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## Book Reviews

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## BOOK REVIEWS

COURTS ON TRIAL, *Myth and Reality in American Justice*. By Jerome Frank. Princeton: Princeton University Press, 1949. Pp. x, 441. \$5.00.

Lawyers' "myths" picture our trial courts as doing what, in reality, they cannot do and are not doing. Certainty, as far as they are concerned, is an illusion because their "fact-finding" methods pile up "subjectivity upon subjectivity". Judge Frank proposes to tell the "facts of life" and not the profession's "stork story" about the birth of trial court decisions. The "stork story" may be represented by the formula " $R \times F = D$ ", "R" being the "rules of law", "F", the "facts as found", and "D", the "decision" born of the happy union of "R" and "F". Thus is the illusion of certainty created. According to Judge Frank the formula is really " $R \times SF = D$ ", for "F" is inevitably "SF"—subjective fact—for witnesses may lie or be mistaken, the poverty of a party may prevent him from securing vital evidence, judges may doze, and jurymen go wool-gathering. Moreover, it is but "legal magic" to talk about "legal rights" until a court decision has authenticated them as such in a particular case. Reforms may reduce but cannot eliminate the subjective factor. What we need then is a new approach to judicial administration, aided by the psychoanalyst, the psychiatrist and the anthropologist. We should welcome "individualization" of decisions. Such are the "high-lights" of *Courts on Trial*. The "words" are different, but the philosophical (epistemological) "music" is the "music" of Judge Frank's earlier *Law and the Modern Mind*,<sup>1</sup> with perhaps a more subdued Freudian obligato.

To this reviewer it seemed that from the standpoint of the author's purposes, the formula " $R \times SF = D$ " is no less an oversimplification than " $R \times F = D$ ". What trial lawyer taking a client into a negligence suit, for instance, would naively guarantee the result on the basis of " $R \times F = D$ "? On the other hand, are we merely indulging in "stork stories" when we warn a would-be testator about the statutory consequences—say of a will devising or bequeathing more than half his estate to charity? Again, are we but purveyors of "legal magic" if we do not expressly warn the testator that the subscribing witnesses may perjure themselves at probate and that the will may thus fail? Judge Frank's broad thesis "trusted home" to its logical consequences makes what we are coming to call "Preventive" Law silly affectation, and the current campaign of the bar advising laymen to "See Your Lawyer First" becomes somewhat fatuous.

Taking the formula " $R \times SF = D$ " as more realistically describing the trial court judicial process, Judge Frank makes suggestions for controlling the SF factor. They are not, on the whole, either new or startling, ranging as they do from a more general use of special verdicts and reforming the exclusionary rules of evidence, to providing for juror education in the schools. Judge Frank is against the retention of the jury system in *Courts on Trial*, and favors the ultimate substitution of judges as fact-finders.<sup>2</sup> He admits that his "improvements" in the jury system of

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1. FRANK, *LAW AND THE MODERN MIND* (6th ed. 1948).

2. But cf. Judge Frank's opinion in *Arnstein v. Porter*, 154 F. 2d 464 (2d Cir. 1946), where the court reversed the trial court's summary judgment for defendant in an action for damages for alleged infringement of copyright. Judge Frank said, "Surely then we have an issue of fact which a jury is peculiarly fitted to determine. Indeed even if there were to be a trial before a judge, it would be desirable (although not necessary) for him to summon an advisory jury on this question."

fact-finding will not eliminate the SF factor entirely and that the same SF factor will remain even after the jury goes and the judge takes its place. As for the judges he makes other suggestions, including a proposal to have them carefully psychoanalyzed. This would help, he thinks, to straighten out some of their psychic kinks. But that "ol' debbil" SF will still be there. You can't escape it.

At this point, the author develops perhaps the most interesting portion of *Courts on Trial*. He sketches a new kind of judicial process, indeed a new type of judicial administration. He is influenced apparently by the alleged success of administrative agencies in "fact-finding", and finds comfort in the present Supreme Court's more or less open acknowledgment that it acts as a political agency in passing on the constitutionality of laws.<sup>3</sup> More significant, however, than the proposals specifically made is the philosophy of law underlying them. The favorite theme that "Certainty in Law" (Judge Frank's *bete noire*) is illusory, reappears. Primitive Man, we are told (via the anthropologists) feared the "chanciness" of life. His wizards with magic formulae sought to calm such terrors and create the illusion that "chanciness" had been overcome. Religion later took over such "magic". (The complacency of the author with regard to the "conclusions" and "fact-finding" of the anthropologists, the psychiatrists, *et al.*, is in sharp contrast to his skepticism with regard to the fact-finding methods of the courts.) Today we should be civilized enough to raise above the demand for "certainty" and to cast out that legal "magic" which deludes us into the belief that we get it, or the hope that we can get it, in the trial courts.

The relativism and subjectivism of Justice Holmes who is for Judge Frank the "completely adult jurist"<sup>4</sup> cast their long shadows over *Courts on Trial*. Holmes had said that "to have doubted one's first principles is the mark of a civilized man", and Judge Frank had agreed and applauded in *Law and the Modern Mind*.<sup>5</sup> Yet cannot it be that one needs first principles even *before* he can doubt? Readers of *Courts on Trial* will then find interesting the epistemological implications of Judge Frank's point that witnesses can never testify to facts but only to what they believe were the facts.<sup>6</sup> Such a view posits a whole philosophy. Is Truth itself objective? Does the mind never know Reality but only its own processes? *Courts on Trial* then is no mere limited study of trial courts. It is instinct with a philosophical system. Shall "reform" of the judicial process come in the name of that system? This is the most important question for readers of *Courts on Trial*.

Again we find much talk of the "sub-conscious" and the "conscious", but little of "conscience". The author says he will avoid using lawyer's "jargon". He shows no similar reluctance about the use of the "jargon" of the psychiatrist and the psychoanalyst. Their "magic" is apparently potent enough to charm the submerged prejudices and the "sub-conscious" "drives" of the judges. One may still innocently wonder at the "magic" which leaps the gap between the consciousness and the "sub-conscious". How shall consciousness give valid testimony of the "sub-conscious" which, by definition, lies beneath it?

And thus does judicial administration get its "new look". Decisions should be frankly recognized for what they are and should be—"individualization" of cases.

3. P. 311. (This reviewer wonders how the concept of the Supreme Court as a "political agency" squares with democratic theory under which laws are to be made by *elected* representatives of the people).

4. FRANK, *LAW AND THE MODERN MIND* 253 (6th ed. 1948).

5. *Id.* at 257, 260.

6. P. 22.

All that impedes this should be cast out, including the "fetishism" of "stare decisis" and transcendentalist nonsense that law is a body of principles and rules lying beyond this or that judge.<sup>7</sup> It is not surprising then to find Judge Frank continuing his assault on the "Cult of the Robe". "Robe-ism" is part of the legal mumbo-jumbo which obscures the essential subjectivity of the judicial process and retards the new dispensation wherein "individualization" of justice will be recognized. Judges are "neither gods, nor devils, but men". Draping them in black robes conceals this fact.

The quarrel over the judicial robe might seem a tempest in a teapot did it not serve to point up the philosophy of law implicit in *Courts on Trial*. Some unregenerate readers may still think that the robe is more than a few yards of silk or serge, that it is a symbolic pledge of the pursuit of a long cherished ideal. Seven centuries ago Bracton wrote that the King himself was a "*sub Deo et Lege*". The Kings are gone. The judges remain. Shall *they* not also be "under God and the Law"? We live also by ideals we shall never see or touch. The symbols we see and touch are the pledges that the ideals still have value and are still to be pursued. How wisely has the Ancient Mother Church provided by innumerable symbols, tangible pledges of that "world intangible" to which she leads her weak and erring children! In the contest between the sponsors of law as "individualized" justice and the defenders of law as a body of principles, whether the latter express their concept in Bracton's "*sub Deo et Lege*" or in John Adams' "government of laws and not of men", the attack of Judge Frank on the robe, itself symbolically marks out the true battleground.

Limitations of space allow only bare mention of the author's criticism of American legal education. He thinks it is "unrealistic" because it continues too exclusively the "casebook" system deriving from Harvard's Langdell—a "neurotic escapist"—to use Judge Frank's characterization of him. Greater attention to student observation of actual court trials is recommended. "Moot" courts are at best "faked". They are a poor substitute, often providing merely amusement or relief from tedium.<sup>8</sup>

The "Natural Law" gets a rather confusing chapter in *Courts on Trial*. Apparently the author intended to show that "Natural Law" has little, if any, value in securing "certainty" in trial court decisions. He has, however, gone on to discuss "Natural Law" generally. The results are not too happy. Does the author think that the "Natural Law" doctrine is peculiarly a Roman Catholic possession? Again, without citing the source, he quotes Chroust as saying that Natural Law has "at different times, assumed and relinquished every and any philosophic standpoint". Judge Frank quotes Father Lucey (again without citing the source, and with text omissions) saying that "What is morally good today may be morally bad tomorrow and vice versa, because, while the few basic principles of morals do not change, others do . . . . (the omissions are Judge Frank's). Countless human actions are neither good nor bad in themselves" but "get their goodness or badness from circumstances of time, place, object and intent". This, says Judge Frank "sounds

7. Cf. Kennedy, *Functional Nonsense and the Transcendental Approach*, 5 *FORD. L. REV.* 272 (1936).

8. This reviewer's experiences as a Faculty Assistant in "moot courts" at Fordham Law School and at Notre Dame Law School have convinced him that the "moots" have not served merely the purposes of "amusement" or "relief from tedium". At Notre Dame, no student is graduated without at least ten hours attendance per semester for four semesters in the trial courts of St. Joseph County.

surprisingly like Pragmatism". Indeed he goes on to quote Brendan Brown as advocating the teaching of "Scholastic Pragmatism". The inferences drawn from these quotations out of context seem questionable. They need further development. Is the reader to conclude that Chroust is denying the objective validity of the Natural Law doctrine, that Father Lucey is suggesting, for instance that Euthanasia may be in accord with the Natural Law at one time but not at another, or that Brown surrenders Scholasticism to Pragmatism?

The "Natural Law" as expounded by St. Thomas Aquinas and applauded by Judge Frank in *Law and the Modern Mind*<sup>9</sup> is certainly not a parochial possession of Roman Catholicism. Aquinas offered it as the birthright of all men everywhere precisely in their character as creatures of a Divine Creator and endowed by Him with an immortal soul, an intellect and a free will. God, acting with Supreme Intelligence, made man and the world he inhabits in accordance with a Divine Plan. The Plan is the "Eternal Law". Man participates in it through his reason, *i.e.* he can, by his own reason, discover the primary dictates of the Eternal Law and the inferences derivable from them. The Natural Law then is no more a private possession of Catholics than is the Declaration of Independence which embodies its main teachings. The Natural Law must be the ultimate test of the validity of the laws men make for men in organized society.<sup>10</sup>

The reviewer cannot follow Judge Frank in his attack on the Natural Law on the ground that "Nature is no copybook containing precepts for civilized man. Nor is human nature, unartificialized, a sound foundation for a beneficent social structure", because "millions of Nazis recently disclosed what human nature can be"! Might it not be suggested that it was precisely because the Nazis violated Natural Law that the Nuremberg prosecution, when the "rotten parchment bonds" of International Positive Law proved but broken reeds as the basis of the indictment, was driven to rely on the Natural Law, at least implicitly—the Natural Law upon which Suarez and Grotius had built the foundations of what little the civilized world might call "International Positive Law" in 1945? It was either the "Natural Law" or the "individualized"—perhaps "personalized" justice of the victors which spoke at Nuremberg. The dilemma is not without embarrassment to Legal Positivists.<sup>11</sup>

*Courts on Trial* is an important book. It is a "must" for lawyers, judges, and in fact for all who are concerned with the kind of basic philosophy which should direct present and future legal reform. It draws sharply and deeply the lines on which apparently the greatest intellectual combat in the field of jurisprudence since the Common Law lawyers successfully resisted the "reception" of the Civil Law, is to be fought. We owe to Judge Frank a debt of gratitude for the clarity, vigor and courage with which he has stated the position of at least one of the parties to that combat. Those who think the position unsound and dangerous should not hesitate to join issue. Surely no one would welcome this more than the author of *Courts on Trial*.

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9. FRANK, *LAW AND THE MODERN MIND* XVII (6th ed. 1948), where Judge Frank declared, "I cannot understand how any decent man can today refuse to adopt, as the basis of modern civilization the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas."

10. The reviewer asks pardon for this *excursus* on the Natural Law. It seems necessary in view of Judge Frank's general discussion of the subject.

11. Book Review, 16 *FORD. L. REV.* 301 (1947).

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THE ASSESSING OF SALVAGE AWARDS. By Charles T. Sutton. London: Stevens & Sons Limited, 1949. Pp. 757.

The ever-recurring occasions of the rescue of lives and property endangered upon the high seas furnish one of the most romantic chapters of man's daring and courage, often woven into the world's great literature. In addition to the romance of the subject, however, the great sea-going nations, for centuries, have recognized that such services should receive acknowledgment in the form of pecuniary rewards, and maritime law has developed certain principles, peculiar to it, administered by Admiralty Courts, relating to "Salvage" and "Salvage Awards." In the law of salvage there are two basic principles (among others) that (a) salvage awards are payable out of the value of the salvaged property and (b), that the awards must be fair to both the salvors and the owners of the salvaged property. So, within the limit of the value of the property saved, an award, as far as possible, should be an appropriate acknowledgment of the successful efforts of the salvors, encouraging mariners to the utmost exertion and promptness in rendering services; and, at the same time, the award should leave a reasonable benefit of the salvage to the owners of the property saved.<sup>1</sup>

To comply with those basic principles, the assessing of an award necessitates proper consideration of numerous factors involved, such as the type and seriousness of the peril from which the property is saved, the character and extent of the hazards confronting the salvors and their equipment, the arduousness and length of time of the salvage services, etc. As the relative importance of those factors varies in practically every salvage service, it is impossible to assess a fair award by a rule of thumb or some fixed percentage of the value of the salvaged property. Yet, it is equally obvious that a wide disparity between high and low extremes of salvage awards would result in unfairness.

An English author, Charles T. Sutton has developed convincingly, by his thorough study of the salvage awards assessed by experienced English Admiralty judges in upwards of 500 cases between 1919 and 1939, his thesis that those awards, although assessed upon the variable circumstances and merits of each case, disclose a broad consistency in the relative importance given to the principal factors in all types of salvage services, with due allowance for the factual variations. After carefully identifying the factors which are most commonly found in all salvage services, Sutton has grouped them in three main divisions, and has worked out an empirical formula, by which their relative values can be scaled, or measured, with approximate accuracy, despite variations in the surrounding circumstances of each case. He proves his thesis by showing that the application of his formula to the known circumstances and the value of the salvaged property in each of the English salvage cases decided in the 20-year period results in a figure closely approximating the award which the Court granted.

After his intensive study had disclosed the broad consistency of the English awards, Sutton was confronted with the problem of finding a mathematical expression of a formula which would adequately evaluate the basic factors, despite

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1. Humanity demands that no price be placed upon the saving of life payable by the persons saved, and there are no salvage awards, in the strict sense, for the saving of lives when there is no saving of property. A statute of the United States, 37 STAT. 242 (1912), 46 U. S. C. § 729 (1946), provides that, under certain conditions, salvors of life, acting concurrently with salvors of property, may receive a fair share of the remuneration awarded to the latter.

the varying circumstances, of each salvage service; and perhaps the most unique phase of his work is his development of what may be described as a sliding scale, which, with minor adjustments which are understandable and can be easily made, permits the use of the formula, in all types of salvage services, in reaching an approximately accurate estimate of a reasonable award. Sutton carries that test of his formula through a long list of salvages of vessels in danger of sinking, vessels on fire, vessels aground, vessels disabled by damage to or loss of machinery or equipment, vessels which have been abandoned, and vessels which are in danger of drifting into disaster through loss of their anchors. He also demonstrates that the formula, with minor adjustments, can be applied in cases where there have been two or more sets of salvors who should be reasonably compensated without unreasonably increasing the total award payable out of the salvaged property.

Sutton frankly admits that, as the assessing of an award which will reflect reasonably the particular circumstances and merits of a salvage service lies solely in the sound discretion of the Admiralty Court, no exact or absolute result can ever be reached by some mathematical formula. He points out that it would be inappropriate and misleading to suggest that theoretical resolution be substituted for intuitive balance of judgment, which, so long as it continues to be "balanced", needs no substitute. Nevertheless, the formula which he has developed, reflecting the broad consistency, "balance", in the decisions and awards of the highly experienced English Admiralty judges, should be very helpful to anyone called upon to determine, approximately, a reasonable award for any new salvage service. This book will be all the more welcome to anyone interested in the subject, because other standard works on "Salvage", (at least here and in England) such as Kennedy's well-known Treatise,<sup>2</sup> have heretofore dealt almost solely with the principles of maritime law under which salvage awards may be claimed and granted, without offering any practical guide to the determination of a reasonable award.

In more recent years, when parties have been unable to agree upon a salvage award, the practice has grown to submit the matter to arbitration, and suits for salvage before the Admiralty Courts, here and in other countries, have become more infrequent. If court practice in salvage cases continues to diminish, arbitrators, and Admiralty judges themselves, may lose familiarity with the background of court decisions to such extent that salvage awards will no longer represent "balanced judgments." We are, perhaps, nearing that possibility in this country now. In the last 25 years few, if any, of the men appointed to the bench of our Federal District Courts have had any previous acquaintance with Admiralty or the background of historical and technical reasons underlying the principles on which the maritime law has developed; and, when called upon to sit in Admiralty in judgment upon a suit for salvage award, they are understandably ill-equipped to assess the award with "balanced judgment" reflecting that "broad consistency" which, as Sutton argues, must continue if salvage awards are to be assessed fairly in the interests of all parties concerned. If a salvage award today is two or three times larger than the award in a closely comparable case yesterday, the salvors in the earlier case and the owners of the salvaged property in the later case may rightly feel that they have been dealt with unjustly.

Sutton writes with a literary style which makes for clarity and enjoyment in the reading. He is, and has been for years, an executive of a British corporation which owns and operates a large fleet of merchant vessels. His ability to carry on the heavy burden of his business engagements, and, at the same time, make the ex-

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2. KENNEDY, A TREATISE OF THE LAW OF CIVIL SALVAGE (2d ed. 1907).

tended and intensive study of details and statistics which was obviously necessary for this book, stirs both astonishment and admiration.

Until a comparable study is made of the salvage awards of our Admiralty Courts, it may perhaps remain uncertain whether Sutton's formula can be applied as closely here as in England. But the probability is that the awards of the Admiralty Courts of the United States, when analyzed, particularly in cases throughout the 19th Century, will disclose that same "broad consistency" on which Sutton's formula has been fashioned, because our Courts, from their beginning, have not hesitated to look to the much older Admiralty Courts of England for guidance in a field of law which is practically international in its general principles. In any event, Sutton's book is a veritable mine of information which furnishes valuable guidance to the assessing of reasonable salvage awards, and the book should come to be accepted as a standard work on the subject with which it deals.

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