

Law and the Modern Mind (Book Review)

Louis Prashker

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BOOK REVIEWS

Editor—ALEXANDER A. MERSACK

EXPERIMENTAL JURISPRUDENCE.

LAW AND THE MODERN MIND. Second printing. By Jerome Frank. New York: Brentano's, Inc., 1931, pp. xix, 368.

Mr. Jerome Frank, the author of this volume, is presently General Counsel to the Agricultural Adjustment Administration. Today, he may rightfully be regarded as the most vehement and aggressive exponent of a philosophy of law, which, until recently, passed under the name of Realistic Jurisprudence. In a recent address,¹ Mr. Frank suggested that *Realistic* Jurisprudence "in the light of its congeniality with experimental economics" be renamed *Experimental* Jurisprudence and that its followers be called experimentalists.

The "primer" of this legal philosophy is "Law and the Modern Mind." Its general aim, the author tells us, is "the development of that 'realistic' movement in law which seeks to overcome an astonishingly prevalent blindness to legal realities."²

I

What are its salient features?

There is a "vulgar notion that law is capable of being made entirely stable and unvarying; they [lawyers] seem bent on creating the impression that, on the whole, it is already established and certain."³ This "basic legal myth" is accepted by most members of the Bar as well as the laity. The existence of such legal myth is Frank's major premise. Its origin, as a father-law substitute, is his minor premise. Little effort is made to establish the validity of these premises by facts and figures. Instead, explanations borrowed from the "mushroom science of psychoanalysis" are offered.⁴

Legal decisions, says Frank, are in fact unpredictable. "Any competent lawyer, during any rainy Sunday afternoon could prepare a list of hundreds of comparatively simple legal questions to which any other equally competent lawyer would scarcely venture to give unequivocal answers."⁵ Why doesn't an attorney tell his client that decisions are unpredictable? "Why these pre-

¹ Delivered at a meeting of the Association of American Law Schools held in Chicago on December 30, 1933. See (1934) 7 AM. L. SCHOOL REV. 1063.

² FRANK, *op. cit. supra* at 21.

³ *Id.* at 7.

⁴ MORRIS R. COHEN, LAW AND THE SOCIAL ORDER (1933) at 361.

⁵ FRANK, *op. cit. supra* at 5. Respecting this assertion, Professor Walter B. Kennedy makes the following comment: "Unfortunately Frank fails to append samples of his list, and in the absence of such a list, one may withhold judgment whether a list of 'hundreds of comparatively simple legal questions,' and yet doubtful and debatable, could be prepared in the leisure of a rainy Sunday afternoon. But it is suggested that the 'same competent lawyer' on the ensuing Sunday afternoon, rainy or fair, could compile a companion list of 'hundreds of comparatively simple legal questions' the answers to which would not disturb the peace or mental tranquility of 'any other equally competent lawyer.'" In proof of his last assertion, Prof. Kennedy, in a note, offers a list "of 'comparatively simple legal questions' that he compiled on a Friday morning

tenses, why this professional hypocrisy?"⁶ "*Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.*"⁷ (Author's italics.)

Whence came this myth of stability and predictability of law? "Why do men crave an undesirable and indeed unrealizable permanence and fixity in law? Why in a modern world does the ancient dream persist of a comprehensive and unchanging body of law?"⁸ Because it meets a social want? But exactness and predicability in law are *incapable* of satisfaction, and indeed, if satisfiable, would be undesirable. No, social want is not the answer. This craving "must have its roots, not in reality but in a yearning for something unreal."⁹ It has its inception in child-growth and development. A child at birth is forced into a new environment with demands different from his prior "nearly perfect pre-birth harmony and serenity."¹⁰ "His struggle for existence has begun." His new wants are few but are almost completely satisfied by his parents. Doubt and chaos are not on his horizon. For him, the world is not chancy. Everything may be accounted for. Maturer experiences "erode this fictional over-estimate." But the average child does not completely accept this disillusionment. "Chance and contingency, he will not submit to as finalities; the apparently fortuitous must be susceptible to the rule of some person—a person, too, like his father, whom the child can propitiate. * * * The demand for fatherly authority does not die." With manhood, the demand for fatherly authority is more unconscious. "But the relation to the father has become a paradigm, a prototype of later relations. Concealed and submerged, there persists a longing to reproduce the father-child pattern, to escape uncertainty and confusion through the rediscovery of a father." To the grown man, the law is the father-child pattern reproduced.¹¹

What are the consequences of this basic legal myth?

Lawyers use "*weasel words*" such as "prudent," "negligence," "freedom of contract," "good faith," "ought to know," "due care," "due process"—words of the vaguest meaning, employed none the less to give the *appearance* of "continuity, uniformity and definiteness" of law.¹² A child is a "confirmed verbalist." So is the lawyer. Names are persistently confused with things. The name becomes as real as the thing. And knowing the former there is little need to fathom the latter.

(weather clear) in *five minutes*, the balance of which list must await the inspiration of a 'rainy Sunday afternoon.'" Walter B. Kennedy, *Men or Laws* (1932) 2 B'KLYN. L. REV. 17.

⁶ FRANK, *op. cit. supra* at 8, 9.

⁷ *Id.* at 7. *Except where otherwise stated, italics used in this paper are mine.*

⁸ *Id.* at 10.

⁹ *Id.* at 11. Respecting this postulate, Frank makes the following comment: "There is no denying that, in part, the demand for exactly predictable law arises from practical needs, has its roots in reality. But the practical aspect of the demand is usually exaggerated."

¹⁰ *Id.* at 13.

¹¹ "The Law—a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeeds—inevitably becomes a partial substitute for the Father-as-Infallible-Judge." *Id.* at 14-18.

¹² *Id.* at 27.

Nor is the process of rationalization respecting law more "mature" or on a "higher level." For note Frank's statement of the process of rationalization: Ideas and beliefs are of two kinds: (1) those "based primarily on direct observation of *objective* data;" and (2) those that are entirely or almost entirely a product of *subjective* factors. Beliefs of the second kind are "usually emotionally toned to a high degree" and constitute "bias." For most of us, conclusions are based upon "bias." "When challenged by ourselves or others to justify our positions or our conduct, we manufacture *ex post facto* a host of 'principles' which we induce ourselves to believe are conclusions reasoned out by logical processes from actual facts in the actual world. So we persuade ourselves that our lives are governed by Reason."²³ Lawyers are professional rationalizers. Frank then poses the query: Why have verbalism and scholasticism²⁴ "survived in lawyerdom when they have become obsolescent [if not obsolete] in the natural sciences? *Are lawyers more stupid than the scientists?* Do they have lower I. Q.s?"²⁵ No. But to the principal query, Frank makes answer, *viz.*: "The trouble with legal thinking is not the mental inadequacies of the lawyers. *It is the very nature of law*, its role as a father-substitute that stirs up unconscious attitudes, concealed desires, illusory ideals, which gets in the way of realistic observation of the workings and significance of law." Indeed, "not only lawyers, but all men in their approach to the law are still somewhat childish emotionally and therefore are prone to Platonizing."²⁶

And what is law? "For any particular person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until the court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law but only a guess as to what the court will decide."²⁷ Principles and rules of law are but fictions. *What officials do with reference to disputes—that is law.* This concept is placed in bold relief with that of Professor Beale. The latter's belief in a "general body of principles accepted as the fundamental principles of jurisprudence," Frank refers to disparagingly as fundamentalism, legal absolutism, "Bealism." To the ordinary human being, it is meaningless; it is "law in the sky, above human experience * * *". Principles, rules, conceptions, standards and the like, may be law for lawyers, regardless of whether such law ever comes into contact with the affairs of life. But not for the rest of

²³ *Id.* at 28, 29. Frank speaks of two levels of thinking: The *lower level* is wishful or subjective thinking—thinking "unadapted to or turned away from reality, uncontrolled or undirected by experience;" it is childish thinking. The *upper level* is realistic thinking—"thinking which does not turn away from but deliberately seeks reality." *Id.* at 71.

²⁴ Frank frequently uses the latter term interchangeably with the former. He also uses Platonism interchangeably with Scholasticism. Prof. Cohen's comment is interesting: "Platonists and scholastics" are "epithets never used in a derogatory sense except by those who are woefully ignorant of the writings of Plato and of Thomas Aquinas." COHEN, *op. cit. supra* note 4, at 362.

²⁵ FRANK, *op. cit. supra* at 68.

²⁶ *Id.* at 91, 81.

²⁷ *Id.* at 46.

humanity. To mere humans, law means what the courts have decided and will decide, and not vague, 'pure' generalizations."¹⁸

How come these decisions? What relationship is there between *what the judges say* and *what they do*? What is the nature of the judicial process? The judging process is in a bad state. For one thing, judicial judgments "are worked out backward from conclusions tentatively formulated." Furthermore, "judges in writing their opinions, are constrained to think of themselves altogether too much as if they were addressing posterity."¹⁹ Frank, citing Judge Hutcheson's "honest report of the judicial process," states the Judge's principle of the *hunch*. It is "that intuitive flash of understanding that makes the jump-spark connection between question and decision and at the point where the path is darkest for the judicial feet, sets its light along the way." To which Frank adds, "*Whatever produces the judge's hunches makes the law.*" The problem then becomes one of determining the hunch-producers, for *they* are the judge's stimuli. We must psychoanalyze the "biases," the discretion and the individualism of the judge, for they all play a large part in his final decision.²⁰ Judges should be empowered to exercise a wide discretion and individualism, *consciously and skillfully*.²¹ And as for their qualifications: they should be men of strong personalities:²² men with a touch of the poet, "who will administer justice as an art and feel that the judicial process involves creative skill"²³—men "who will enjoy thinking as experimentation."²⁴

The conventional view is that judges do not make the law; that they only declare it. This "phonographic theory of the judicial function" (the characterization is Prof. Cohen's) is, according to Frank, but a means of preserving the basic myth of predictability and stability of law.²⁵ The *jury* is another such means—particularly the general verdict of the jury. The traditional theory of the operation of the jury is that it accepts the judge's charge as to the law, determines the facts, and applies law as charged, to the facts. All is merged in the general verdict. But this is not realistic, for the jury determines not merely the facts but also whether, and to what extent, to apply the law to the facts. And the general verdict is not subject to analysis—we cannot determine whether this verdict is the resultant of a certain factual determination or application, or misapplication of the judge's charge—which often "might as well be spoken in a foreign language." While the verdict of the jury may at times be set aside, the practice is on the whole infrequent and costly. The jury, particularly in criminal practice, is a means of humane individualization of the law. "Not easily would our people relinquish to the judges the power to pass on the guilt or innocence of one accused of crime. The jury is assumed to be more merciful to the alleged criminal, more responsive to unique extenuating circumstances." But the jury "are hopelessly incompetent as fact finders," and

¹⁸ *Id.* at 51, 55.

¹⁹ *Id.* at 153, 154. It should be noted that *ex post facto* judging has a place in logic. The "conclusion" is subjected to the "demonstration"—a checking back—not unfamiliar in mathematics and the sciences.

²⁰ *Id.* at 104, 105.

²¹ *Id.* at 362.

²² *Id.* at 138.

²³ *Id.* at 169.

²⁴ *Id.* at 166.

²⁵ *Id.* at 34-36.

jury training is an impossible task, for "no one can be fatuous enough to believe that the entire community can be so educated that a crowd of twelve men chosen at random can do, even moderately well, what painstaking judges now find it difficult to do." Indeed, "the jury makes the orderly administration of justice virtually impossible."²³

Not fixity, stability and certainty should characterize our jurisprudence, but experimentalism—as in the natural sciences. Law is a method of social control. It must be functional, flexible, adaptive and responsive to new needs. Trial and error must determine its scope and content. "Certainty," said Mr. Justice Holmes, "generally is illusion, and repose is not the destiny of man."²⁷

We must grow up. The *modern mind* must be a mature mind free of childish emotional drags. Judges must have power to render "free judicial decisions"—*for man was not made for the law, but law is made by and for man.*²⁸ This, in brief, is Frank's conclusion.²⁹

II

What say the critics? "*This book excites,*" says Prof. Llewellyn. "It is keen, cogent, well integrated."²³ But Prof. Cohen thinks "*the book is not well organized:* the shots are often carelessly fired and wide of the mark, many of the shells are duds and some may act like boomerangs."³¹

Personally, I think the book irritates. As a book intended to be an expression of realism and experimentalism, it ought to practice realism and experimentalism. It does neither. It does not give a true picture of reality, and is fantastic. It is not experimental. Its conclusions are not based on data scientifically procured and interpreted. Nevertheless, because of its numerous challenges to legal placidity, it constitutes a valuable contribution to jurisprudence.

Frank's "basic legal myth" is of his own making. Current notions as to the stability of law are not nearly as naive as he represents. The current notion is not one of *entire* stability and constancy. There is prevalent, however, a healthy notion that the vast body of law is pretty well certain. We all recognize that in newer fields of law, *e.g.*, radio law,—a great deal of pioneer work must be done. But by and large, *law is reasonably certain.* The testimony of Mr. Justice Cardozo on this point has often been cited: "Nine-tenths, perhaps, more, of the cases that come before a court are pre-determined—pre-determined in the sense that they are predestined—their fate pre-established by inevitable laws that follow them from birth to death. The range of free activity is relatively small. We may easily seem to exaggerate it through excess of emphasis."³²

²³ *Id.* pt. 1, c. 16. In an appendix, Frank indicates the following three-fold classification of possible theories of the function of the jury: (1) the official theory, (2) the sophisticated theory, (3) the realistic theory. *Id.* at 302.

²⁷ *Id.* at 256.

²⁸ *Id.* at 252.

²⁹ *Id.* pt. 3.

³⁰ K. N. Llewellyn, Mortimer J. Adler and Walter Wheeler Cooke, *Law and the Modern Mind: a Symposium* (1931) 31 Col. L. Rev. 82.

³¹ COHEN, *op. cit. supra* note 4, at 358.

³² BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* (1924) at 60. Prof. Llewellyn's comment as to this aspect of the book is interesting: "In its eager

Frank's explanation that the desire for certainty and predictability is a father-law substitute is one that no responsible critic has accepted. It is probably pure fiction. Normal people do not want constant change. Does Frank believe that the Restatements of the American Law Institute, the Uniform Laws prepared by the Commissioners on Uniform State Laws, and modern codification,³³ have as their basis the father-law substitute? I doubt it. The illusion of complete legal certainty "cannot be overthrown by an admitted fiction from the mushroom science of psychoanalysis * * *. If the natural human craving for certainty be childish, the complete denial of it would be complete madness."³⁴ Dean Roscoe Pound's opening sentence in his *Interpretations of Legal History*, "Law must be stable and yet it cannot stand still," is, I feel, still sound. It is a keener analysis than Frank's.

Only a little less fantastic is Frank's theory of the process of rationalization in relation to law: "*Not only lawyers, but all men in their approach to the law are still somewhat childish emotionally and therefore are prone to Platonizing.*" Thinking here is so largely "subjective" and of the "lower level." Law casts a spell over all who approach it. Experimental Jurisprudence stands in dire need of some experimental data to support such conclusions. Is it too rash to predict that they will never be found? No responsible critic has accepted this legal smoke-screen theory as sound.

What of Frank's concept of the nature of law? In 1921, Dean Pound, in his discussion of the "End of Law," formulated and analyzed twelve concepts of the nature of law.³⁵ Frank calls attention in the appendix of his book to Pound's classification.³⁶ But in his principal discussion of the nature of law, he recognizes but one type of law—"law as official action" (the phrase is Prof. Llewellyn's)—the law of the courts—their actual and precise decisions. Prof. Adler makes an excellent and valid criticism of this analysis. He criticizes Frank's attack on Beale and points out that Frank has failed to distinguish between *law as official action* and *law in discourse*. While the former "designates all of the actual processes which take place in time, the prosecution of litigation, the advisory work of the law office, the judicial administration of disputes and so forth," the latter "is an academic subject matter, a body of propositions having a certain formal relation capable of analysis." It is "a purely formal science, like mathematics; its subject matter is entirely propositional; its only instrumentality is formal logic; it deals with certainties and nothing else. The relation between the two sciences can be easily seen; in part they are related as experimental physics is to mathematical physics, and in part as the applied science of engineering is to the pure science of physics

attack on the illusion of complete certainty it under-emphasizes what certainty there is; in its perception of the importance of particulars it well-nigh denies the importance of generals." Prof. Adler, less reverently, speaks of the "hocus-pocus" of the basic myth." Llewellyn, *op. cit. supra* note 30, at 82, 102.

³³ "A code deliberately devised with reference to the desirability of growth and stated in terms of general guiding and flexible principles may some day prove to be the way out of some of the difficulties of legal administration in America." FRANK, *op. cit. supra* at 311.

³⁴ COHEN, *op. cit. supra* note 4, at 361, 362.

³⁵ ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1921) c. 2.

³⁶ FRANK, *op. cit. supra* at 290.

* * *. *Judicial decisions are laws in the sense that they are critical instances of official action. They also express and apply propositions of law to the particular case.* They decide only the particular case, if viewed from the point of view of describing the action of the court; but as expressing propositions of law, in discourse, they must always be *general propositions or rules*. As propositions in discourse, they are *possible rules* (author's italics), *i. e.*, potential laws, before they become actual decisions. It is in this aspect that they are also probable decisions. Propositions of law or rules are logically antecedent to their first temporary expression in a judicial decision, since they are propositions implied by some part of the total aggregate of propositions which constitutes the law in discourse. The judge *makes* (author's italics) law in the sense that until the decision is uttered in the particular case, the law does not exist as an instance of official action, but the judge *discovers* (author's italics) law in the sense that the proposition which his decision states cannot be expressed by him unless it is implied by some part of the set of propositions which comprise law in discourse." "An engineer," adds Prof. Adler, "builds a particular bridge; but the rules which he employs in its construction are general and can be used in other instances of bridge building."³⁷ Under Frank's concept of law, the specific bridge is important and not the principles of mechanics and engineering which were applied in the drawing of the blue-prints for the bridge.

Frank's analysis of trial by jury—particularly the general verdict, is much sounder than most of his analysis. I take it, however, that he would not abolish the jury trial at the present time. He does not indicate what the present treatment should be.

Mr. Frank's judicial process is a mockery. Compare his analysis of the process with that of Mr. Justice Cardozo in his justly famous "The Nature of the Judicial Process." Under Mr. Frank's system, the hunch takes on great proportions; rules and principles are fictions; free judicial decisions are the order of the day. But as Prof. Cohen remarks, "Uncontrolled discretion of judges would make modern complex life unbearable."³⁸ Plato, Aristotle, St. Thomas Aquinas, Jhering, Pound, Cardozo, and perhaps even Holmes, must be modernized. Hutcheson, with his theory of the hunch, is a brilliant example of and for the modern.

Under Frank's exposition of realistic or experimental jurisprudence, a temple of justice becomes a house of madness.

Let the heralds proclaim: "Law! Law! There is no Law!"

LOUIS PRASHKER.

St. John's University School of Law.

³⁷ Adler, *supra* note 30, at 103, 104. Prof. Walter Wheeler Cook concedes the validity of Prof. Adler's two-fold classification of law but stresses the importance of recognizing the "empirical, observational science of law." *Id.* at 109.

³⁸ COHEN, *op. cit.* *supra* note 4, at 362.