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Courts On Trial: Myth and Reality in American Justice, by Jerome Frank

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COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE. By Jerome Frank. Princeton: Princeton University Press, 1949. Pp. xii, 441. \$5.

It has long seemed to me that book reviewers, a grubby crew at best, ought always to honor their random readers with a sort of *caveat lector*—a full disclosure of such personal relationship, hot or cold, with a book's author as prompts a prejudiced plug or a prejudiced panning. In just this spirit, let me confess that I plan, with bias aforethought, both to plug and to pan Jerome Frank's "Courts on Trial." As a passionate admirer, personal and professional, of Judge Frank, his works and his ways, I cannot but call his latest book a brilliant, eloquent, wise, witty, go-buy-it-and-read-it job—all of which by sheer happenstance, it is. As a congenitally cantankerous character who would fall over backward any day to avoid the pleasure of over-praising a friend, I cannot but stress the flaws I found in "Courts on Trial," even though their argumentative mention here may seem perhaps to inflate them beyond their actual or relative importance. So much by way of full—or fulsome—disclosure.

Coincidentally, full disclosure—in a slightly different sense—is the very essence of Judge Frank's book. The Judge believes that judges should toss away their robes and appear on the bench as what they are, men; one of his 32 chapters deals delightfully with the absurd and anti-democratic anachronism of the judicial uniform. But the whole of his book is itself a disrobing of another and more meaningful kind. With a forthrightness rare—even, in spots, unique—

22. The statute is cited and discussed in KURATOWSKI, *A General Outline of Some Principles of Conflict of Laws in Poland*, STUDIES IN POLISH AND COMPARATIVE LAW 110 (1945).

23. Sec. 44-6 of the Act dated March 11, 1948, reprinted in 33 JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW (3rd series) 78, 83 (1949).

24. 2 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 440 (1947):

In conclusion, the task of the court is this: it has, in the absence of an agreement, first, to state whether the individual facts of the contract are colored by a certain law; if not, second, whether the contract belongs to a class typically centering in a certain country. This inquiry has to be done in full consideration of the circumstances personal and economical, but without inferring judicial or state policies.

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for a practicing judge, he strips from the whole judicial process, from the business of "court-house government" as he calls it, all the flimflam and the flummery about the "majesty," the "certainty," the "predictability," the "scientific" and "logical" nature of the law, and leaves it stark naked as a chancy and fallible process which manages to achieve justice—if and when it achieves it—mostly by-guess-and-by-God and by the goodwill and good sense of human beings.

Not that this tonic thesis, as sketchily outlined here, holds in itself much of surprise or novelty for any but the dim-witted among lawyers. But Judge Frank aspires, as have others before him, to that vast and credulous audience of laymen whom he would unfool, in the name of democracy, about the way courts work, and whom he would then enlist in a crusade to make courts work better. In thus appealing over the heads of his own craftmates to the citizenry at large, he imbues the old thesis with such a wealth of new insights, new wrinkles, new analyses and analogies that the book should make refreshing and provocative reading to even the most sophisticated of the legal clan.

For Judge Frank, in the breadth and scope of his curiosity and knowledge, comes about as close as anyone I know to being the modern counterpart of the fabulous "compleat man" of medieval and earlier times. His book abounds with eclectic references to anthropology, psychology, philosophy, literature, mathematics, physics, even music, and with casual quotations from pundits, past and present, in these and other fields of learning. So familiar is the Judge with all this stuff, and with his more legal material as well, that he frequently forgets to footnote for sources the quotes and paraphrases he tosses off in such profusion; indeed, one of my minor gripes at his book is the favoritism of his footnoting system, whereby every tiny allusion to his own earlier writings is meticulously guide-posted at the bottom of the page but other authorities are not always so honored and, in some instances ("one judge has said," etc.) are not even named. The amazing variety of Judge Frank's mental storehouse and his somewhat free-association method of delving into it rob his book of anything resembling continuity; his argument doesn't march, it scatters and deploys. Yet he never loses sight of his main objective—the exposure of court-house government—even though, like Lewis Carroll's Snark-hunters, he may seek it with thimbles and seek it with care and pursue it with forks and hope and threaten its life with a railway share and charm it with smiles and soap.

Despite the kaleidoscopic content of "Courts on Trial," despite many minor forays, despite the numerical listing toward the book's end of thirteen suggested reforms and several sub-reforms, it is not, I think, over-simplification to attribute to Judge Frank one major theme which dominates his book and two lesser and related themes which he specially seems to relish. His major theme is that fact-finding, as handled by trial courts (which courts, he says, decide 98% of all law cases) is so utterly unreliable and hap-hazardous a process that

our whole legal system, with its rules and reasoning and supposed stability resembles a pretty palace built on sand. His specially relished lesser themes are (1) that the greatest single obstacle to effective fact-finding is that old symbol of freemen, the jury, which he would ring round with restrictions and almost abolish; and (2) that much, if not most, of the blame for the general neglect of our trial courts and hence for their continued slipshod performance, can be laid to American law schools with their top-heavy and almost exclusive emphasis on upper-court law. Let me take a few snipes at these two last notions before tackling Judge Frank's pet ogre—trial court fact-finding.

When the Judge attributes largely to the kind of education lawyers get their astigmatic disinterest in trial courts, he picks on the wrong whipping-boy and, just to mix a metaphor, puts the cart before the horse. True, our law schools do, universally, stress and overstress upper-court stuff and hence turn out, for the most part, library lawyers. True, the institution of law-school clinics, where students could work on real cases from the ground up, as Judge Frank proposes, would be a helpful, healthy innovation—if the bar would bother to cooperate. But for any substantial shift of attention from upper courts to trial courts, Judge Frank had better forget the law schools and start reforming the profession first. So long as our bar, by contrast to Britain's, rates trial lawyers a lesser breed (and looks languidly on trial judgeships as political plums), so long as the big money and the big prestige go, with rare exceptions, for upper-court brief-writing, upper-court advocacy and library-wise legal counsel, so long as the lawyers who hire law school graduates—in government as well as private practice, in small towns as well as large cities—care far more today that a man can read a revenue act or distinguish a precedent than that he can cleverly cross-examine a witness, just so long will our law schools remain essentially upper-court, library schools. Judge Frank is being uncharacteristically unrealistic when he asks (just one more metaphor) that the tail wag the dog.

The question of trial by jury—boon or bane?—is infinitely tougher. There is much to be said for Judge Frank's view that juries are stupid, ill-informed, swayed by emotion and prejudice, indifferent to legal rules, unscientific in reaching their verdicts—and he says all of it. If he sometimes loads the dice a little, that is the privilege of an advocate—and the Judge is here a most ardent advocate of the jury's near-extirmination. If he seems just a trifle inconsistent in wanting court judgments made by educated men and yet balking at blue-ribbon juries, consistency is not invariably a virtue. If he even verges on the anti-democratic in his utter mistrust of the common man's ability to make commonsense decisions, this touch is so completely out of tone and character as to be branded aberrational. All this aside, the fatal flaw in Judge Frank's excoriation of juries is im-

plicit in his own ideal remedy; in all but "major criminal cases," he would simply replace juries with judges. Yet judges too can be stupid, ill-informed, swayed by emotion and prejudice, indifferent to (or muscle-bound by) legal rules, unscientific in reaching their decisions—as Judge Frank is well aware. Indeed, the chapter which follows his diatribe against juries is titled "Are Judges Human?" and his eleven-page answer is Yes. Then, on page 180—(Our Forgetful Authors?)—Judge Frank writes: "In assuming that upper-court and trial-court decisions are equally susceptible of prediction and criticism, conventional legal thinking blunders egregiously. It forgets that a trial judge, faced with oral testimony does not wholly differ from a jury. Lord Bramwell once observed: 'One third of a judge is a common-law juror if you get beneath his ermine'; and Mr. Justice Ridell added that 'the other two-thirds may not be far different.'" *Ipse dixit.*

When Judge Frank says, "More than anything else in the judicial system, the jury blocks the road to better ways of finding the facts," he makes clear how high in his hierarchy of reform he rates his stuff on juries—for, as earlier noted, his plea for improvement in fact-finding techniques is the dominant theme of his book. So recurrent is his deliberate repetition of this theme, with and without variations, that when I came to a chapter frankly titled "Da Capo," it struck me that it might still better have been titled, after the last line of the limerick, "Again and Again and Again."

The theme itself is indubitably sound and Judge Frank may be pardoned for pounding it home by the fact that it has been so conspicuously neglected by even the most realistic and skeptical of legal critics. (The Judge pounces gleefully on this fact too and worries it with much warrant, tho it does seem a trifle monomaniacal to chide St. Thomas Aquinas, along with the moderns, for overlooking fact-finding.) What Judge Frank preaches is this:—that in any case where the facts are in dispute and where oral testimony enters, a myriad of fluid, unreliable, distorting human factors interpose themselves between the actual facts of a case, as they happened, and the "facts" that a court—judge or jury—will "find" as the basis for decision. Hence no decision, regardless of rules, is ever certain or predictable in such a case, and lawyers who claim otherwise are knaves or fools.

Now it happens that Judge Frank's fluid human factors which prevent precise fact-finding fall, by my judgment, into two groups although Judge Frank does not so divide them. One group might be called the inevitable factors—the factors which would still be present if every person in the courtroom were completely honest, completely impartial, and reasonably intelligent. They include the fallibility of witnesses' powers of observation and perception; the fallibility of witnesses' memories; the fallibility of witnesses' efforts to communicate in speech things "remembered" as having

been "seen"; the fallibility of judges' or jury's powers of observation and attention; the fallibility of judges' or jury's memories of what they think they hear; and the ultimate fallibility of any human attempt to pull a strictly mechanical judgment about alleged facts out of an emotion-laden pre-conception-filled human mind. None of these muddying or distorting factors can ever be completely eliminated from any effort to recapture past facts in any kind of court.

But the second group of factors that impede more accurate fact-finding in our courts today are not so inevitable. They include the deliberate or unwitting bias of almost every witness in favor of the side that calls him to testify and the consequent loading of the "facts" he reports or fails to report; the effect of the dramatic, contentious atmosphere of the court-room on even the most unbiased witness and hence on his ability to tell a calm, straight story; the effect, on witnesses' reporting of the facts and on judge or jury's comprehension of those facts, of the countless stratagems, tactics, wiles and ruses which lawyers use to point up favorable testimony and discredit the unfavorable; the effect of all the elocutional tricks of the trial lawyer's trade that play on the emotions and prejudices—as opposed to the reasoning processes—of judge or jury; in short, the factors which make our trials far less a sensible search for truth than what Professor Morgan of Harvard has called "a game in which the contestants are not the litigants but the lawyers." These factors Judge Frank recognizes and discusses; it is largely in order to minimize their harmful effects that he would substitute his smart judges for his stupid juries and that he proposes several other peripheral and partial reforms. But nowhere does he specify that *all* these not-so-inevitable obstacles to accurate fact-finding stem from one single basic root. That root is the adversary nature of all our court-house government—our stubborn retention of a somewhat more civilized form of trial-by-combat as the foundation of all that we call law.

The most interesting and revealing chapter of Judge Frank's book, to me, is the one entitled "The 'Fight' Theory versus the 'Truth' Theory." In it, as its title implies, he does indeed lay in part to the adversary nature of our court proceedings some of the fact-finding impediments he deplors. In it, he does suggest a few measures beyond his pet judge-for-jury switch to reduce the more extreme unfairnesses that result from adversary proceedings. But the Judge here shrinks, in a way that must have troubled his bold mind, from following his brilliant analysis straight on through. Early in the chapter, after listing some of the more blatant ways in which trial-by-lawyers'-combat makes a farce of fact-finding, Judge Frank says "I think . . . an improved system can be contrived"—and my note in the margin reads "Swell; go on." Later, after the Judge has proposed a couple of mild reforms, he says defensively, "Trials would still remain adversary"—and my marginal note asks "But why?"

At the chapter's end, Judge Frank opines that "to treat a law-suit as, above all, a fight surely can not be the best way to discover the facts"—and my note sighs "This is where I came in."

What Judge Frank shrinks from, of course, is a flat proposal that we completely abandon trial-by-lawyers'-combat—an anachronism at best and an outrage at worst—as a way of finding the facts that underlie law disputes. Why—except from a lawyer's selfish standpoint—not? Lawyers could still argue upper-court cases and still argue, in trial courts, about points of law (but not about our silly combat-minded rules of evidence, which could be largely discarded). Lawyers could perhaps help their clients dig up evidence and witnesses before trial, though this would tend to a continuation of the present practice of witness-coaching and though Judge Frank suggests—and I more than agree—that it would be fairer to provide litigents with government-paid experts to do much of this job. But in court, the lawyers, if present at all, would have to keep mum while the facts were being found. The judge, informed briefly beforehand of the nature of the factual issues, would question the witnesses, call for other witnesses, and—whether or not a jury was sitting to hear and judge the evidence—would completely run the fact-finding show. Indeed, a trial would no longer be a show, an emotion-charged combat between word-wielding gladiators, each out to win at any cost; it would instead be a sensible, civilized, far more rational search for objective truth.

If such a proposal seemed to radical or utopian for Judge Frank to contemplate, I suggest that the increasingly popular use of arbitration to settle disputes—to which the Judge devotes only a couple of skimpy pages—is already a definite step in this direction. I also suggest that the compulsory psychoanalysis of every prospective judge, which Judge Frank does propose, is no more utopian or radical. Yet I grant that when I expect a member of the legal profession to propose that facts be found in law cases without benefit of lawyers—or when I complain that he does not propose it—I am asking for the moon. That, however, is one of the penalties of writing a book like "Courts on Trial." For the moon does not seem too much to ask of an author as perceptive, as tough-minded, and as courageous as Judge Jerome Frank.

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