

2-1931

Law and the Modern Mind, by Jerome Frank

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Recommended Citation

James, Daniel (1931) "Law and the Modern Mind, by Jerome Frank," *Indiana Law Journal*: Vol. 6 : Iss. 5 , Article 10.

Available at: <https://www.repository.law.indiana.edu/ilj/vol6/iss5/10>

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Law and the Modern Mind. By Jerome Frank. New York: Brentano's. 1930. 362 pages. Price \$4.00.

"The basic myth" of juristic thinking is that legal certainty and absolute predictability are somewhat attainable. This myth is believed by the profession and the laity alike. It has its roots in "a yearning for something unreal." For an explanation of that yearning we turn to psychology, which takes us back to our childhood. There, before our mentality was of sufficient strength to be skeptical about the expressed thoughts of our fathers, we found in them the ultimate and absolute. We developed a father-complex, which we have never outgrown; we have simply substituted law for father. Unfortunately most of us are not aware of that complex; hence, the myth: we accept an untruth—legal certainty—as though it were true, and we do not know that it is not true.

That legal certainty is not a reality, of course, needs explanation, which is effected by an elaboration upon two quotations, one from Judge Cuthbert W. Pound and one from Mr. Justice Holmes. "The decision consists in what is done, not what is said by the court in doing it. Every decision must be read with regard to the facts in the case and the question actually decided." In rendering a judgment a court writes an opinion, usually stating principles which it says govern and control the judgment; but the force of principles "lies in the application of them and this application cannot be predicted with accuracy." In the functions of fact-finding and applying of principles the individuality of the judge makes a far greater inroad upon the law-making process than has generally been supposed. "General propositions do not decide concrete cases;" and any seeming certainty apparent in the general principles of judicial opinions is illusory. The law is what a judge decides as to a particular situation. This definition of law is "legal realism," as opposed to "legal fundamentalism" or "Bealism" (after Professor Joseph Henry Beale), which conceives of law as a "uniform, general, continuous, equal, certain, pure" system, which is "truly law even though no court has lent its sanction to many of its principles."

Belief in the myth of legal certainty must be exploded. We must remember that it is not a mere fiction, but a myth, which overclouds our sky: we act upon the assumption of a falsity not knowing that it is false. Juristic blindness results. The bench, the bar, the laity must be awakened to the true nature and content of the process carried out by the courts. Only through a lucid awareness of the reality of judicial action can we cope with modern problems and progressively develop.

The preceding three paragraphs are a statement, too brief to be just, of the thesis of Frank's *Law and the Modern Mind*. It is an application of modern psychology to the judicial process. Frank is concerned, more candidly than most juristic writers, with the subjectivity of law—the individuality of judges and of cases. It is well to study what the courts do as an objective phenomenon; but courts are judges, and judges are human beings, with specially trained minds, with environmental backgrounds, with prejudices—with all of the thousand and one uniquenesses that enter into the constitution of a man. A judge has an individuality and he cannot escape from it. Just as surely as it enters into his extrajudicial conduct, it sits with him on the bench. *Ex hypothesi* there must be psychological significance in judicial conduct, just as there is historical, social, economic, logical significance. Frank, in attempting to discover that significance, leans perhaps too heavily upon child psychology and the father-complex. He has a good horse but he rides it to death. As he returns time after time, in almost every chapter, to his father-complex, one cannot help but recall Hamlet's admonition: "There are more things in heaven and earth, than are dreamt of in your philosophy."

But the book is stimulating. Whether or not it convinces, it certainly should provoke intellectual action in any reader. And it is readable. Mr. Frank should be commended for escaping that formalistic, monotonous, conveyancing style of writing which unnecessarily obscures a great deal of good thought on jurisprudence. Notes closely related to the text are indicated by asterisks and given at the bottoms of the pages; notes of more remote application or giving mere citations are numbered and relegated to the back of the book, so that one need look to them only if he is interested.

Law and the Modern Mind is a book not only for lawyers but also for the more intelligent laity. It should do much to justify the ways of the law to the common man, or at least to show him that many of the faults and weaknesses which he has been prone to consider exclusively those of the lawyer are nothing more than ubiquitous human frailty in the peculiar setting provided by the law.

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