under Hitler.³⁰

Unpleasant but plausible and fascinating explanations of Fichte's shifts of position have been given. Popper, quoting Fichte's statement in 1799 that "not only the dearest hopes of humanity but its very existence are bound up with the victory of France," adds that "when Fichte made these remarks he was negotiating for a university position in Mainz, a place then controlled by the French." Popper also quotes Anderson's *Nationalism* to the effect that, in 1804, Fichte wanted to leave Prussian employ and serve the Russian government, because "he looked for more recognition from Russia, writing to the Russian negotiator that if the Russian government would make him a member of the St. Petersburg Academy of Science and pay him a salary of not less than four hundred roubles, 'I would be theirs until death. . . .'" Two years later, the transformation of Fichte the cosmopolitan into Fichte the nationalist was completed.³¹

I began this review by saying that legal philosophy is but hard thinking about—theorizing about—government. Such theorizing will go wrong just to the extent that it ignores inescapable governmental practices.³² It is important, then, that all but one of Cairns' thirteen legal philosophers,³³ when they theorize about courts, do no theorizing about the distinctive and inescapable practices of trial courts—their methods of "finding" the facts of particular

30. See, e.g., FRANK, *FATE AND FREEDOM*, 8-10, 293, 342-343 (1945); Kohn, *The Paradox of Fichte's Nationalism*, 10 J. OF THE HISTORY OF IDEAS, 319 (1949).

31. POPPER, *op. cit. supra* note 26, at II, 51. See also Popper's discussion, *op. cit. supra* note 26, at II, 52, 298 note 58, of Kant's condemnation of Fichte.

32. See FRANK, *COURTS ON TRIAL*, 192-197 (1949) which includes some comments on Cairns' interesting ideas about "legal science."

33. The single exception is Aristotle in his *RHETORIC*. See FRANK, *COURTS ON TRIAL*, 371-372 (1949). Strictly speaking, Aristotle's *RHETORIC* dealt largely with lawsuits after the evidence had been received.

lawsuits.³⁴ This lack is peculiarly notable in the philosophic writings of Cicero and Bacon, each of whom actively participated in many trials.

Cairns is silent about this gap in the writings of these philosophers.³⁵ Why? In part, I think, because, so far as I know, he has himself had little or no experience as a trial lawyer. In larger part, I suspect, because he desires to think of "law" as capable of being largely systematized in terms of generalizations, but senses that a close-up study of trial-court fact-finding would interfere with satisfaction of that desire. At any rate, he fails to consider the nature of such fact-finding.

That failure leads him to step on my toes. For he criticizes the so-called "legal realists" (of whom I am one) in a singularly misunderstanding fashion: He ascribes to these "realists" a surprising notion that "particular laws are unique events distinct from all other particular laws."³⁶ Such a notion, as Cairns correctly says, would compel the absurd conclusion that every legal system must be wholly devoid of "general principles." But I know of no "legal realists" who entertain the ridiculous idea that "particular laws are unique events." The position, briefly stated, of at least some of the "realists" (myself included) is this:

According to traditional theory (which will do for present purposes), a trial court's decision in any law-suit is a product of the application of a legal generalization—a legal rule or principle—to the relevant facts of that particular suit.³⁷ The trial court—a jury or a trial judge sitting without a jury—must determine what are the relevant facts. The actual facts necessarily happened outside the courtroom and in the past, before the suit began. In most suits, those past facts are in dispute. That means that usually the testi-

34. Thomas Aquinas and Hegel did briefly consider the nature of judicial fact-finding, but gave it little importance when constructing their theories. As to Aquinas, see FRANK, COURTS ON TRIAL, 366-367 (1949); as to Hegel, see *infra*. As to Plato's brief mention of, and puzzlement about, the subject, see FRANK, COURTS ON TRIAL 22-23 (1950).

35. The present book, like Cairns' other writings, shows his familiarity with Maine's works. Yet Cairns overlooks the several passages in which Maine discloses his awareness of the problems involved in judicial fact-finding. See MAINE, EARLY HISTORY OF INSTITUTIONS, 48-50 (1875); MAINE, VILLAGE COMMUNITIES, 311-312, 318 (4th ed. 1881); FRANK, IF MEN WERE ANGELS, 116-117 (1942); FRANK, COURTS ON TRIAL, 153-154 (1949).

36. P. 549.

37. As Cairns points out in some detail, a legal rule often obtains its formulation (i.e., widens or contracts) in the process of ascertaining the facts. That is, there is an interacting process in the determination of the "relevant" facts and the formulation of the applicable legal rule. P. 238-239. See also WURZEL, METHODS OF JURIDICAL THINKING, in the volume THE SCIENCE OF LEGAL METHOD, 390, 396-399 (1917); TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW 550-551 (1918); Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645, 652-653, 656-662, 782-784 (1932).

But see FRANK, COURTS ON TRIAL, Chapter 23 (1949) as to "relevant" facts. The criticism there made of Cook, Levi and Rodell is applicable to Cairns. See also Frank, *Modern and Ancient Legal Pragmatism*, 25 NOTRE DAME LAW. 207 (1950).

mony of the witnesses, concerning those actual past facts, is oral and in conflict. The trial judge or jury must endeavor to "find" those actual past facts, the "objective" facts. To do so, it is necessary to determine which of the discrepant stories of the witnesses are correct. The trial judge or jury reaches a "finding" as to the "objective" facts on the basis of the trial judge's or jury's reaction to the words and demeanor of the several witnesses. That is, the trial judge or jury must make a choice between those conflicting and irreconcilable stories. No one has contrived any objective method for making that choice. One trial judge or jury makes a choice which another trial judge or jury, hearing the same stories, might reasonably reject. It is ordinarily impossible to say that any special choice is objectively right or wrong. The choice made in any particular suit is thus inherently subjective, idiosyncratic—and therefore unique. And that unique choice constitutes the "facts" to which the legal rule is applied. Each trial judge or jury possesses an immense discretion to "find" the facts one way or another. That discretion—it might be termed "fact discretion"—exists even when the applicable legal rule is so precise as seemingly to preclude all discretion; for "fact discretion" exists in addition to the kind of discretion—which may be termed "rule discretion"—explicitly conferred by a relatively few legal rules.³⁸ Because the witnesses' demeanor—which is a kind of "real evidence"³⁹—is observed by the trial courts and not by the upper courts, the upper courts interfere little with the trial courts' exercise of their "fact discretion": The facts as "found" by a trial court are usually accepted by an upper court on appeal.⁴⁰ The manner of "finding" the "facts" in most lawsuits cannot, then, be generalized, cannot be stated in terms of any rules. In its very nature, the process of "finding" the "facts" is, ordinarily, "un-ruly."⁴¹

38. See, e.g., FRANK, COURTS ON TRIAL 32, 57, 127-135, 169-170, 326-327 (1949); Frank, *Cardozo and the Upper-Court Myth*, 13 LAW AND CONTEMPORARY PROBLEMS 369, 377-378 (1948); FRANK, IF MEN WERE ANGELS 91-92 (1942); *Nash v. Fries*, 129 Wis. 120, 108 N. W. 210, 211 (1906); *Woey Ho v. U. S.*, 109 Fed. 888, 890 (9th Cir. 1901); *Broadcast Music v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2nd Cir. 1949); Frank, *Modern and Ancient Legal Pragmatism*, 25 NOTRE DAME LAW. 207 (1950).

Cairns shoves his brief mention of what I call "fact discretion" into a footnote; see 108 note 80.

39. *Nokes, Real Evidence*, 65 L. Q. REV. 57 (1949); *Colby v. Klune*, 178 F.2d 872 (2nd Cir. 1950); cf. WIGMORE, EVIDENCE, § 1396.

40. See, e.g., *Broadcast Music Co. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77 (2nd Cir. 1949); *Aetna Life Ins. Co. v. Ward*, 140 U. S. 76, 88 (1891); *Quock Ting v. U. S.*, 140 U. S. 417, 421 (1891); *Hoontestroom v. S. S. Sagporack*, (1927) A. C. 37, 49; *Arnstein v. Porter*, 154 F.2d 464, 470-472 (2nd Cir. 1946); *Powell and Wife v. Streat-ham Manor Nursing Home* (1935) A. C. 243, 247, 249-251, 255, 263, 267; *Watt or Thomas v. Thomas* (1947) A. C. 484. As to niceties in review of trial court fact-finding, see *Cervis v. Higgins*, 180 F.2d 539 (2nd Cir. 1950).

41. See FRANK, COURTS ON TRIAL *passim* (1949). See particularly Chapter 12 as to the trial court's unique "gestalt," which further complicates the problem.

As to ambiguity of the word "fact," and resulting confusions, see Frank, *Modern and Ancient Legal Pragmatism*, 25 NOTRE DAME LAW. 207, 233 (1950).

It follows that a trial court's decision, in a case where the oral testimony is conflicting, is usually a result of the combination of (1) a legal generalization—a "particular law," i.e. a rule or principle—and (2) a unique subjective factor called the "facts." The "particular law," being a generalization, is not unique. But the particular decision is unique—since it is a product, in part, of something that cannot be generalized, i.e., the subjective reaction (of the trial judge or jury) called the "facts." It is because Cairns mistakenly assumes that all the "legal realists," when they dwell on the uniqueness of many decisions, are talking solely or primarily of the rule-component—the generalized component—of those decisions, that he mistakenly writes down all "legal realists" as excessively "nominalistic."⁴²

For many years I have vainly urged Cairns in his writings to face the grave problems arising from the inescapable subjectivity of most trial-court fact-finding. It bothers me that he now seeks to dispose of those problems by throwing the word "nominalistic," as if it were a devastating bomb, at those (like myself) who stress those problems.⁴³ Those problems are too serious to be so cavalierly disposed of. For no matter how well and justly made are the

42. See FRANK, COURTS ON TRIAL, Chapter 29 (1949) for discussion of excessive nominalism, excessive anti-nominalism, and a sensible combination of the two.

43. Cairns' discussion of "subjectivism" is largely confined to the argument of those who assert that all legal rules are infected with "subjectivism." See, e.g., p. 33.

He considers unworthy of elaborate discussion Hegel's significant concession—which Hegel himself does not elaborate—that judicial proof is unavoidably subjective. See p. 542-543. See HEGEL, PHILOSOPHY OF RIGHT, 141-143 (1821, transl. by Knox, 1942):

In court the specific character which rightness acquires is that it must be demonstrable. When parties go to law they are put in the position of having to make good their evidence and their claims and to make the judge acquainted with the facts. These steps in a legal process are themselves rights, and their course must therefore be fixed by law. They also constitute an essential part of jurisprudence. . . . By the judgment of the court, the law is applied to a single case, and the work of judgment has two distinct aspects: first, ascertainment of the nature of the case as a unique, single, occurrence (e.g., whether a contract, &c., &c., has been made, whether a trespass has been committed, and if so by whom) and, in criminal cases, reflection to determine the essential, criminal, character of the deed; secondly the subsumption of the case under the law that right must be restored. . . .

The first aspect of the work of judgment . . . , the knowledge of the facts of the case as a unique, single, occurrence, and the description of its general character, involves in itself no pronouncement on points of law. This is knowledge attainable by any educated man. In settling the character of an action, the subjective moment, i.e., the agent's insight and intention, is the essential thing; and apart from this, the proof depends not on objects of reason or abstractions, of the Understanding, but only on single details and circumstances, objects of sensuous intuition and subjective certainty, and therefore does not contain in itself any absolute, objective, probative factor. It follows that judgment on the facts lies in the last resort with subjective conviction and conscience (*animi sententia*), while the proof, resting as it does on the statements and affidavits of others, receives its final, though purely subjective, verification from the oath.

legal rules, injustice results when (as all too often happens) a court, through a mistake in "finding" the "facts" of a case, sends an innocent man to death or jail, or enters a ruinous money judgment against a defendant for an act he did not do.^{43a} Tragedies of that sort which cannot be prevented must be regarded as the equivalent of injury by earthquakes or lightning. In so far, however, as the fact-finding process can be bettered but isn't, such tragedies are avoidable. To avoid them should be a major task of all persons—legal philosophers included—which have a genuine interest in justice. There can be little meaning in legal rules expressive of justice, if justice in particular decisions is wanting.⁴⁴

Injustices in particular decisions, caused by mistakes in ascertaining the facts, stem from the fallibilities of human beings—witnesses, trial judges and juries. The reduction of those injustices, so far as is humanly possible, can be had only if much public attention is centered on the remediable defects in our method of conducting trials. Yet some persons fear to have the public become aware of those defects. Those persons, in effect, adopt Plato's doctrine that an elite should, for "the public good," employ "useful lies," "opportune falsehoods."⁴⁵ Thus, recently, a writer, who conceded the gravity of the problems occasioned by faulty trial-court fact-finding, concluded as follows: "It may well be that America is not now sophisticated enough to accept the brutal fact that our government is, and must be, basically, in large measure, one of fallible men, not certain laws. Some faith in the certainty of positive law and the sureness of justice may be, at least for the present, the indispensable cement of our social structure. If so, then the enlightenment must be spread slowly."⁴⁶

I cannot bring myself to believe that Cairns shares that disbelief in the vitality of our democracy. Consequently, I am sure that in his next book he will forthrightly discuss the subjectivity of the "facts" as "found," in most cases, by trial courts.

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43a. See, e.g., FRANK, *COURTS ON TRIAL* 12-13, 33, 35, 61, 88, 96-97 (1949); Frank, *Cardozo and The Upper-Court Myth*, 13 *LAW AND CONTEMP. PROBLEMS*, 370, 381, 382, 388 (1948); Frank, *Modern and Ancient Legal Pragmatism*, 25 *NOTRE DAME LAW.* 207, 256 (1950).

44. See FRANK, *COURTS ON TRIAL*, 365-371 (1949).

45. See *REPUBLIC*, 307, 389, 401, 424, 459; *LAW* 730.

46. Sommer, Book Review, 51 *THE COMMONWEALTH* 348 (1949).

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