

assumptions about the minimum intelligence and good will of the audience which is to be allowed to hear; and if so, do not all positions on free speech turn on the size of the elite that is permitted to hear everything? Does not a totalitarian government also use a clear and present danger test? Is the case for free speech ultimately that it is a necessary evil, or is error itself of affirmative value? Is not the controversy in a particular instance more about the degree of danger in that instance than about the degree of danger demanded by the principle?

The last question suggests one final and disturbing point. Why are the defenses of free speech, even the coolest of them, so rhetorical?⁵ The point is disturbing because it suggests that this apparently secure value judgment may be hard pressed after all. It arises perhaps from the familiar dilemma that no one seeks to protect all speech, and yet we wish to give it a significantly distinctive degree of protection. In the attempt to protect our position from those felt to be less tolerant, there is the disposition to retreat into epigram and exhortation in stating the principle and the tendency to win handily all cases except those which in fact arise.

This book, however modest the editorial task it performs, is welcome and useful because it makes more accessible important materials on what will always be one of the best of issues.

HARRY KALVEN, JR.*

Courts on Trial. By Jerome Frank. Princeton: Princeton University Press, 1949. Pp. xii, 441. \$5.00.

A few years ago, a learned layman asked a serious-minded lawyer friend if he could give him a quick definition of the "judicial process." The lawyer obliged by defining it as "the ascertainment of the *facts* in a legal dispute, and finding and applying to them the appropriate *rule of law*." "That," countered the layman, with a facetious twinkle, "is 50% more than one of your distinguished colleagues would care to admit. For I have just finished reading Jerome Frank's *Law and the Modern Mind* in which he contends that the 'rule of law' is *always* so uncertain that it can never be found. Therefore, I take it, the 'judicial process' is just the ascertainment of 'facts'!"

I wonder what the layman would say if he read Jerome Frank's latest book, *Courts on Trial*, in which it is now contended that *facts* in a legal dispute are so uncertain that they can never really be found. "My goodness," he might be

in mind. On the other hand Milton is able to make a brilliant defense without recourse to the role of speech in the democratic process, despite the fact that he appears to regard the mass of mankind unflatteringly. Chafee questions whether Meikeljohn does not push this so far as to undermine the protection of scientific and artistic speech, which is without political significance.

⁵ The *Areopagitica* remains the arsenal for rhetorical arguments. We find repeated today such refrains as that we are copying our enemies; the regulation is an insult to the country, the youth, the teaching profession; the regulation is impractical; that a first step here will lead at once to a hundred others, etc.

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prone to remark, "first 'law,' and now the 'facts'! Is there nothing left of the 'judicial process'?"

Of course, this is all exaggerated, but beneath the caricature of any exaggeration is an underlying grain of truth.

Judge Frank's present concern is with the spuriousness of "fact" determinations by trial courts—a seemingly inherent condition which arises out of the "subjective" nature of "fact finding." To him, "the trial court's facts are not 'data,' not something that is 'given'; they are not waiting somewhere, ready made, for the court to discover, to 'find.' More accurately, they are processed by the trial court—are, so to speak, 'made' by it, on the basis of its subjective reactions to the witnesses' stories." To be sure, says the author, "facts" as they *actually* happened have been "twice refracted"—first by the witnesses, and second by the judges, who themselves are witnesses of what goes on in the courtroom. "Thus we have subjectivity piled on subjectivity." "A trial court's finding of fact is, then, at best, its belief or opinion about someone else's belief or opinion." And when this "belief or opinion" is based upon a "mistaken" view of the credibility of witnesses, on false impressions made on the judge and jury by the irascible or overscrupulous, it is obvious that a miscarriage of justice results. For even assuming that it is possible to ascertain "the correct legal rule" applicable to a situation (a view to which Judge Frank has at last openly subscribed), what if the trial court applied such a "rule" to the "wrong facts"? "Then," according to Judge Frank, "injustice results fully as much as if the court had applied an incorrect rule to the actual facts."

To allude to a "mistake about the facts," or "wrong facts," would seem to imply a standard of *correctness* as to the facts; otherwise the terms would have no meaning. Judge Frank, however, states that "no means . . . have as yet been discovered, or are likely to be discovered, for ascertaining whether or to what extent the belief of the trial judge about the facts of a case corresponds to the objective facts as they actually occurred, when the witnesses disagree, and when some of the oral testimony, taken as true, will support the judge's conclusion. In other words, in such a case there is no objective measure of the accuracy of a judge's finding of the facts. There exists no yardstick for that purpose." But if this be true, there would be no valid basis for Judge Frank ever asserting that the "facts" in any such case were ever "wrong" or "mistaken." Better yet, how, on the basis of this assumption, could one take seriously some of the author's suggested reforms—that we encourage the use of experts to testify concerning the "detectable fallibilities of witnesses," that trial judges publish "findings of fact," that "fact-verdicts" be required in jury trials. For without any test of the accuracy of facts, how can one, in such a case, ever judge a witness to be "fallible"; and why bother with "findings" or "fact-verdicts"? If the premise (the absence of any objective yardstick) is correct, these conclusions (in the form of recommendations) must fall; if the conclusion is correct, the premise must fall.

Perhaps the difficulty of Judge Frank's position may be obviated by a re-examination of his major premise. It is true, as he points out, that the "facts" with which a trial court deals are in the past, and can never be recovered for the purpose of verifying the hypothesis that had been inferred from them. One cannot, for example, roll back the past to test conclusively the finding of "fact" that a plaintiff lost his leg because the railroad failed to repair a defective brake on a freight car. Proof in such a case, in the nature of things, must be by probable inference from the present: from written documents the authorship or authenticity of which may often be in question, from oral testimony of witnesses whose veracity may often be in doubt. But Judge Frank insists that proof by probable inference is purely "subjective"—indeed, "probability" is merely a "feeling" and, as such, "varies from man to man." Of course, if this is so with respect to the ascertainment of past facts in trial proceedings, it must also be so with respect to all of history. For the domain of history obviously is with the past. One cannot completely and conclusively prove that Roosevelt was President of the United States, because the past cannot be re-created for the test. But surely Judge Frank would not contend that proof of this "fact" by probable inference from present evidence was "subjective," and varied "from man to man." To do so would deny any semblance of authenticity to any historical data—including the data to which Judge Frank himself so eruditely alludes throughout his book.

To be sure, many inferred past "facts" are deceptive, but this does not mean that there are no methods *at all* for exposing a hypothesis concerning "facts" to critical objective evaluation. The canons of evaluation are *ex necessitate rei* based on probabilities, but to the extent that they aid in reducing the margin of probable error, the arbitrariness of purely "subjective" judgment is reduced. There are calculable consequences which a past event may have in the present: for example, the receipt of a reply would probably confirm the inference that a letter was written. Events may be described by a witness that contradict well-established principles of the natural sciences. There is the probability that honest, competent witnesses will be consistent with themselves. These and other canons, based on human experience, surely are available to reduce the arbitrariness of a judgment left solely to "subjective" chance. As for the observation that "probability" is merely a "feeling," Judge Frank should ponder carefully the views of two distinguished students of logic and scientific method: "Questions of probability, like questions of validity, are to be decided entirely on objective considerations, not on the basis of whether we *feel an impulse* to accept a conclusion or not."¹

Shorn of the excesses of nominalism and psychiatric lore, Judge Frank's *Law and the Modern Mind* did a great deal to awaken students of the law from a state of ivory-towered stupor; it illuminated many unexplored realities behind legal processes. Shorn of the excesses of "subjectivism," his *Courts on Trial* does a

¹ Cohen and Nagel, *An Introduction to Logic and Scientific Method* 157 (1934).

first-rate job of spotlighting a neglected area surrounding one of our most important institutions of law—the trial court. His plea is that greater attention be given to the “fact-finding” procedures in legal controversies. He points to the grave injustices that arise not only from the use of faulty procedures, but also from the inability of those with limited resources to cope with them. His suggested reforms in legal education and trial court procedures—aimed at facing “courthouse realities”—merit the serious consideration of all of those who are interested in cleaning up the debris of our own back yard before being concerned about the lack of democracy abroad.

JULIUS COHEN*

The Law of Real Property, Vol. I. By Richard R. Powell. New York: Matthew Bender & Company, 1949. Pp. xiii, 792. \$16.50.

This is the first volume of a five-volume treatise on land law. Those who as students, colleagues, American Law Institute associates or otherwise know Professor Powell, his industry, his keen intellect, his lack of prejudice and accessibility to new ideas, will expect great things of these books. When a man of this kind has devoted himself for so many years to the study and incidental practice of land law, it is appropriate that he should be recognized as this country's master of that important field of the law. One is curious, then, to see what the master can do with the subject. Is the subject such that it is susceptible of masterful treatment?

The philosophical discussion in Chapter 2 of the Social Evolution of the Institution of Property is well done. It leaves with lawyers an admonition that they have an opportunity and a responsibility in relation to the constantly changing concepts of property, to shape them for the good of society. It is likely, however, that in the future as in the past, the lawyers' part will be to set brakes against the pressures for change that are exerted by others, to keep the changes from coming too fast.

Chapter 3, English Background on Land Tenure, probably makes as vivid as possible in a short treatment the way in which land tenure operated and developed in England from the time of the Conquest down to the beginning of our American land law. This is interesting history, is something which a cultivated lawyer should know, at least superficially, and is always given some space in a treatise on land law. I doubt, however, that it has had any substantial effect upon American land law. The interests which are permitted and recognized at the present time are the interests which the practical needs of our situation called for. It is not surprising that those interests coincide, in many respects, with those in historical England, or with those in other developed countries, historical or modern.

The treatment in Chapter 4, on pages 73 to 93, of the economic, political, so-

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