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JEROME FRANK who died on January 13th, 1957, was probably the foremost figure among the American Legal Realists and certainly one of the great legal thinkers of the present century. He was one of the band of young legal intellectuals who came to Washington with Franklin Roosevelt at the outset of the New Deal. He was not, in the early days, one of that inner circle of policy-makers—later to be dubbed the "Brain Trust". However, by the close of Mr. Roosevelt's second term he had advanced to the Chairmanship of the Securities and Exchange Commission. In some respects he was atypical of the younger "Young Turks" in the Roosevelt entourage. He was a Middle Westerner and a graduate of the University of Chicago rather than of an Ivy League school, and he had already made a reputation before reaching Washington—both in professional practice in Chicago and also as author in his spare time of the controversial and brilliant "Law and the Modern Mind".[1] President Roosevelt appointed him to the bench in 1941 as a member of the United States Court of Appeals for the Second Circuit. This court was widely regarded in the United States (and also in the other Common Law countries) as the "strongest English-speaking court". This was in the form of a tribute to the extraordinary quality of the personnel of the Court which included at the time Learned Hand, Augustus Hand, Thomas W. Swan, and Charles E. Clark and also a recognition of the fact that since the

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[1] FRANK, LAW AND THE MODERN MIND (New York 1930). Other monographs published by Judge Frank include: Save America First (New York 1938); If Men Were Angels (New York 1942); Fate and Freedom (New York 1945); Courts on Trial (Princeton 1949).

passage of the Judiciary Act in 1925 and the practical confining of the United States Supreme Court to public law matters, the United States Courts of Appeals have become in effect the final appellate tribunals for American private law questions.

Judge Frank's career indicated the range and variety of his interests. His activities were so extensive that, in spite of his extraordinary energies and abilities, he never quite reached the limit of his potential in any one avocation, except as a legal publicist. He never made the transition from the highest civil service executive rank to a Cabinet post; he did not obtain the appointment from the United States Court of Appeals to the Supreme Court as did his junior in the Second Circuit, Justice Harlan, in 1954. Perhaps if Adlai Stevenson had been elected in 1952 or 1956, he would have achieved this distinction. In spite of his intellectual stature he never held a chair in a major American law school. However, after his elevation to the bench he began giving regular lecture courses each semester at the Yale Law School which he continued for more than a decade up to his death. This was an extra-judicial activity for which, it is submitted that he was the pioneer in modern times. Judge Charles E. Clark has followed him at Yale and Judge Calvert Magruder at Harvard. As a legal publicist Judge Frank reached his highest intellectual permanence. Roscoe Pound, no doubt, was a more systematic and thorough scholar, but Judge Frank had also the gift of vivid and often pungent expression that was unrivaled. Through his wife, Florence Kiper Frank, a poetess in her own right, Judge Frank had entrée, as a young Chicago lawyer, to the more significant *avant-garde* literary and artistic groups of the post-war America.

The key to the "American Legal Realist movement" is to be found in the more general intellectual turmoil of the 1920's, outside the closed realms of lawyers and law teachers. For Legal Realism was in essence a state of mind rather than a dogma of doctrine or proposition: an index to this can be found in the insistence of some of the leaders of the Realists that they were not a *school* in any organized or accepted sense but individuals whose views happened to coincide on many important issues.[2] The Legal Realists of the 1920s were essen-

[2] FRANK, LAW AND THE MODERN MIND vii-viii (New York 1949): "I made a blunder, leading to misunderstandings, [in the first printing in 1930] when I employed the phrase "legal realism" to label the position, concerning the work of the courts, which I took in this book. . . . But, in 1931, less than a year after this book appeared, I published an article stating regrets at the use of this label. . . . I then suggested that the legal

tially debunkers, iconoclasts, and rebels against an established legal order in the United States which they saw as having enshrined a rigid and mechanical positivism comparable to the Begriffsjurisprudenz of Windscheid and the Pandectists of 19th century Germany. Through the Realists' eyes, judges (and to some extent law schools) were seen as insisting that the problems of judicial decision-making were to *find* law and never to *make* it; that so far as private law was concerned there was to be found, floating in the medieval skies, a self-contained and self-sufficient body of Common Law doctrine relevant and immediately applicable to present-day needs; that so far as public law was concerned, the Founding Fathers had enshrined "right reason" in the text of the constitutional instrument of 1787 and later in the post-Civil War Amendments, and that the task of contemporary generations was simply to reason syllogistically from the Constitution's lapidarian phrases to resolve current socio-economic issues and their tensions.

Several points may be made here in regard to the Realists' approach. First, it must be conceded that theirs was a rather oversimplified presentation of the traditional conception of the judicial process,—that the Realists had to some extent set up a tactical strawman for themselves to knock down in their struggle against legal orthodoxy. Again, it must be acknowledged that others apart from the Realists were reacting against the existing legal order: Dean Roscoe Pound, for example, for some years had been presenting his own special thesis: legal decision-making involved the balancing of a number of conflicting interests pressed by individuals and groups in society, pointing towards an ultimate resolution of the conflict in terms of that solution that would most accord with the dominant trends in societal development. Pound's jurisprudence would have provided, of course, criteria for criticism of the methods and procedures of actual decision-making of American courts of the era, in so far as those decisions were

realists be called "constructive skeptics", and their attitude, "constructive skepticism".

There was a more cogent reason for regretting the use of "realist" as a method of ticketing these legal skeptics. The label enabled some of their critics to bracket the realists as a homogeneous "school", in virtual accord with one another on all or most subjects. This misconception—not certainly the result of any careful reading of their works—led to the specious charge that the "realist school" embraced fantastically inconsistent ideas. Actually no such school existed.

". . . . These so-called realists have but one common bond, a negative characteristic already noted: skepticism as to some of the conventional legal theories, a skepticism stimulated by a zeal to reform, in the interests of justice, some court-house ways".

in no sense expressed in the written opinions filed in support thereof, as being based on consideration of the interests pressed by the parties to the respective cases. However, it needed the Legal Realists to present the problem in dramatic, clear-cut, terms which the public at large could understand. It was the Legal Realists who challenged the cult of the robe[3] in successfully "exposing" the "myth" that judicial decision-making could be reduced to a matter of logic alone. The Legal Realists explored the gap between what judges actually did in deciding cases, and what they said they did in their subsequent opinions: the syllogism might be the official basis for judicial approach to solution of cases, but the judgments would all too frequently be determined, in the choice between alternative, conflicting legal propositions. Justice Holmes categorized these as "inarticulate major premises" stemming from a judge's cultural and group affiliations,—political, social, and economic. Put in the rather over-simplified, political terms of the angry 1930's,—if the conservative majority of one on the Supreme Court was persisting in invalidating major legislative planks of the Roosevelt New Deal, this was not because such a result was necessary and inevitable in terms of the Constitution; the judges were simply injecting their own (conservative) economic values into the Constitution as a means of defeating the popular verdict of the polls, and under cover of a spurious logical interpretation.

The final defeat of the Old Court majority in the exiciting events of 1937 represented, no doubt, the apogée of the Legal Realists' achievements. Curiously enough, though many of them were politically minded and probably most of them were also Democrats, they were not as a whole public lawyers. In general they had no well thought out and articulated philosophy of judicial review to offer the New Court that rapidly assumed power after 1937. The New Court's floundering, (especially during the eras of the Stone and the Vinson Chief Justiceships which were characterized by multiple dissents, special

[3] FRANK, COURTS ON TRIAL 255 (Princeton 1949): "The judges were oracles of an impersonal "higher law," a body of "law" absolute and infallible—so believed many who sponsored the judge's gown. Therefore, this garment of sacerdotal origin was appropriate, clothing its wearer with the dignity that befits the augur. Others, more skeptical of the law's dignity, nevertheless appreciated the public effect of priestly trappings. They were astute in this perception. In the minds of altogether too many persons the judicial garb inspires excessive awe. Hughes, as Secretary of State, was fallible; Van Devanter, as Solicitor for Interior, was not beyond criticism. But as judges, clad in their solemn black silk, they automatically became (for much of the public) if not as sacred as once was Japan's Emperor, at least brushed with divinity."

concurrences and extremes of factionalism—in search of a common set of judicial values or at least a minimum *modus vivendi,* can in part be explained by the fact that the Legal Realists, predominantly private lawyers, had nothing further to give the Court once the Court revolution and the overthrow of the *laissez-faire* Constitution had been achieved. In the area of private law once the necessary mental attitude of skepticism had been inculcated in the students as to the traditional theory of the judicial process, the way was open to the introduction of Pound's interests-oriented approach. The Legal Realists themselves, being not always or even generally members of the sociological school also began to concentrate on applied jurisprudence—(field projects pitched at a fairly low level of abstraction and usually rigorously empirical and detailed in method). Thus Professor Douglas (later Mr. Justice Douglas of the United States Supreme Court) had entered as early as 1930 on his monumental survey of bankruptcies and business failures; Professor Llewellyn embarked on his commercial codes research; Professor Underhilll Moore undertook such projects as the New Haven Green traffic study; Professor Frank, after refining his earlier theories so as to distinguish between "rule skepticism" and "fact skepticism",[4] seemed somewhat to retreat from an earlier, almost free-law-finding view of the judicial process,[5] and to concern himself instead with the problems of fact-finding in litigation, particularly at the trial level, perhaps in reaction to the extremities of language and thought of some of the other Realists.[6] Of course, occupation with the heavy burdens of his Judgeship increasingly isolated Judge Frank, while still quite young, from opportunities for that sustained reflection necessary to the development of any new philosophic theory that might build on his early Realist ideas. Nevertheless Judge Frank was aware in his later years that the original con-

[4] FRANK, LAW AND THE MODERN MIND viii-x (New York 1949); Frank, *Cardozo and the Upper-Court Myth,* 13 LAW AND CONTEMP. PROB. 369 (1948).

[5] See note 3 *supra,* at 286: ". . . . Although many persons (myself included) believe that the theory of precedents ought to be restated so as to conform more nearly with precedent practice, no sensible person suggests that stare decisis be abandoned." That this statement most nearly reflected his considered attitude towards the judicial process was indicated by Judge Frank in a letter to the present writer dated January 11th, 1957.

[6] Frank himself admitted some years ago that if doing LAW AND THE MODERN MIND again, he would not write it exactly as he had first done in 1930. FRANK, LAW AND THE MODERN MIND vi (New York 1949). Compare Patterson's suggestion that Frank's earlier statements about logic in law were aimed at exaggerated claims of rationalists, especially of Adler. PATTERSON, JURISPRUDENCE, MEN AND IDEAS OF THE LAW 545 (New York 1953).

ditions in North America of the 1920's and 1930's that had made Legal Realism viable, and also challenging and exciting, as a philosophy of law were no longer present. New and complex socio-political tension issues existed at the present day for which Legal Realism could provide no solution; a new, affirmative philosophy was what was needed. He had begun to delve into questions of comparative or integrative jurisprudence,[7] though he was much too penetrating a scholar to be deceived by that shallow eclecticism (the ventures into purely mechanical comparisons or taxonomies of institutions and rules of various countries without regard to the political, social, and economic conditions from which they are spawned) to be found in so many of the courses in comparative law that are now creeping into the North American law school curriculum. He rightly recognised that the comparative study of law, unless it is undertaken against a broad background of the social sciences, is pretentious and foolish, and also substantially useless.[8]

Mention has been made of Judge Frank's sympathies and affiliations with the younger American literary leaders of the 1920's. There was in his temperament and style of writing something of the spirit of H. L. Mencken, in spite of the frequent superficialities of the latter and of the disparities in the two men's backgrounds. However, Frank was extraordinarily well read, in traditional American, English, and especially Continental works. His writings are replete, as was his conversation, with literary allusions. He was probably most at home with Rabelais, finding a bond of sympathy with his earthy humanism and jovial irreverence. Judge Frank was a Jew,—conscious and proud of his affiliation. It was perhaps for this reason he felt especially free to disagree violently, if need be, with other jurists of the same faith. Thus he scarified Professor Goodhart in words that were especially wounding in the present age of intellectual flux as a "safe-and-sound" legal thinker;[9] though perhaps here he did him less than justice in not seeing him in his particular space-time context;[10] likewise, he had little

[7] Frank, *Civil Law Influences on the Common Law—Some Reflections on "Comparative" and "Contrastive" Law,* 104 U. OF PA. L. REV. 887 (1956).

[8] *Id.* at 916. This point is foreshadowed by Judge Frank in a letter to the present writer dated September 2nd, 1952.

[9] FRANK, COURTS ON TRIAL 63 (Princeton 1949); and compare Goodhart's indignant reply, Goodhart, *Frank, Courts on Trial,* 67 L.Q.R. 535 (1951).

[10] Thus there is reason for believing that Dr. Goodhart, as an American teaching in England, was seeking in the elaboration of his rules for determining the ratio decidendi of a case, to assist the process of sterilising unwanted precedents: his rules,

sympathy for Mr. Justice Frankfurter as one who aspired in the Supreme Court to wear Mr. Justice Holmes' liberal mantle—had not Judge Frank himself set Holmes up as his model of the "completely adult jurist"?[11] Frank tended to view Mr. Justice Frankfurter's philosophy of judicial review as a sort of conservatism by indirection. Judge Frank was, of course, in all his writings and teachings, a man who responded quickly and warm-bloodedly to issues and personalities, and thus, he had little time or patience for judicial periphrasis, or for the veiled tactic, however laudable the ultimate objectives to which it might be directed. His more recently developed interest in the social sciences[12] might have helped him to bridge the gap here. Some greater disposition to recognize the role of the Supreme Court as one part only of the institutional framework of government in the United States might thus have brought him closer to Mr. Justice Frankfurter whose judicial approach rests, after all, in the ultimate, on a special conception of the Supreme Court's responsibilities and occasional duties of self-restraint vis-à-vis the co-ordinate arms of government. It seems doubtful, however, that Judge Frank would ever have embraced Justice Frankfurter's philosophy; his own conception of the responsibilities of the "adult" jurist impelled him inevitably to an activist role. But except for a keen interest and knowledge of psychology, Judge Frank was a humanist in his approach and not a social scientist, any more than the bulk of the Legal Realists; we are apt to forget, in this regard, how recent in its impact, is the campaign for integration of law with the other social sciences and how few, still, are those who are adequately equipped, intellectually, for inter-disciplinary research and teaching. Judge Frank recognised that this type of approach, properly applied, would be indispensable to the solution of the great community issues of the Cold War and post-Cold War eras: he also

insofar as when applied they must limit or narrow the grounds of decision of any case, are peculiarly attuned to the operational needs of the device of "distinguishing" cases in effect forced on the English judges by the extreme strictness of the English doctrine of stare decisis. See Goodhart's remarks in 220 LAW TIMES 1 (1955).

[11] FRANK, LAW AND THE MODERN MIND 253 *et seq.* (New York 1930).

[12] Frank had, of course, a rich acquaintance with and knowledge of contemporary writings in psychology, and can rightly be regarded as the pioneer in the psychological method as applied to law. His famous characterisation of the "legal-certainty-myth", in LAW AND THE MODERN MIND (New York 1930) p. 20 *et seq.*, had a manifest root in Freudianism. Nevertheless, for one who had a most active career in public administration, particularly in the area of governmental regulation of business, he showed surprisingly little interest in the secondary literature in the basic Social Sciences, especially Political Science and Economics.

recognised that some further work on methodological aspects might eliminate barriers currently existing between the policy-oriented thinkers and the older Realist and Sociological groups[13] and produce a new synthesized American jurisprudence for the second half of the century, in place of the current rather atomized and factionalized assortment of doctrines and techniques.[14]

How important were the Legal Realists to legal history and thought in North America? Unlike parallel Continental movements and thinkers—for example, the Free-Law Movement associated in the Germanic countries with Ehrlich, and also Gény and his followers in France—the American Legal Realists offered only a theory of the judicial process and had no firm set of values or objectively-verifiable criteria for the solution of concrete case problems once the fallacies of the orthodox theory of the judicial process had been exposed and the opportunities for creative, law-making choice on the part of the judicial decision-maker demonstrated. It is doubtful, of course, granted the varied natures and personalities of the leaders of the Realist movement, that they could have reached agreement on any uniform method or standards for solving cases: it is even more doubtful whether they would have even wanted to do so. Their prime function as a group, as they saw it, was to inculcate skepticism in the mind of judge, lawyer, teacher, and student; such a skeptical frame of mind would sweep away cobwebs, expose "inarticulate major premises" that might otherwise, (unknown to the decision-maker concerned) determine the solution of cases, and leave the decision-maker free from his inhibitions and able accordingly to make the "best" solution: what that solution might be, presumably, did not matter so long as the decision-maker was fully aware of the predispositional and environmental factors operating on his choice and did not conceal them in his opinion. Stated in these terms Legal Realism approximates in many respects to a new form of Legal Positivism,[15] though

[13] See note 7 *supra,* at 905, letter from Judge Frank to the present writer dated October 12th, 1956.

[14] Frank was aware of course of the dangers of going to the other extreme and seeking to introduce an "excessive planetary uniformity which would efface desirable differences in cultural values and monopolistically obstruct local originalities, initiatives, inventive creations. . . . There remains . . . an ultimate wisdom in Horace Kallen's oft-repeated warning that true democracy calls for an orchestration of differing attitudes—in which some unresolved cacophonies play a part—not for a stifling regimented unity." See note 7 *supra,* at 924.

[15] *Cf.* FULLER, THE LAW IN QUEST OF ITSELF 51-2 (Chicago 1940).

on a much more sophisticated, scientific and objective basis than in the heretofore existing schools of analytical jurisprudence; and presumably so far as it remains a continuing influence in American legal theory, this will be the way that Legal Realism may go in the future.

Politically, the contribution of the Legal Realists was much more significant and far-reaching than that. It was they who triggered the successful reaction of the late 1920's and the 1930's, in both the private law and public law spheres, against the hegemony of traditional analytical positivism and "black-letter" law, paving the way for the current dominion of sociological jurisprudence in which decision of cases proceeds on resolution of interests-conflicts. Without the Legal Realists' exciting, red-blooded impact, it is doubtful whether the Sociological jurisprudes, solid and sober citizens all, could have taken over so quickly or so completely. The poets may have started the revolution, but it was a different personality-type, (the administrator class) who consolidated the gains and built a durable regime.

It may be said, that the legal revolution could not have been achieved in the United States without the Realists because the German Interessenjurisprudenz, starting much earlier and on much stronger intellectual and philosophical foundations than the American sociological school, had not in any way approached a position of dominence in Germany by the time Hitler came into power in 1933. The Nazi jurists were, it is true, able to utilize the concepts of "Zweck"-oriented, purposive, jurisprudence in some measure to further their special "Volk" ends, but it has not been until well after World War II that the balancing of interests approach has been markedly noticeable in German Supreme Court jurisprudence, and then, it may be suspected, it has come, second-hand, from Dean Pound via a reading of American Supreme Court cases, rather than from von Ihering, Stammler, Kohler, Heck, and the other German forebears of the sociological approach. And so the cycle would seem to have been completed: Dean Pound took his basic ideas from German legal theory, and they have returned to Germany once again with two World Wars and half a century intervening: the comparatively greater strength (in comparison to the United States of America) of the cult of the robe in Germany, plus the absence of any such politically powerful group of witty, irreverent legal iconoclasts as the American Realists[16] delayed and in

[16] It is to be conceded that just as the German Interests-school preceded in point of time the American sociological school, so the Continental Free-Law movement also

substantial degree frustrated until the present day the revolt, against Begriffsjurisprudenz in Germany. The needs of contemporary generations for an affirmative legal philosophy that will provide active guides to the solution of policy conflicts,[17] should not impair recognition of the achievements of the Legal Realists in purging North American law once and for all of time-worn encrustations and survivals, fictions, and cloudy and confused modes of thinking.

anticipated the main substance of the American Realists' arguments by a number of years: but, in comparison with the American Realist group, the Continental Free-Law jurists were usually neither witty nor irreverent, and they failed to excite the general community support necessary to any successful political challenge to the traditional legal order.

[17] *Cf.* McDougal, *Fuller v. The American Legal Realists: An Intervention,* 50 YALE L.J. 827 (1941); Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203 (1943). McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community,* 56 YALE L.J. 1345 (1947).

One might comment here also on the fundamentalist tendencies to be observed in the published works over the last decade or so of Dean Roscoe Pound, a seeming contradiction of the relativist emphasis of Pound's earlier sociological work; and on similar fundamentalist aspects of the work of younger legal writers like Lon Fuller, Jerome Hall, and Edmond Cahn.