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Confession and Avoidance--Reflections on Rereading Judge Frank's Law and the Modern Mind

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CONFESSION AND AVOIDANCE? — REFLECTIONS ON REREADING JUDGE FRANK'S *LAW AND THE MODERN MIND**

THE late Mr. Justice Holmes once remarked in a letter to Sir Frederick Pollock, "all books are dead in twenty-five years, but luckily the public does not find it out." Judge Frank's *Law and the Modern Mind* was first published in 1930. Justice Holmes' literary statute of limitations has thus not yet run against it. A sixth printing is now issued. The 1930 text remains exactly the same. The author, however, "confesses" in a new preface specially written for the reprint, that he would not today write the book "precisely" as he did eighteen years ago. At the end of the preface he adds a list of three books and eighteen articles written by him since 1931. To these the reader is sent "if he has any questions about the ideas expressed" in *Law and the Modern Mind.*

Few lawyers and fewer laymen will have ready access to all of Judge Frank's post-*Law and the Modern Mind* writings, or the opportunity to compare them carefully with the unrevised text of the present reprint to determine the "precise" extent to which the author's philosophy of law has undergone material alteration, if any. Those, however, who pursue the course of collateral reading recommended by

*LAW AND THE MODERN MIND. By Jerome Frank. Sixth Printing. New York: Coward-McCann, Inc., 1949. Preface by the author, pp. xxvii, text pp. 362. $5.00.

Judge Frank and then reread the text, may well conclude that it is time to re-write rather than reprint *Law and the Modern Mind.* Some may think that the author is in fact now adding his note to the *Swan Song of Legal Realism.*[1] For the preface of the sixth printing is replete with caveats, disclaimers, limitations and qualifications. Judge Frank regrets that he attempted another definition of "law" and thus involved himself in fruitless controversies with other "law definers." He wishes it had been more clearly understood that he intended to "talk of actual past decisions or guesses about future decisions, of specific lawsuits." It was a "blunder" to have used the term "legal realism" at all, since there was no "homogeneous" school of legal realism, and since the word "realism" had philosophical connotations which have no connection with the work of "legal realists." Hence the way was opened for his critics to ascribe to him views perhaps entertained by *some* "legal realists," but by no means fairly descriptive of the thinking of *all* legal realists, to say nothing of the author himself. Moreover he was mainly concerned with the judicial process in the trial courts and with the problem of uncertainty and unpredictability in our present trial court methods in fact determinations.

Judge Frank now admits that his comments on Aristotle were "glib" and that his references to "scholasticism" were "superficial and unfair." He reminds us that he has since made "amends and apologies" elsewhere. "Roman Catholics" misunderstood him if they thought he intended to criticize the "Natural Law" doctrine. The book "contains no mention of Natural Law." Indeed, in a sweeping sentence, in the new preface, Judge Frank says that he 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." Nevertheless, the "Natural Law" "furnishes no help-

[1] Aronson, Book Review, 20 TEX. L. REV. 118 (1941). Reprinted entitled *The Swan-Song of Legal Realism.*

ful standard for evaluating the fact-determinations of trial courts in most lawsuits, and no assistance in ensuring uniformity, certainty or predictability in such determinations." Writers on "Natural Law" have not yet faced this problem.

Judge Frank's elaborate psychoanalytical apparatus reconstructed from the work of Piaget and Freud, as an explanation of the "persistent longing of lawyers and non-lawyers for a patently unachievable legal stability" remains intact in the reprint. In his preface the author warns the reader that he repeatedly stated that the explanation was offered only as a "partial" one, and that he had in fact enumerated fourteen other "partial" explanations. His critics—for example, the late Dean Walter B. Kennedy [2]—were wrong in accusing him of resorting to "Freudian complexes" in explaining the demand for certainty in the law. It was likewise error to charge him with "abject devotion" to psychology as an "authoritarian science," for to Judge Frank, psychology is not a "science" but an "art" and even so "still in its infancy." He is not a "devotee of behaviorism." Nor is he a "psychological determinist." All this, we are told, he has made abundantly clear in his other writings, and he points out that even in *Law and the Modern Mind* he had occasion to criticize adversely at least one important feature of behaviorism. He was surprised, therefore, when some of his critics accused him of "anti-rationalism" and "anti-idealism."

When *Law and the Modern Mind* was first issued in 1930, traditionalists were shocked and realists enthusiastic. Llewellyn thought the book was "keen, cogent and well-integrated."[3] Adler found it contained "very little argument" and "such as there is misses the point entirely or confuses rather than clarifies the issue between realism and fundamentalism

[2] Kennedy, *Functional Nonsense and the Transcendental Approach*, 5 FORD. L. REV. 272 (1936); and by the same author, *Realism, What Next?* 7 FORD. L. REV. 203 (1938).

[3] Llewellyn, Adler and Cook, *Law and the Modern Mind: A Symposium*, 31 COL. L. REV. 82 (1931).

in jurisprudence."[4] Allen wrote caustically about "Jazz Jurisprudence," and referred to some of Judge Frank's remarks on precedent as a "fantastic distortion of the nature of judicial logic and discipline."[5] Only a new edition and not a reprint of *Law and the Modern Mind,* incorporating the qualifications of the present preface and the results of the author's later thinking can tell whether the traditionalist's sense of shock will be lessened or the realist's ardent enthusiasm dampened by Judge Frank's present position. Until then further misunderstanding is almost inevitable.

Rereading the text now in the light of the new preface alone, it would seem that large portions of *Law and the Modern Mind* have undergone considerable "disinflation." For instance, in the reprinted text,[6] Judge Frank states that "on the continent there is a movement in favor of 'free legal decision' which emphasizes the subjective sense of justice inherent in the judge. The question is not whether we shall adopt 'free legal decision' but whether we shall admit that we already have it." In his new preface the author says "no sane informed person will deny that within appropriate limits, judicial adherence to precedents possesses such great value that to abandon it would be unthinkable." Does Judge Frank still believe that "free legal decision" is a desideratum to be eagerly pursued by us? Is it with him now a *fait accompli?* In his preface he quotes from an opinion written by him after donning the robe of a judge: "courts should be exceedingly cautious in disturbing—at least retrospectively —precedents in reliance on which men have importantly changed their positions."[7] Are we then to forget the text of the reprint here and read only the new preface as correctly stating Judge Frank's present position? Or shall we wait patiently for a new edition of *Law and the Modern Mind*

4 *Id.* at 91.

5 ALLEN, LAW IN THE MAKING 45, 248 (3rd ed. 1939).

6 LAW AND THE MODERN MIND 54, note.

7 Aero Spark Plug Co. v. B. G. Corp., 130 F. (2d) 290, 296 (C. C. A. 2nd 1942).

wherein the author will show the appropriate limits of "free decision" and "stare decisis,"—the boundaries of the areas wherein adherence to precedent is, and wherein it is not, of compelling importance? Such clarification is certainly due those who now reread the unrevised chapter of *Law and the Modern Mind on* "Dean Roscoe Pound and the Search for Legal Certainty," [8] wherein the illustrious Dean is taken to task for "partitioning" the field of legal order between cases relating to "property and business transactions" and those raising problems of "human conduct," and stressing the supreme value of stare decisis in the former in the name of "certainty" and "predictability." What sort of "partitioning" would Judge Frank now make? Quite obviously, a proper chapter in a new edition of *Law and the Modern Mind* could be entitled "Dean Pound Revisited." Such a chapter might well show the points at which the realist's "judicial" justice achieves juristic *rapprochement* with the "rule" justice which the author's present prefatory acknowledgment of the value of stare decisis apparently approves, at lease within appropriate limits.

If, as Judge Frank reminds us now in his preface, "realists" aim at more "judicial justice," and if the method of "free legal decision" is to be accepted, it may be well to recall the words of Professor Dickinson written some time after the first publication of *Law and the Modern Mind*:[9]

> . . . some of the proponents of newer theories of jurisprudence seem to avoid stability by substituting the idea of government by "flexible intelligence" for government in accord with rules of law. Their hostility to rules arises precisely from the element of stability which rules necessarily involve, and they, therefore, seek to eliminate the rule-element in law in favor of a conception of law consisting essentially of intelligent discretion. From this standpoint, law is whatever government does in the exercise of a supposedly intelligent discretion. Hence the desire to have government operate as much as possible through discretionary administrative agencies of experts

8 LAW AND THE MODERN MIND, Part II, Ch. I.

9 Dickinson, in MY PHILOSOPHY OF LAW (Rosenwald Foundation for General Law ed., 1941).

> and the insistence that the discretion of these agencies shall be free from review by courts of law. This view stripped of its contemporary phraseology and modernistic trappings, is nothing but a return to the age-old idea that the best government is governed by philosopher-kings. This idea long ago lost out in the competition of the market-place to the more pedestrian idea of government by law, because law, although at the expense of a certain amount of flexibility, can at least institutionalize the common sense wisdom of mankind, while the wisdom of the philosopher-king can often be proved to be wisdom only by the persuasive force of bullets and bombs. Whether the wisdom of modern philosopher-kings can be made to rest on any different kind of proof remains to be seen.

What assurance can the realists give us that their quest for more "judicial" justice, perhaps through the method of "free legal decision"—a quest deemed more worthy than that for "certainty"—will not produce results quite like those suggested by Dickinson? After all we may remember that Walter Wheeler Cook, who frankly avowed his allegiance to "realism" in jurisprudence, once said that "having given up the quest for certainty, we have no guarantees to offer."[10] Many, like the present writer who first read *Law and the Modern Mind* in 1930, felt that Judge Frank's assault on the demand for "certainty" in law—the "basic myth" (to use the author's language)—was more exuberant than his real purpose demanded. The baby was thrown out with the bath water. Does the present by implication suggest that the baby might now well be brought back? If so, *Law and the Modern Mind* can hardly avoid being misunderstood once more. It cannot be saved by a reprint at war with a preface.

Further disinflation of the author's apparent purpose appears in the present prefatory discussion of the alleged "school" of realistic jurisprudence. Unsuspecting average readers as well as eminent legal critics could scarcely be blamed for concluding from the first edition of *Law and the Modern Mind* that the author at least did not intend to disparage "legal realism." As Adler said,[11] the book

10 *Id.* at 64.

11 Llewellyn, Adler and Cook, *op. cit. supra* note 3, at 92.

> . . . can be taken as representative of the school of legal thought which has raised much dust in jurisprudential controversy in this country in the last twenty-five years. In criticizing *Law and the Modern Mind* one criticizes the positions of Cook, Oliphant, Bingham, Yntema, Green, Wurzel, and to a lesser extent, Pound, Cardozo, and Holmes.

In the present preface, Judge Frank tells us that it is a mistake to assume that there is a "homogeneous school" of legal realism. Now while it may be true, as Morris Cohen puts it, that a "philosophic label" is often a "libel," and while as yet the legal realists have not applied for corporation papers, nevertheless there was and still is an attitude of pragmatism and empiricism fairly common to all legal realists. It may be, as Adler remarked, a "raw" pragmatism and empiricism, less "raw" in some than in others. It may be also that the great fountain-head of contemporary "legal realism" is John Dewey's *Quest for Certainty*. Judge Frank tells us that "legal realists" are roughly divided into two groups. There are "Rule Skeptics" and "Fact Skeptics." From the former, Judge Frank disengages himself. He is a "Fact Skeptic." The "Rule Skeptics" to him, by their undue concentration on the work of appellate courts and by their endeavors to find the "real rules" behind the "paper rules" as more reliable instruments of prediction, dwell in a "two dimensional world." "Fact Skeptics" are more closely concerned with the fact-finding process in the trial courts. They are wary of the "Myth of the Upper Court." [12] They dwell in a "three dimensional world."

The reader of the first edition of *Law and the Modern Mind* was scarcely prepared for this new classification of legal realists. The author did indeed devote considerable attention to the "basic myth" as it appeared in the workings of the trial courts. This however did not clearly appear to be his only or even his primary concern. If now warned by his preface that we are to take the reprinted text as intended

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12 Frank, *Cardozo and the Upper Court Myth*, 13 L. & CONTEMP. PROB. 369 (1949).

mainly to deal with the problem of "certainty" vs. "uncertainty" in the trial court process, it can at least be said that the general attack on the "myth" of certainty in the legal field seems too broad. Those of us who have tried cases to juries or to the court alone surely learned early enough not to guarantee the outcome to clients when the facts were in dispute and the witnesses contradicting each other with mistaken or intentionally distorted versions of events perhaps already long past at trial time. Granted that we need extensive reform in our methods of fact finding in the trial courts, and granting that students of psychology (though not a "science" but merely an "art"—to use Judge Frank's characterization) may have much to teach us, does our inability to predict with certainty the ultimate verdict of a jury on disputed testimony warrant a general repudiation of "certainty" in law as a "childish" myth foolishly cultivated by lawyers and judges to appease the equally "childish" demand of the layman seeking a "substitute" to fill the void of the long exploded "absolutes" of his childhood—a "certainty" which the law can never give in any sense? Truly, "until men are angels" we will not have angels in the jury box nor archangels on the bench. In the long meantime, are we to abandon as a vain effort sure to result in the frustration or deception of the layman, the quest for "certainty" in law—in "human" not "angelic" justice through impersonalized rules of law? Are we to renounce even as an ideal (assuming that "realists" whether of the "Fact Skeptic" or the "Rule Skeptic" divisions, respectively, will leave us some of our ideals) "government by law" in favor of "government by men" still sadly "less than angels"? *Law and the Modern Mind* was written in 1930. Three years later Adolf Hitler became Chancellor of the German Reich and the world for fifteen years was witness again to a brutally "real" manifestation of personalized justice and personalized law. And now the "realist" champion Cook tells us that "having given up the quest for certainty we have no guarantees to offer."

Is this Judge Frank's position now? If not, what are his "guarantees"? Is the only "certainty" simply that there are no "certainties"? In a world "grown gray at the breath" of personalized "justice," what have the "realists," whether of the "Right" or of the "Left," to offer? Such questions are provoked fairly by a rereading of *Law and the Modern Mind* after eighteen years, when one has "called in aid" the new preface and the author's other writings. In spite of prefatory disclaimers, it seems that Judge Frank is not content to limit his inquiries into legal philosophy to the narrower field of "juriesprudence," as he calls it. He is led forever onward like all who grasp the seamless garment of Jurisprudence to formulate a general philosophy of law. One who ventures into Jurisprudence even through the medium of "juriesprudence" can never return until he has faced and answered the far, far deeper questions that lie beyond the behavior of an Anglo-American trial judge or trial jury. Some questions and some answers appeared in the first edition of *Law and the Modern Mind.* The preface to its reprinting now shows that author not "precisely" satisfied. He has evoked newer and more fundamental questions. The answers will require more than a reprinting of an old text with a new preface.

Of course in the reprint, the author's "Freudian" analysis of the layman's demand for certainty in the law remains unaltered. The preface merely warns us that it was offered only as a "partial" explanation. The present writer is but a "mere lawyer," not a psychoanalyst, psychologist or (be it added in haste) an embryologist. He must therefore leave to others more qualified than he the interesting question whether the origin of the human quest for certainty lies in the striving of the human being vainly to re-acquire the prenatal security he enjoyed as an embryo in his mother's womb. The same must be said about the author's borrowings from Piaget and others to the effect that the layman's "childish" expectation of "certainty" in the law is but a "transfer"

made when "Life with Father" revealed all too soon to the child that father is not infallible and when other "father substitutes" proved also to be but broken reeds. Judge Frank has left these and other explanations intact in his reprinted text of 1930. It is thus still open to the criticism made by others eighteen years ago — that Piaget's findings and conclusions have not escaped serious questioning — that Judge Frank has reasserted them with a dogmatism he is too ready to chastise when he thinks he has found it in others. (The rather "emotive" attack on Beale and Bealism [13] is in point here). Sometimes we are never so dogmatic as when we attack dogmas with which we disagree. Suffice to say that the present preface does little to allay the misgivings of the reader of *Law and the Modern Mind* in 1949. Disclaimers of "behaviorism" and of "psychological determinism" may not be enough.

Not only "Roman Catholics" (who contrary to the prevalent impression have not acquired a non-assignable, nontransferable interest in Natural Law) but many others not of Roman Catholic persuasion will be interested in Judge Frank's prefatory *amende honorable* to "Scholasticism" and "Natural Law." What effect does it really have on the unrevised text of *Law and the Modern Mind?* How much for instance, of the chapter on "Verbalism and Scholasticism"[14] is to remain intact in the light of the author's generous disavowal of his former views? Are we merely to forgive Judge Frank's unpardonably careless use of "Dark Ages" which, in the manner of a school of historians we had long thought extinct, he uses interchangeably with "Middle Ages"? Are we merely to excise from the reprinted text the implications of pitying contempt in his use of the terms "Scholastic" and "Medieval"? Or, is something far deeper intended? In his text Judge Frank says that "Scholasticism worshipped the

13 LAW AND THE MODERN MIND, Part I, Ch. VI.

14 *Id.* Part I, Ch. VII.

word."[15] "It established a hierarchy of ideas in which what is most void of content is placed highest."[16] This strange concept of Scholastic epistemology and ontology is almost of a piece with that of men who once dismissed them as offering nothing more than silly controversies over how many angels could dance on the point of a pin. Judge Frank gives no indication that he has deeply delved into the history of the conflict between the Nominalists and the Realists in Medieval Philosophy. He seems to have conjured up a picture of Platonic Idealism and then passed his version on through Aristotle to the Scholastics. Perhaps it is unfair now to make these strictures in view of the "apologies" which Judge Frank reminds us he has made "elsewhere." Still the question remains—how does the author's present view of Scholasticism affect his Chapter VII, which perforce remains intact in this reprinting, exactly as it was written in 1930? How much of the apparent thesis of *Law and the Modern Mind* rested upon the author's views of Scholasticism? How much is now gone out of it in view of the apparent change of views on Scholasticism?

"There is no mention of Natural Law in the book" says Judge Frank in his preface. However, in the course of his frontal attack on Bealism, mainly because of its claim of a superhuman character for law, the author quotes[17] (and certainly not with approval) Blackstone's famous statement regarding the "Natural Law": "The law of nature . . . is binding over all the globe in all countries and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all their authority mediately or immediately from this original." Judge Frank then proceeds to point his batteries at those who, like Blackstone and Beale place law on an "extra-experiential" basis. Against them he cites with praise, the famous Holmesian half-truth that "law is not a brooding omnipresence in the sky."

[15] *Id* at 64.
[16] *Ibid.*
[17] LAW AND THE MODERN MIND 54.

In his preface Judge Frank now tells us that he certainly did not intend to criticize adversely the Thomistic version of the Natural Law. St. Thomas in a passage which one may venture to assert Blackstone had read carefully, said "every human law has just so much of the nature of law as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law." [18] Precisely what is it in Blackstone's passage which Judge Frank disparages that does not appear with equal clarity in the quotation from St. Thomas? Furthermore, when one reads St. Thomas' discussion of the relations between the "Natural Law" and the "Eternal Law," [19] it would seem that for St. Thomas too, law had an "extra-experiential" basis. What then does Judge Frank mean, taking his preface and his text together, by his accolade to the Thomistic Natural Law?

Of course, Judge Frank tells us that the Thomistic Natural Law offers "no helpful standards for evaluating the fact-determinations of trial courts in most lawsuits and no assistance in ensuring uniformity, certainty or predictability in such determinations." One wonders whether Judge Frank fully appreciates the meaning of St. Thomas' treatise on law. St. Thomas was certainly not writing a treatise on Anglo-American jury trials. If Judge Frank intended, as he now tells us, to deal primarily with the judicial process in trial courts in *Law and the Modern Mind,* and was not principally concerned at all with the broader problems of the philosophy of law, why acclaim Thomistic Natural Law in the present preface? The fact is that the reader, in spite of the preface, when he reads or rereads the text will get the reasonably clear impression that the author in whole chapters of the book was exploring the field of Jurisprudence generally. If such an impression is correct, then the author's present concession of value to the Thomistic Natural Law has a deeper and more

18 THOMAS AQUINAS, SUMMA THEOLOGICA, I, ii Q 95, art. 2.
19 *Id.* Q 93, art. 3.

extensive impact on the book than the author apparently realizes at present. The Thomistic Natural Law doctrine is not something which can be wrenched out of the marvelously concatenated scheme of the *Summa Theologica* of which it is an integral part. It does not stand *"in vacuo."* Will not its acceptance by the author bring with it other "acceptances" quite inconsistent with, if not wholly fatal to entire sections of *Law and the Modern Mind?* For example, how does Judge Frank's present benediction of the Natural Law of St. Thomas fit into his laudation of Justice Holmes as his "completely adult jurist" [20] who "put away the childish longings for a father-controlled world," the hero for whom the "golden rule" was "that there is no golden rule"? Surely Judge Frank is well aware of the half-humorous, half-contemptuous dismissal of the Natural Law doctrine by Justice Holmes. After reading the preface of the present reprint and the unrevised chapter on Justice Holmes with which the book closes, one is tempted to ask "Under which King"?

When we have a new edition of *Law and the Modern Mind,* the dilemma thus evoked should make an exciting chapter. For the present, it must be said that the "preface acceptance" of the Thomistic Natural Law placed against the unaltered text creates a series of problems which have not yet been answered by the author. Far-reaching are the implications involved in an acceptance of the Thomistic Natural Law. Judge Frank with great courage and with unquestioned sincerity of purpose is striving to bring more justice into law. Will he now be led to a more solid and more satisfying synthesis than that deriving from pragmatism and empiricism, which, though decrying all absolutes as "childish," and though professing to have "no guarantees to offer," yet give us their own strange Absolute — the "Non-Absolute"? One can only wait and see.

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20 LAW AND THE MODERN MIND, Part II, Ch. III.