

Not Guilty. By Judge Jerome Frank and Barbara Frank. Garden City, N.Y.: Doubleday and Co., Inc., 1957. Pp. 261. \$3.75.

According to Judge Frank's daughter and collaborator, final corrections in the manuscript of this volume were made only two days before her father's death. In *Not Guilty*, Judge Frank returned to issues which had frequently engaged his attention in his earlier writings—the problems of procedural efficiency and decency, the fallibility of the fact-finding process, and the means by which the margin of institutional failure may be reduced. Illuminating the discussion is Judge Frank's old faith in the efficacy of human intelligence to comprehend and solve human problems. There is the same ill-concealed scorn for those who condemn the skeptical and inquiring mind as dangerous or indecent. In his first book, Judge Frank wrote: "But just in proportion as [one] learns more about what was previously unknown, he reduces his chances of being crushed by unobserved dangers."¹ One must not expect to find sympathy here for the view that we ought not to talk about problems of convicting the innocent because this will "create public cynicism and impair public confidence in the machinery of justice" (P. 37).²

Not Guilty consists of a series of case histories of persons convicted of criminal offenses in the United States, whose innocence was later established. Accompanying the histories are comments analyzing the causes for the failures of justice and suggesting solutions for the problems so identified. The concluding chapter is given over entirely to comment and summary. Barbara Frank tells us that she was primarily responsible for preparation of the case narratives and Judge Frank of the comments but that each author contributed to the other's work. While, in what follows, I shall attribute most of what is said to Judge Frank, this will be done for convenience and with full recognition that the book is the product of joint authorship.

A book dealing with such subject matter and employing such a technique necessarily invites comparison with Borchard's classic work, *Convicting the Innocent*, published just a quarter-century ago. It must be admitted that there are many points in common. The general plan of the Franks' book is strikingly similar. Both books discuss many of the same problems and agree at many points in analysis and recommendations. But there are differences. None of the cases discussed by the Franks appeared in the earlier volume. Most occurred after the Borchard book was published. But the contributions of *Not Guilty* are not simply cumulative. At many points Judge Frank's comments are fuller and contain a greater thrust. Moreover, the new book is more obviously directed to a lay audience than Borchard's rather formidable volume. It is only about half as large. In none of his writings did Judge Frank

¹ Frank, *Law and the Modern Mind* 159 (1930).

² Page references, unless otherwise indicated, refer to the volume under review.

wear his learning so lightly. It is certainly worth recording that, apart from a table of sources, not one footnote is included!

If it were not already obvious enough, *Not Guilty* demonstrates that it is possible for innocent persons to be convicted of serious crimes in the United States, sometimes of capital offenses. In some cases the hazard is far from remote. Certainly, the plight of the impoverished accused with a criminal record, who is brought to trial for a crime which has produced community outrage, presents a series of problems which has insufficiently engaged the public conscience and concern. In looking over the materials which the Franks present, one is inclined to conclude that the failures of justice related can be largely attributed to three basic factors.

First is the problem of misidentification of the defendant by the victim or other witnesses. The magnitude of the peril clearly emerges from Borchard's work. But it is even more dramatically demonstrated in this volume. In some thirty-six instances of conviction of the innocent presented by the Franks, misidentification of the defendants played a part in about three-quarters of them. In the case of Shepherd, a completely innocent man was twice convicted of forgery on the erroneous identification of witnesses and narrowly escaped two other convictions for similar crimes, once by the failure of the grand jury to indict and once by the confession of the true criminal while charges were pending against Shepherd (Pp. 76-78). Strangely enough, the importance of misidentification has provided comfort for those who complacently defend American law-enforcement procedures. Such failures of justice, it is said, are the inevitable result of human fallibility about which nothing significant can be done. But the Franks' volume demonstrates that many of the errors are not inevitable. Some stem from innocent, but unenlightened, identification procedures of the police. For all our ignorance, enough is known about the processes of perception, memory, and bias to make important improvements in such procedures as the line-up and other identification devices. But not all the mistakes are innocent. Instances of police and prosecution coaching of witnesses occur. In the Majczek case the chief prosecuting witness was apparently coerced into a misidentification of the defendant under a threat of retaliatory prosecution directed against her. Such examples are fortunately rare. But all too often both police and prosecutors are too easily satisfied with statements of witnesses identifying the suspected party as the culprit and, as a result, fail to make thorough investigations of defendants' alibis or other circumstances favorable to the defense.

Second is the problem of poverty. Men are convicted—no one knows how many—whose "only crime is that of being poor" (P. 86). The appointment of counsel for indigent defendants is a necessary, but only a small, part of the solution. For, assuming that the appointed lawyer is highly competent (many are not), a defendant may find himself helpless for lack of funds

to search out witnesses or documents or to employ competent expert witnesses. This volume provides a wealth of examples.³ It should be realized that the problem of inadequate means is not simply that of those defendants who are totally indigent, but extends to those who have enough to employ counsel and little more. Such a defendant lacks the resources for investigation, limited as they are, which are sometimes made available to the pauper by a public defender's office. Thus, Judge Frank asserts, "The innocent white-collar defendant in a large city is . . . ordinarily, more likely to be convicted than if he were wholly destitute" (P. 89). Only recently, the Supreme Court of the United States has held in *Griffin v. Illinois*,⁴ that a state may not deny a convicted criminal the right to ordinary appellate review because of his lack of means to supply a stenographic transcript of trial proceedings. Curiously enough, some have seen in the *Griffin* holding a bold and radical step. On the contrary, it hardly scratches the surface.

The third broad consideration which goes far to explain these failures of criminal justice is the fact that in the American culture, law-enforcement officers are often supplied motives which lead to results other than the conviction of the guilty and acquittal of the innocent. In some regrettable instances, peculiarly outrageous crimes have resulted in a demand on the part of the public and the officials that someone—anyone—be made to suffer in consequence. Such a spirit seems to underlie the conviction of Majczek in Illinois, where the victim of the murder was a policeman. Perhaps the most remarkable expression of this view is that of Mississippi Governor Bilbo, related by Borchard. One Thomas Gunter was convicted of murder. Later, after Gunter was incarcerated in prison, the victim's wife confessed to the crime, pleaded guilty and was given a suspended sentence. Bilbo denied Gunter's application for pardon with this cogent statement:

Somebody ought to be in the penitentiary all the time for the murder of a sleeping man. If Judge Pegram does not believe Mrs. Drew is guilty enough to serve her term, then the man convicted of the murder will have to serve his term.

Husbands ought to have some protection.⁵

Certainly, it is true that insistent public demand for convictions in shocking cases, often fanned to flame by the press, produces pressures on the officials which, when yielded to, as they sometimes are, result in extreme instances of abuse, such as third-degree tactics by the police, and the withholding of evidence by the prosecution. The facts that American public prosecutors are elected officials and that a record of convictions by a "tough" prosecutor has often proved to be the royal road to political advancement have also played

³ Consult, e.g., the case of Shepherd, pp. 74-78.

⁴ 351 U.S. 12 (1956).

⁵ Borchard, *Convicting the Innocent* 344 (1932).

their part. For whatever reasons, the processes leading to criminal convictions strongly resemble trial-by-battle in many American jurisdictions, even though infinitely more civilized and sophisticated procedures characterize the trial of civil cases in the same states. Judge Frank notes that only in the United States among the civilized nations of the world is discovery not granted as a matter of course in criminal cases (Pp. 243-49). Frequently the defendant cannot even procure before trial a copy of the confession he is alleged to have made nor examine the pellets which he is alleged to have shot into the body of the victim. Surely, Judge Frank is correct in regarding criminal discovery as an inherent part of any rational system of criminal justice and our failure to provide it as inconsistent with our desire that "criminal trials . . . reveal the truth as far as is humanly possible, to bring about the acquittal of innocent persons and not to remain a sporting adventure" (P. 245).

These problems are discussed in Judge Frank's commentary. But many other features of American criminal procedure fall under his lash. He attacks the niggardly and unsystematic provision for making compensation to those who are convicted and whose innocence is later established (Pp. 117-18). He denounces the rule which permits the prosecution to communicate defendant's past criminal record to the jury under the guise of "impeaching" cross-examination (P. 114). He would liberalize the rules relating to right of counsel so that they might take fuller account of the inadequacy of defendant's representation when the lawyer was hired by defendant rather than being appointed by the court (P. 34). He would not permit a criminal conviction based on perjury to stand even though there be no proof that the prosecution made "knowing use" of perjured evidence (P. 116).

Certainly, one does not turn to a book like this to obtain a full and balanced picture of American criminal justice. This book is a history of failures, and all is not failure. Moreover, the failures are not all of one sort. Much might be written of those defects in the system which, while serving no rational purpose, permit the guilty to escape. But the problems which the authors chose to discuss are those of convicting the innocent. It would be difficult rationally to deny the substantial accuracy of the authors' indictment of our system, both in general and in particular. Indeed, one may feel that in advancing measures of reform, Judge Frank sometimes does not go far enough. His specific remedy for the third degree, for example, seems to be the recruiting of a higher quality police force "like [the] FBI." Improvement in the quality of police personnel is, of course, indispensable to the solution of this and other problems. But one suspects that elimination of the third degree may ultimately require more.⁶

Protection of the innocent from criminal punishment is a vital consideration

⁶ Consult Allen, *Due Process and State Criminal Procedures: Another Look*, 48 *Nw. U. L. Rev.* 16, 34-35 (1953).

to any society. But it becomes a matter of most critical importance in periods of crisis when the very life of the community depends upon the apprehension of wrongdoers and the prevention of their depredations. The state trials of sixteenth- and seventeenth-century England demonstrate that a system of criminal justice which is incapable of separating the innocent from the guilty not only produces human tragedy, but is itself a threat to the state's security. The enormity of the incidents surrounding the so-called Popish Plot of the 1670's lies not alone in the fact that the perjured testimony of Titus Oates sent a dozen or more innocent men to their doom. It also lies in the fact that the weaknesses of the system prevented the detection of the very real peril to the state which, in fact, existed. Judge Frank's book is thus not simply an exercise in humanitarian sentiment. It deals with problems which in enlightened self-interest we had better solve.

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Administrative Law. By Morris D. Forkosch. Indianapolis: Bobbs-Merrill Co., 1956. Pp. xiv, 856. \$17.50.

There was a time when the teacher of administrative law could warn his students that there were no systematic treatises on administrative law and that salvation lay in close attention to the case-book and the instructor, plus the saving grace of a few law review articles. Early works by Goodnow and Freund drew upon comparative law to suggest there was such a thing as administrative law in the United States.¹ Subsequent writers turned their attention to a "vertical" study of individual administrative agencies,² which culminated in the monographic studies of the federal agencies by the Attorney General's Committee on Administrative Procedure.³ None of these were of great use to the beleaguered student. Influenced perhaps by the organization of the conventional administrative law case-books and the form taken by the Administrative Procedure Act, administrative law scholars have in recent years produced a number of "horizontal" studies of administrative law, which attempt

¹ E.g., Goodnow, *Comparative Administrative Law* (1893); Freund, *Administrative Powers Over Persons and Property* (1928). Goodnow, *Principles of Administrative Law* (1905), contained material on "Officers" and "Local Administration" no longer considered as part of Administrative Law.

² E.g., Sharfman, *The Interstate Commerce Commission* (1931); Henderson, *The Federal Trade Commission* (1924); Patterson, *The Insurance Commissioner* (1927); Dodd, *Administration of Workmen's Compensation* (1936).

³ The twenty-seven monographs were prepared for the Attorney General's Committee in 1939 and 1940 by an investigating staff working under the direction of Walter Gellhorn and including Kenneth C. Davis, both of whom have since made exceptional contributions to administrative law.