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JEROME FRANK AS PROPHET: *COURTS ON TRIAL* REVISITED

By Damian L. Halstad, Esquire

In 1949, legal philosopher and federal judge Jerome Frank published his most important legal treatise, *Courts On Trial*.¹ Widely received as a comprehensive and incisive criticism of our trial courts, the book sought to eliminate the mystery surrounding the courthouse and propose much needed change to the judicial system. "My principal aim," Frank wrote in his preface, "is to show the major importance of [trial] courts; how they daily affect the lives of thousands of persons; and how, most often with tragic results, they do their job in ways that need reform."

In the forty-three years since its debut, *Courts On Trial* has proven remarkably prophetic. The influx of television programs with law discussed ostensibly as their subject has removed much of the mystery from the field of law. These programs have shown us litigation, negotiation and titillation of all kind. However, Frank's specific criticisms of our legal culture remain relevant and his proposed reforms have either been adopted or are again being discussed by judges and bar associations throughout the country. It is therefore helpful to today's debate to review Frank's theory as argued in his literary tour de force.

Frank's fundamental jurisprudence, a form of legal realism, can be summarized in his signature phrase, "facts are guesses." In other words, the American justice system frequently fails because of mistakes in fact finding. Many of these mistakes, Frank acknowl-

edges, are simply attributable to human nature. An honest witness may erroneously observe, recollect, or articulate the facts, or may be unconsciously swayed by subtle subliminal biases. Further, a dishonest witness might commit perjury. These mortal failings and faulty observations are then filtered through a second tier of interpretation, the finder of fact (whether judge or jury), with their own similar weaknesses. While Frank conceded that no system can overcome witnesses who lie, forget, or allow prejudices to color memory, he also opined that a high percentage of mistakes in fact finding actually derive from defects in our methods of getting at those facts, such as the adversary system, the use of juries, the relative unaccountability of our fact finders, and the inherent advantage enjoyed by the State in criminal prosecutions.

Regardless of the source of factual mistakes, Frank argued that their prevalence makes it virtually impossible for even well-trained lawyers to predict a court's decision in any given case. Attorneys, however, find the reality of this subjectivity intolerable, and hence perpetuate two myths to impose order on the court system. Myth One: Regardless of the actual facts, a rule of law exists to dictate the court's decision. Myth Two: Even if the trial court renders a bad decision, the appellate court is a safety net that will itself apply the correct rule to the facts. Frank concludes that both fictions are fallacious. What good is a legal rule, he

asks, if the facts to which we are applying the rule are wrong? Further, how remedial is an appellate court when it too is basically constrained by the factual findings of the trial court? The short answer is that the justice system must reject these rationalizations and concentrate on improving fact finding.

Frank's proposed reforms read like a checklist of what plagues the judicial system today. His recommendations included that courts institute "talking movies" of trials; use non-partisan "testimonial experts" called by judges; encourage trial judges to actively examine witnesses; require special education for prosecutors - a type of moral fitness test emphasizing the obligation of a prosecutor to obtain and bring out all evidence, including anything exculpatory; and require similar training of police to guard against "third degree" interrogations. His most comprehensive and novel reforms, however, pertain to legal education, the jury system, and the role of the trial judge.

Legal Education

Frank argued that the legal rule and upper-court myths owe their continued existence to American legal education. He frequently complained of the "neurotic-escapist" character of contemporary law schools, with their over-emphasis on the library, appellate opinions, and legal theory instead of the reality of practice:

The law students are like future horticulturists studying solely cut flowers; or like future architects studying merely pictures of buildings. They resemble prospective dog-breeders who never see anything but stuffed dogs. Perhaps there is a correlation between such stuffed-dog legal education and the over-production of stuffed shirts in my profession.

This form of detached legal education owes its beginning to Harvard Dean, Christopher Columbus Langdell, a brilliant recluse who rarely went to court and therefore deluded himself into believing that law is a science and a library the laboratory. "What qualifies a person to teach law," Langdell wrote, "is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience in learning law . . ." As a result, long after Langdell, law students are taught by professors who often know very little about being lawyers.

Ironically, the method of legal training that Langdell replaced was, in truth, superior. The colonial law student was essentially an intern; an apprentice who "read law" in the office of a practicing attorney. He was in daily intimate contact with courts and law offices. "Before his eyes, legal theories received constant tests in legal practice." Arguing that the profession was damaged by the abandonment of the apprentice system, Frank presented specific reforms to improve the curriculum.

Frank first suggested that most law school teachers possess five to ten years experience practicing law. This would end the perpetual cycle of the book-law teacher producing not lawyers, but other book-law teachers, ad infinitum. Next, Frank proposed that the law school "case system" should be modified to replicate the case history style used in medical schools. This would allow law students to read and examine the

complete record of the dispute, rather than just analyzing the appellate opinion.

Frank also used medical schools as a model for proposing a supplement to the texts. He advocated frequent visits by the law student to both trial and appellate courts. "What would we say of a medical school," he wonders, "where students were taught surgery solely from the printed page?" Like a resident internship at a hospital, Frank suggested that law schools operate legal clinics where students could provide free services to those in need while simultaneously learning the human side of the administration of justice, including the hazards of jury trials, how legal rights are affected by lost papers, missing witnesses, perjury and prejudice, the effects of "fatigue, graft and laziness," on judges, and real draftsmanship.

In short, Frank believed students could be taught to read a case in six months. The remainder of the three year law school experience is wasted. Supporters of the Langdell method argue that book-law analysis does no harm, and students will eventually learn the real legal facts in practice. Frank effectively dispelled this tepid argument by countering that students are essentially miseducated by receiving or forming an erroneous, ivory-tower impression of the ways courts and lawyers behave. He finally asks, "what kind of education is it that has to be undone?"

The Jury System

For ages the jury system was viewed as the great achievement of English and American jurisprudence. The jury, according to lore, finds facts and then uses legal reasoning to apply to those facts the legal rules it learned from the judge. Frank, however, rejects this theory as naive and labels juries "the skeleton in the judicial closet." He proposed his own "realistic" theory: that jurors often ignore the facts, defy the law, and "determine that they want Jones to collect \$5,000.00 from the

railroad company, or that they don't want pretty Nellie Brown to go to jail for killing her husband; and they bring in their general verdict accordingly." Cases are decided according to what the jury supposes the law *ought to be*, and the jury therefore becomes not only the judge but the legislature in a "court house government." Further, the general verdict (guilty or not guilty, liable or not liable) hide the jury's errors by keeping from view their deliberations.

Frank does not condemn jurors for this failure. Juries simply do not understand what they are told by the judge about the legal rules. Given that the law is often incomprehensible to attorneys, we obviously ask too much of the jury. If, by chance, the jury understands the rules, they still face formidable obstacles in ascertaining the facts. In addition to the normal problems highlighted by Frank's fact skepticism, juries often need computer-like memories to assemble and separate evidence which may be too esoteric or scientific to begin with, and must overcome what Frank called the "thirteenth juror" -- prejudice. Frank concluded that "there is probably more wool-gathering in jury boxes than in any other place on earth."

As a solution, Frank bluntly proposed abandoning jury trials except in major criminal cases. Alternatively, he recommended several changes to the jury system, including the special verdict, which compels the jury to make specific findings of fact to which a trial judge may apply an appropriate rule. Frank believed that this would ensure, at least to some degree, a reasoned verdict rather than an emotional response. Frank also suggested the "special jury." If a case relates to a particular business, trade or profession, Frank recommended empaneling a jury consisting of citizens engaged in the same business, thus resulting in a more informed jury. Next, Frank believed the court should employ its own objective expert to report on the facts and form an opinion that the jury may take or

leave. Frank would also abolish most of the civil exclusionary rules; he theorized that such rules often keep out important evidence without which the actual past facts cannot be determined. Frank further suggested recording jury deliberations so that the Court could determine whether the verdict was reached by improper means. Finally, Frank recommended citizen training for jury service consisting of courses that track the function of the jury and nature of trial court fact finding. Such a requirement might mitigate the class warfare that is currently conducted in today's urban courtroom.

The Role of the Judge

In response to his rhetorical question, "Are judges human?" Frank answered an empathic "Yes." That reality, as much as any other, affects the fact finding process:

[The judge's] own past may have created plus or minus reactions to women, or blonde women, or men with beards, or Southerners, or Italians, or Englishmen, or plumbers, or ministers, or college-graduates or Democrats. A certain facial twitch or cough or gesture may start up memories, painful or pleasant. Those memories of the trial judge, while he is listening to a witness with such facial twitch or cough or gesture, may affect the judge's initial hearing, or subsequent recollection, of what the witness said, or the weight or credibility which the judge will attach to the witness' testimony.

Combine the judge's idiosyncracies with his very human attention span, and the impediments to accurate judicial fact finding are evident. Moreover, the judge often feels compelled to obscure her findings and subsequent decision in a legal opinion that is basically undecipherable.

Much of the obscurity is due to what Frank terms "robism," or "the

cult of the robe." The use of the robe, which did not become standard in the United States until the late 1800's, provides equal prestige to the worthy and unworthy. It creates an air of mystery about the bench and thereby shields judges and their methods from rational inquiry. "Robism" similarly affects court opinions. "The conventions of judicial opinion writing," Frank observed, "the uncolloquial vocabulary, the use of phrases carrying with them an air of finality, the parade of precedents, the display of seemingly rigorous logic, bedecked with 'therefores' and 'must be trues' lend an air of thorough certainty, concealing the uncertainties inherent in the judging process." Believing that courts have an obligation to make themselves intelligible to the average citizen, Frank advocated the literal and metaphorical abandonment of the robe, relying on the somewhat dubious belief that "plain dress may encourage plain speaking."

To otherwise help improve their performance, Frank suggested special training for trial judges. In light of the almost irreversible weight given judicial fact finding, it is imperative that they be prepared to do their job well. The would-be judge should first develop solid litigation experience as a trial lawyer, including an apprenticeship with a trial judge. He should be educated in psychological devices useful in testing the trustworthiness of witnesses. More importantly, Frank believed the prospective trial judge should undergo "something like a psychoanalysis" to explore his own prejudices and biases in an attempt to overcome them. Additionally, Frank suggested that the future trial judge become aware not merely of his prejudices, "but also of the factors which peculiarly affect his capacity for sustained attention, so that he can avoid inattention when witnesses testify before him." Finally, prior to appointment, the trial judge should be required to pass a "stiff examination" of her legal ability and moral character.

Conclusion

Ultimately, the importance of *Courts On Trial* transcends its specific reforms. In the midst of McCarthy's America, Jerome Frank undertook an assault on the most sacred of our governmental branches by attacking the myth of the court's divinity. By exposing the warts of the judicial system, Frank promoted beneficial changes, including videotaped trials, law school clinics, practical legal education, and the humanization of the bench. Indeed, while some of the weaknesses in our courts that Frank noted still exist today, they are nevertheless more accessible and frankly fairer than forty years ago. *Courts On Trial* arguably initiated that improvement, and will hopefully inspire continued attempts to perfect the process.

Endnote

¹Jerome Frank, *Courts on Trial* (1949) (First Princeton Paperback ed., Princeton University Press 1973).

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