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In Memoriam

JEROME N. FRANK (1889-1957)

Advisory Editor to the **NATURAL LAW FORUM**

IT IS QUITE POSSIBLE that Judge Frank regarded his analysis of the disturbing role of "Fact Finding" in the judicial process and his assault on the popular myth of certainty in the law as his most important contributions to a realistic study of law in action. Calling himself a fact skeptic rather than a rule skeptic and devoting much of his interest to the vitally important role of trial courts, he never tired of emphasizing the impossibility of attaining a high degree of predictability with regard to judicial behavior due to the elusiveness of fact finding. "No matter how precise or definite . . . the formal legal rules," to quote his language, "no matter what the discoverable uniformities behind these formal rules, nevertheless it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in most (not all) lawsuits, not yet begun or not yet tried."¹

However important this aspect of his work, I would like to take the opportunity to speak briefly of a related contribution—his psychological realism. Typical of his approach is his discussion of the myth of certainty. By lending strength to our sense of security, as he argued, "an unquestioning dependence upon authority" brings with it a great degree of emotional satisfaction. Small wonder that, "in the absence of trustworthy human authorities, fictitious authorities are invented," taking frequently the form of absolute principles. This understandable human attitude, according to Judge Frank, explains the profound and widespread belief in a harmonious and definitive body of law behind the law of statutes and decisions, binding on legislators and judges alike. It has only to be discovered.²

The parts of his most famous book devoted to a psychoanalytical approach to law have remained the most controversial. Despite the intense criticism encountered by some of Judge Frank's challenging observations, he was justified, I submit, in his conviction that a psychological approach gives to law and to its study a new and indispensable dimension. To be sure, jurisprudence, during most of its long history, did not forget that the validity of rules of law cannot be based on obedience alone; they have to be anchored in the sense of justice of the members of the community. Legal as well as

1. FRANK, *LAW AND THE MODERN MIND*, Preface ix (1949).

2. STEPHENSON, *LANGUAGE AND ETHICS* 92 (1944).

other social institutions must be in harmony with what those who live under them think to be moral.³ But we should not conceal the disquieting fact that due to the enormous role played by emotional, i.e., irrational factors, the law we live under is far from the ideal of being "dispassionate reason."

Until recently, attempts at analyzing and understanding the sense of justice—so vitally important for stability as well as progress—have been neglected, at least in this country.⁴ Recent studies have shown, as he claimed, that our sense of justice is a name for a bundle of demands on society which are in a never-ending conflict with one another. In the name of justice, as has been pointed out, demands for "arithmetical" as well as for "geometrical" equality, for the protection of the status quo, as well as respect for one's individuality and liberty, have been made. We all must go through the slow and painful process of learning that justice cannot always mean arithmetical equality or the protection of the status quo. With many members of society this important step in the direction of moral maturity is never fully accomplished.⁵ They are willing to forego the gratification of their deep-seated demands only on condition that the other members of the community will be forced to do the same. Disregard for this principle within the body politic is often regarded as a miscarriage of justice, as breach of an implied social contract, as has been aptly observed.⁶ A return to anti-social attitudes is frequently the result. Furthermore, in the life of all of us there arise situations where social and self-assertive instincts, prejudicial and enlightened attitudes are in most precarious balance. These insights are of the utmost importance for the administration of criminal justice and our attitude with regard to the criminal. We are bound to realize that society's role towards the criminal is frequently ambivalent to a disturbing degree.⁷

A psychoanalytical approach is of invaluable help to a better understanding of natural law which Judge Frank took much more seriously than some of his critics have been willing to concede. Natural law, in one of its most important aspects, is a psychological phenomenon. Its emphasis on the dual structure of law shows remarkable insight. Natural law philosophy emphasizes the interdependence of two levels of reality. Law, as our external experience tells us, is positive law; law, our inner experience demands, has to conform to the idea of justice. To be sure, the law that is and the law

3. Knight, *Ethics and Economic Reform*, 6 *ECONOMICA* (N.S.) 1, 4 (1939).

4. CAHN, *THE SENSE OF INJUSTICE* (1949); RIEZLER, *DAS RECHTSGEFÜHL* (2nd. ed. 1946).

5. BIENENFELD, *THE REDISCOVERY OF JUSTICE* (1947).

6. ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* 10 *et seq.* (1931).

7. EISSLER, *SEARCHLIGHT ON DELINQUENCY* (1956).

that ought to be have to be *distinguished* whenever possible, to avoid arbitrariness, but it is equally true, as natural law philosophy insists, that law and the fundamental principles inherent in our moral tradition cannot be *separated*. It is even meaningful to maintain, with Radbruch, that positive law which violates fundamental notions of justice to an "intolerable degree" is "lawless" law, so that—to mention only one of many implications—resistance on the part of the members of the community is not merely a moral duty.⁸

Still, natural law having emotional ingredients, it is not surprising that conflicting values have been both defended and attacked in the name of natural law.

Thus, however profound its insights and in spite of impressive contributions of natural law philosophy to the development of our legal orders, a disquieting question remains: will not natural law be deprived of its *vis directiva* if its adherents, playing their role of "ethical leaders,"⁹ when attempting "to discern those minimum principles that must be accepted in order to make law possible,"¹⁰ are unwilling to listen to a realistic science of human nature? Can natural law philosophy as at present oriented rightly claim to be doing its part in the creation of those human conditions which are required for the widespread development of a mature sense of justice which is indispensable for a just social order? To achieve maturity the opportunity of choice and therefore of making mistakes and of assuming responsibility for their consequences is indispensable, as liberalism correctly claims.

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8. Fuller, *American Legal Philosophy at Mid-Century*, 6 JOURNAL OF LEGAL EDUCATION 481 *et seq.* (1954).

9. J. Frank, dissenting in *Repouille v. United States*, 2d Cir. 1947, 165 F. 2d 152.

10. Fuller, *supra*, note 8 at 463.