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FACES ON THE COURT HOUSE STEPS

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A REVIEW*

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JUDGE FRANK may one day write a book which it will be possible to take or leave, but I doubt it. Few writers, with his ability and insight in the field of administration of justice, I suppose, succeed in evoking in their readers the spirited reactions that his writings produce. This is the highest praise that any reader can bestow—even though his reaction be a spirited disagreement.

In his most recent book, *Courts on Trial,* he has attempted to destroy what he calls "myths" in legal thinking describing the fact-finding process just as he did for the rule determination and application process in *Law and the Modern Mind.*[1] His thesis, which he says he is presenting for "intelligent non-lawyers as well as lawyers," is that the fact-finding procedure which lawyers describe as a reasonably certain means for the discovery of facts in contested cases, differs widely from "court house government"—the actuality. He feels that the real danger lies in lawyers half-believing "a lot of stork stories concerning the birth process of judicial decisions." The important job to be done, the first, is to let the people know;[2] reforms will not be forthcoming, nor will suspicion of the legal profession be removed so long as the explanation of our trial court processes is cast in terms of the certainty of judge and jury fact-finding.

The great bulk of the book (429 pages) is devoted to the development of the observation that the fact-determination process is subject to many forces which tend to obscure rather than discover the facts in dispute. Litigation is a fight.

* COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE. By *Jerome Frank,* United States Circuit Judge; formerly Chairman of the Securities and Exchange Commission. Princeton: Princeton University Press, 1949. Pp. x, 441. $5.

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1 FRANK, LAW AND THE MODERN MIND (1930).

2 "The legal profession, as a whole, however, should not be singularly blamed for the remediable faults of our legal system. Most of those who comprise any profession or trade tend to venerate almost all its traditions, to overlook its defects, and are unable to inspect with much detachment its customary ways. And many noted lawyers, including some members of that conservative lawyers' organization, the American Bar Association, have been conspicuous as constructive critics of legal and judicial practices, just as they have been foremost in other phases of American life. Nevertheless, I believe that, to achieve substantial reforms of our trial court methods, it is necessary to enlist the assistance of the non-lawyers." p. 36.

"I want, therefore, to stress the fact that litigation in our courts is still a fight. The fighting, to be sure, occurs in a court-room, and is supervised by a government officer known as a judge. Yet, for the most part, a law-suit remains a sort of sublimated, regulated brawl, a private battle conducted in a court house."[3]

Facts are guesses.

". . . proof of those facts, in 'contested' cases, is at the mercy of such matters as mistaken witnesses, perjured witnesses, missing or dead witnesses, mistaken judges, inattentive judges, biased judges, inattentive juries, and biased juries. In short, a legal right is usually a bet, a wager, on the chancy outcome of a possible future lawsuit."[4]

Lawyers, we are told, disliking the chanciness of judicial fact-finding, seek certainty through the use of the "magical" theory that legal rules, being relatively certain, must give relative certainty to the outcome of trials.

"The basic component of court decisions consists of the legal rules. In so far as those rules are crisp and definite, declares the theory, future court decisions usually are nicely foreseeable. Some few of the rules, the *R*'s, are indefinite, not finally fixed and settled. To that limited extent, prediction of future decisions is difficult. This lack of precision of some few of the *R*'s is, the pundits declare, virtually the only impediment to precise prediction. So that, whatever little uncertainty there may be about how courts will deal with one's legal rights, it is, for the most part, a function of the uncertainty in a relatively few legal rules. So runs the theory."[5]

Trial tactics, engendered and required by the "fight" theory of the trial of issues of fact, supply another source of truth concealment. Although admitting the "fight" theory does foster the partisan zeal which will necessarily call forth certain evidence that might be overlooked in a dispassionate inquiry, Judge Frank points out that the skill of a trial lawyer is necessarily tested by his ability to use the well-known devices for the concealment of facts harmful to his case. Through failing to call unfavorable or questionable witnesses, discrediting adverse witnesses, coaching, cross-examination tricks and the like, the

[3] Ch. II, "Fights and Rights," at p. 7.
[4] Ch. III, "Facts are Guesses," at p. 27.
[5] Ch. IV, "Modern Legal Magic," at p. 51.

trial advocate discharges what he conceives to be his duty: to win a fight rather than to aid in the discovery of the real facts in issue.[6]

Procedural reformers are, in part, devotees of legal "magic" because, says Frank, in improving procedural rules, they forget the troublesome nature of the *F*'s (the facts).[7]

The facts, as developed at a trial, bear little relation to the true facts for all the reasons already suggested. Then, in making findings from these facts, the jury's prejudices, inattention, conscious disregard, refusal to follow instructions on the law all add to produce a result even further removed from the true facts. The jury, further, is given a means of concealing the use of any or all of these in being permitted to bring in a general verdict.[8]

Judges are little better than juries in reaching objective decisions. Better trained, perhaps, and more experienced, they still are subject to all the weaknesses, prejudices and failings of humans.[9]

The trial judge's decision on the facts is not susceptible of articulate expression on his part because it is the result, not of a controlled, rational process capable of being analyzed, evaluated or described at any particular stage, but is a "hunch." This "hunch" is the result of a complex process in which factors incapable of analysis result in a composite attitude or conclusion—a gestalt. "His decisional process, like the artistic process, involves feelings that words cannot ensnare."[10] Thus, although requiring trial judges to make findings of fact may be of some help, it will not be a panacea.

In a chapter on "Legal Science" and "Legal Engineering," the relation of which is anything but apparent, he concludes that a legal science (to satisfy the lawyers' craving for certainty) is not possible because the data on which such "science" must be built are group beliefs and group customs and thus not predictable. The law must deal with uniques.

Legal education[11] shares the responsibility for the perpetuation of the "upper court myth" and the "rule magic" notions. The case system built, as it is, around upper court decisions takes no account of the fact-finding aspects of a judicial trial. The remedy: clinical,

[6] Ch. VI, "The 'Fight' Theory versus the 'Truth' Theory."
[7] Ch. VII, "Procedural Reformers."
[8] Ch. VIII, "The Jury System."
[9] Ch. X, "Are Judges Human?"
[10] Ch. XII, "Criticism of Trial-Court Decisions—The Gestalt."
[11] Ch. XVI, "Legal Education."

"lawyer" law schools, in which students should concern themselves with actual cases from their inception. In this chapter Judge Frank robs himself of much of the thoughtful consideration that he invites in his discussion of the origins of the case system. Christopher Columbus Langdell, its founder, is described as a "neurotic escapist";[12] his system, "neurotic wizardy";[13] his repudiation of "actual legal practice" as "morbid."[14] The reader is left with the question whether this rather emotional approach to the case system may not be present (though less candidly) in the author's consideration of other personalities and problems in this work.

The judicial robe, too, must bear its share of the burden. As a non-democratic survival, it insulates the judge and courts from criticism, gives the impression of "uniformity in the decisions of the priestly tribe," and apparently has the effect of encouraging and continuing the use of incomprehensible legal jargon in the preservation of the priestly separation of the judge from ordinary men.[15]

Of the precedent doctrine:

> *"If I could revise the precedent doctrine, it would require that a court should never change a rule, retroactively, in its application to any person when the court has reason to believe that he actually relied on that rule and would be harmed substantially by the change; but the court would be free to change an unjust rule as to all other persons, both retroactively and prospectively."*[16]

In many respects this is a disappointing book. The great mass of it is devoted to the single idea that fact-finding, as we presently go about it, does not lead us to the facts actually present in the dispute. The whole tone of the learned marshalling of all the factors that enter into this result is that the author has hit upon something which the entire profession denies. This, I believe, is unfair. Just about all of our thoughtful legal writers must fall in the author's devotion to this single idea. Many must fall unfairly because Judge Frank has lifted a stray quote from some general work and thereby characterized the complete philosophy of the writer. For example, of Dean Pound he says:

> "Roscoe Pound, another highly respected legal thinker, writing of court decisions, states that, from the public judicial records,

[12] P. 227.
[13] P. 231.
[14] P. 231.
[15] Ch. XVIII, "The Cult of the Robe."
[16] Ch. XIX, "Precedents and Stability," at p. 270.

always 'one may find exactly . . . how the questions of fact were determined . . . in the form of special findings of fact' by the jury or trial judge; that always the judge's findings are accompanied by a report published by the judge of the legal rules applied by him; and that, consequently, 'the materials for criticism . . . of judicial decisions are always available and readily accessible.' "[17]

Yet in 1922 Dean Pound wrote:

"At common law the chief reliance for individualizing the application of law is the power of juries to render general verdicts, the power to find the facts in such a way as to compel a different result from that which the legal rule strictly applied would require. In appearance there has been no individualization. The judgment follows necessarily and mechanically from the facts upon the record. *But the facts found were found in order to reach the result and are by no means necessarily the facts of the actual case.*"[18]

The book is also disappointing in that relatively so little attention is devoted to the suggestion and discussion of remedies. Remedies are, indeed, proposed. Experimentation is suggested with the use of independent governmental officials to dig up and present to courts facts that the parties might otherwise overlook, suppress, or minimize.[19] More general use of special verdicts; special juries composed of specialists in the field in which the fact dispute arises; revision of exclusionary evidence rules; recording jury deliberations; and jury training in public schools and adult education classes are all suggested.[20] We might have talking movies of trials so that on appeal upper court judges might form their own impressions of witnesses and their demeanor.[21] Special training for trial judges is suggested, including periodic psychiatric examinations to assist the judge in his "voyage of self-exploration."[22] Others are included summarily in one of the concluding chapters, "Questioning Some Axioms." In none of these cases, however, has the author felt called upon to do more than merely suggest. This is unfortunate, for the reader, convinced that there is a need for reforms long before the author is apparently willing to concede such conviction, is left facing chapter after chapter of further

17 P. 53.
18 POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 133 (1922). Italics supplied.
19 Pp. 97 et seq.
20 Pp. 141 et seq.
21 P. 224.
22 Ch. XVIII.

"convincing" without the relief and benefit of the author's suggestion of remedies. Judge Frank's experience and thoughtful concern with these problems is such that I am convinced that this would be a far more effective book were we given the benefit of more detailed discussion of his ideas for reform.

But then the entire purpose of this book seems to be to demonstrate that the profession will not concede that the fact-finding process is anything other than a "mythical," "magical" rite which always leads to the discovery of the facts exactly as they were. For Judge Frank, one must either be wholly content with things as they are, complacently explaining all with "legal magic" or else must agree with him that the weaknesses typify the whole process. Perhaps it is the privilege of a reformer (and Justice Frank labels himself such) to overstate, exaggerate and characterize his starting point by reference to its failures and weaknesses. I believe that the truth is somewhere in between. This book tells us little about the successes of the system, about the cases in which the weaknesses operate less forcefully or not at all, about the factors which serve to offset and neutralize some of the inadequacies.

The dust jacket on *Courts on Trial* reproduces Daumier's famous caricature, "Faces on the Court House Steps." One of the figures represented is self-satisfied and apparently content with himself, his profession, and with things as they are. He appears to be anticipating criticism and meeting it with contempt. The other seems to be a complete skeptic, not sure that there is much of anything that is capable of being a starting point. I suggest that the great body of thoughtful members of the profession are not represented in this picture—but then a caricature *is* an exaggeration.[23]

[23] I realize that in the original of this drawing there is a third, minor figure entering the court house, but we are not permitted to see his face.