

JUDGE JEROME FRANK: AN AUSTRALIAN NOTE OF APPRECIATION

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UNLIKE SEVERAL other Australian law teachers who have spent some time in the United States, I was never fortunate enough to meet the late Judge Jerome Frank. I spent some days at Yale in 1953 and had hoped to meet him and to attend some of his classes, but he was engaged elsewhere in his judicial capacity, and my hopes were disappointed. My knowledge of him therefore is from his written words and from those indirect but significant clues gathered from the effect he or his writings have had on other people.

I am told that the invitation extended to me to contribute to this memorial issue was inspired by the Editors' surprise when they learned that Australian law students knew about Jerome Frank. If this is so, it is perhaps appropriate to begin by saying something about the impact that he has had on our law students.

It is necessary, however, to remind the American reader that the course of Australian legal development through the last hundred and fifty years has followed English development very closely. It is really only in this decade that our higher courts are beginning to question the opinions of English appellate courts. In the past those opinions have been followed almost slavishly.

Furthermore, the traditions of the courts and of the legal profession of England were carried over unbroken to Australia, and the line is unbroken yet. Our court architecture resembles that of England and Ireland. Our judges and our counsel dress in court very much as they do in England. And those are not just accidental and historical symbols from which no inferences should be drawn. They symbolize a common development and a substantial unity which is cherished. Similarly, it is possible still to speak of the Common Law of England as being the basis of the law applied in each State of the Commonwealth of Australia. Whether that Common Law is a mere "brooding omnipresence in the sky" or not, it has not been fragmented as in the United States. The fact that our federal Supreme Court is a general appellate tribunal for all the States of the federation is, no doubt, the main factor producing in our federation, in other respects so like your own, that marked difference from the situation in the United States.

Thus, in spite of the complete political and legal independence from England enjoyed by Australia for the greater part of this century, most things which

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can be fairly said of the English judicial system can be said as fairly of the Australian.

It is not surprising in these circumstances that our legal education substantially followed the English until very recently. English methods and English texts were and are dominant. Langdell and his followers did not touch us. James and Dewey were not read by lawyers. But a door was open nonetheless. One legacy the English gave us in legal education, which most American law schools still do not enjoy, was a course in jurisprudence as a necessary part of a lawyer's education. Through that door Jerome Frank came to the Australian student.

It would be too much to say that *Law and the Modern Mind* appeared like a new comet on the student's horizon of the early thirties. I suspect that the only copy in the law school at Melbourne was in the hands of the Professor of Jurisprudence.¹ Through Professor Paton's lectures the students were at least introduced to Jerome Frank. It is true that the introduction was part of a brief description of the views of those writers who were being loosely lumped together under the name of "American realists." It is also true that the main reference to Frank was no doubt made in the context of what has sometimes been called "digestive jurisprudence."² He was taken as an example of the left wing of the so-called "realists." His exposition of the importance of the personal idiosyncracies of judges in determining actual decisions was emphasized. The comment that "the bar has always studied the human personality of judges, but it has been too modest to dignify such research by the name of jurisprudence" later appeared in Professor Paton's *Textbook of Jurisprudence*.³ An eminent Australian judge dismissed *Law and the Modern Mind* by saying that to be told his decisions depended upon the state of his liver did not help him to reach a decision in any particular case.⁴

But such is often the early fate of the iconoclast, the vehement critic of established habits of mind, the rebel, the prophet, and Jerome Frank was at least the first three of those.

The picture through the last ten years and more is different.⁵ Of the "reserve" books for the use of students in the Melbourne University Law Library *Law and the Modern Mind* and *Courts on Trial* are among those volumes showing the most desperate signs of use. Students devour them with shock, surprise and delight. I should point out that few students would read any of

¹ Professor Sir George Paton.

² Cf. Sir Carleton Kemp Allen: "It was perhaps appropriate that the age of jazz should produce a 'jazz jurisprudence.'" *Law in the Making* 45 (4th ed., 1946).

³ Paton, *Text-Book of Jurisprudence* 21 (1946).

⁴ Frank would have said that such a judge would not usually have sufficient knowledge of his liver to allow for its effects.

⁵ The references to *Law and the Modern Mind* in Paton's second edition are much more receptive and understanding.

Frank's works until they reached their fourth year of legal studies. By that time they are comparatively well grounded in the various branches of substantive law and are perhaps over impressed with its system, authority and certainty. They are ripe, therefore, to be provoked into questioning many of the assumptions, doctrines and practices about which their work has revolved. At the same time they are sufficiently well informed to detect and to make some necessary allowances for Frank's exuberance and overbalancing vigour, his superficialities and his too-bold generalizations.

Frank's written work, then, has taken an important place in the education of our future lawyers.⁶ If the marks of a great teacher include the ability to hold students' attention, to excite them to think furiously, to force them to question the platitudes of their time and to form their own views on the live issues of their day, then Frank in those respects was a great teacher indeed.⁷ There is no doubt that as such a teacher he will live on through his writing for many years, filling a place which is secure and peculiarly his own.

This is neither the time nor the place for a non-American to attempt an assessment or a criticism of his work as a jurist and as a scholar. It is clear that his influence as a teacher and as a stimulator stirred not only law students, but also much larger and more immediately important audiences. His aim was reform and, to that end, clearer vision of the tasks to be performed by lawyers. His most important and his most telling attack was aimed at the fact-finding processes of the courts as we know them.

In 1948 he wrote that those persons unfortunately called "legal realists" might be roughly divided into two groups:

1. The first and larger group (of whom Llewellyn is representative) may conveniently be labeled "rule-skeptics." They resembled Cardozo in that they had little or no interest in trial courts, but riveted their attention largely on appellate courts and on the nature and uses of the legal rules. Some (not all) of this group (Oliphant being the most conspicuous here) espoused the fatuous notions of "behavioristic psychology." Some (not all) of these "rule-skeptics" went somewhat further than Cardozo as to the extent of the existent and desirable power of judges to alter the legal rules.

2. The second and smaller group may conveniently be labeled the "fact-skeptics." They importantly diverged not only from conventional jurisprudence but also from the "rule-skeptics." *So far as appellate courts and the legal rules are concerned, the views of the "fact-skeptics" as to existent and desirable legal certainty approximated*

⁶ I believe it is the work of his later years, produced after he had had considerable experience on the bench, that is the more valuable in this respect. His work as a "fact skeptic" is more compelling and more thorough than his work as a "rule skeptic." Most of the things he said about the nature of legal rules and their place in the scheme of things have been better said by others.

⁷ I am told that he was even more effective in person than he was through the written word; that his classes at Yale were like others only in that they began at a fixed time; that the students' demands did not permit of any time certain for their duration.

the views of Cardozo, Pound, and many others not categorized as "realists." The "fact-skeptics" divergence sprang from their prime interest in the trial courts. Tracing the major cause of legal uncertainty to trial uncertainties, and claiming that the resultant legal uncertainty was far more extensive than most legal scholars (including the "rule-skeptics") admitted, the "fact-skeptics" urged students of our legal system to abandon an obsessively exclusive concentration on the rules.⁸

In passing it is intriguing to note this change of attitude towards law seen as rules and principles since Frank wrote *Law and the Modern Mind*. Might it not be that his experience on the bench worked that change, however slowly? Perhaps as a Judge, Frank came to see that the rules and principles of the law, the primary material for jurisprudential study hitherto, had more significance and more reality of operation than he had allowed them in his role as a "rule-skeptic" in *Law and the Modern Mind*.

So far as I am aware he never admitted to such a change of view expressly. In the preface to the sixth printing of *Law and the Modern Mind* he briefly stated and as briefly answered many of the criticisms which had been levelled at the views expressed in that book. He nowhere resiles from those views, nor does he modify the parts of the work where he was being a "rule-skeptic." And yet his treatment there of the views of Pound and Cardozo would not lead one to believe that "so far as appellate courts and the legal rules are concerned, the views of the 'fact-skeptics' as to existing and desirable legal certainty approximated the views of Cardozo, Pound and many others not categorized as 'realists.'"

What is clear is that after he was elevated to the Bench, Frank became more and more concerned with the problems of the practical administration of justice from particular case to particular case, with the processes of fact-finding, and with trial court practice generally. *Courts on Trial* brought between the covers of one volume his thoughts on those matters which had previously appeared in a number of different publications.⁹

His constant cry was that it is waste of breath to speak of the certainty and coherence to be discovered or produced in a system of legal rules and principles if all the time the uncertainty and irrationalities of trials were the basis for the operation of any such rules or principles. Paton, in his second edition, made somewhat lukewarm recognition of this when he said: "If the realist plea is that the courts should improve the technique for finding facts, then the school emphasizes a point that was not sufficiently stressed in the past."¹⁰

For too long have those who have inherited the common law tradition inherited also the common lawyers' complacency with court practices and pro-

⁸ Frank, Cardozo and the Upper-Court Myth, 13 Law & Contemp. Prob. 369, 384 (1948) (italics added).

⁹ E.g., *If Men Were Angels* (1942); *Say it with Music*, 61 Harv. L. Rev. 921 (1948); *Cardozo and the Upper-Court Myth*, 13 Law & Contemp. Prob. 369 (1948).

¹⁰ Paton, *Text-Book of Jurisprudence* 20 (2d ed., 1951).

cedures. In these matters reform has usually been slow, and the lawyers themselves among the most conservative in their attitudes. To read of the great procedural reforms in England during the nineteenth century (some of which I understand are not yet enjoyed by some jurisdictions in the United States), and to read the laudatory defences made then of established rules which seem to us now unbelievably grotesque, should be enough to warn us of the twentieth century to look to the efficiency of our own techniques. But, as always, the vast majority of lawyers are too occupied with mastering the established techniques, and with their application from day to day, to question them persistently enough or to re-assess their operation against the purposes for which they were established. In England for too long the law schools have stood aloof from such things, drawing a hard line between the practice of the law and academic study of it, and excluding from the latter all real interest in the procedures and techniques of practice. In Australia the line has not been so sharply drawn, but that fact serves rather to give hope for the future than satisfaction with the past.

There is no reason why those who have the time, the facilities and the inclination for research and analysis should not make the problems of the trial court a major field of study. Frank's most important plea was that they should do so.¹¹ Frank said: "To improve the administration of justice we need, at a minimum, to overhaul our jury system; to revise our evidence rules; to give special training for the trial bench; to augment (without displacing the essential aspects of the adversary procedure) the responsibility of government for insuring that all important and practically available evidence is presented in trials."¹² Without mentioning other matters which Frank felt needed reform, there is enough for a large beginning. If Judge Frank's work leads to effort in those areas comparable to the effort which has been directed to the study of substantive rules, then his name might well be enshrined for all time in the annals of the common law. In any case, he is read and will be remembered by this generation of lawyers outside his own country.

¹¹ In 1953, the late Lord Cooper, with the freedom proper to a Scot speaking of the English, urged the law schools to undertake a study of procedural problems, with the aim of reform, with the same vigor they had given to the study of substantive rules of law. 2 *Journal of the Society of Public Teachers of Law* 91 (1953).

¹² Frank, *Cardozo and the Upper-Court Myth*, 13 *Law & Contemp. Prob.* 369, 389 (1948). And he said similar things and at much greater length in many other places.