

BOOK REVIEWS

NOT GUILTY. By Judge Jerome Frank and Barbara Frank in association with Harold M. Hoffman. Garden City, N. Y.: Doubleday & Company Inc., 1957. Pp. 261. \$3.75.

A Legal Realist and a Humanist—cross-currents in the legal philosophy of Judge Jerome Frank.

Some years back, when I first began teaching in New Haven, I was sipping martinis with a visiting French priest at Mory's when Jerome Frank came in and joined us. Our conversation ranged easily over law and literature, French as well as North American, for Jerome Frank was eclectic in his reading tastes as well as in his sympathies. Somehow, I think facetiously, the Frenchman referred to the guillotine as a mode of effecting execution of condemned men. Frank's manner, which had been jovial and bantering up to that time, at once took on a grimmer note and he said, with visible emotion, "The death penalty is a vicious thing, degrading to those who inflict it as well as to those who receive it." My French friend and I were rather startled, not because of the actual sentiments expressed but because it was Jerome Frank who had expressed them. In our studies outside the United States of the work and ideas of the Legal Realists, and in taking note of their vigorous iconoclasm, both of us had associated them also with the "tough-mindedness" of William James, the "soldier's faith" of Mr. Justice Holmes, and perhaps even with Brandeis' conscious rejection of sentimentality¹ in decision-making. The pragmatist thinking of James and Holmes represented, to be sure, a somewhat different and earlier strain of American legal philosophy than Legal Realism, but most of the Legal Realists adhered also to the Pragmatist creed—its basic ideas and its specialist thought-ways. How could this apparent conflict in Jerome Frank's thinking be explained?

When I later raised this question with Jerome Frank, he reminded me of what I already knew; that the Legal Realists were never a *school* of thought² in the sense of having a definite intellectual style-leader or

1. See FREUND, ON UNDERSTANDING THE SUPREME COURT 66-68 (1949).

2. FRANK, LAW AND THE MODERN MIND vii-viii (1949): "I made a blunder, leading to misunderstandings, [in the first printing in 1930] when I employed the phrase 'legal realism' to label the position, concerning the work of the courts, which I took in this book . . .

"There was a . . . cogent reason for regretting the use of 'realist' as a method of ticketing these legal skeptics. The label enabled some of their critics to bracket the

having enshrined a particular set of philosophic orthodoxies of their own. They were simply people who happened to think alike on a few main issues—that the official theory of the judicial process, accepted in American law schools up to the end of World War I, (that judges “found” law and never made it) rested on a myth, the myth of legal certainty; that society was in a state of flux and that the positive law, if it were not to break down altogether, must be continually re-examined in relation to the degree to which it accomplished its social tasks; that the truly “adult” judge was one who faced up to facts and recognized frankly his legislative opportunities and responsibilities. Beyond these basic points of agreement, the Legal Realists differed widely in their ideas and emphases—quite as much, indeed, as in their personalities, background, experience, and interests. Jerome Frank admitted, in this respect, that his opposition to capital punishment stemmed originally from fundamentalist aspects of his personal creed—his family religion—and that he could quite understand that others of the Realist group who hewed more consistently to relativist, societal tests of the “good” in law, might have no absolutist views on capital punishment any more than they might on, say, Sunday baseball or euthanasia.

Judge Frank went on to say, however, that his opinion on capital punishment had been buttressed, in his own mind, by his investigations, part of Frank’s applied Realist (“Fact-skepticism”) researches, into problems of fact-finding at the trial court level. He had come to the conclusion, in relation to criminal trials, that the fact-finding processes were inexact and imperfect and often hit-or-miss and open to error. To impose the death penalty after a criminal verdict was to give such decisions, turning as they did so often on disputed issues of fact, a finality beyond the possibility of later correction. What can be categorized, therefore, as a natural law position on Jerome Frank’s part on capital punishment gained extra strength from his empirically-based, pragmatist-type, researches.

Judge Frank’s opposition to the death penalty, which forms a major theme in his last book, *Not Guilty*, co-authored with his daughter,³ was

realists as a homogeneous ‘school,’ in virtual accord with one another on all or most subjects. This misconception—not certainly the result of any careful reading of their work—led to the specious charge that the ‘realist school’ embraced fantastically inconsistent ideas. Actually no such school existed.

“ . . . These so-called realists have but one common bond, a negative characteristic already noted: skepticism as to some of the conventional legal theories, a skepticism stimulated by a zeal to reform, in the interests of justice, some court-house ways.”

3. According to the special preface written by Barbara Frank (pp. 9-10), *Not Guilty* was begun in the Fall of 1953 and continued thereafter until the Summer of 1954, when it was temporarily shelved. Writing was resumed in 1955 and finally com-

only one of the more striking consequences of his conclusions as to the inadequacies of the fact-finding processes in criminal cases. As a judge he received hundreds of letters from men in prison requesting help in their behalf, and he would give each letter his personal attention, assigning counsel to those convicts whose cases he thought had any merit. He firmly believed in the wisdom and propriety of appellate courts' reviewing, if necessary through certiorari and similar procedures, proceedings in state criminal cases where there was any suspicion of a miscarriage of justice. And, at the academic level, as a visiting member of the Yale Law School faculty, he never ceased to inveigh against what he thought to be an excessive concentration of student energies on the Law Journal to the exclusion of the Legal Aid Society, Barristers' Union, and other activities that were less pre-occupied with what Frank liked to describe as "appellate-court-itis."

Those who have been acquainted with Jerome Frank's ideas for any length of time will find, in his book, *Not Guilty*, nothing that is startlingly new in terms of basic ideas on law and society. This is the same old Frank, though since the book is predominantly intended for a lay audience much of the verbal crackle and brilliance of style that used variously to excite, irritate, or delight professional legal readers in the past, but which perhaps acted as a barrier to full communication with the general public, has been edited out. It is, in fact, a much tidier and better organized volume than any of Jerome Frank's earlier works, principally because he always wrote in the excitement of a discovery of a new idea and was temperamentally incapable of revising or re-writing manuscripts once the white heat of inspiration was over⁴. The over-all unity and cohesiveness of the present work and its general clarity of style represent the fruits of his literary collaboration with his daughter, a skilled author in her own right. All the same, those of us who accept the notion that there are no intellectual gains without pains may sigh wistfully at time for the unexpurgated Jerome Frank: the Baroque richness of phrase and profusion of literary allusion reflected in a real sense Frank's own vivid and varied personality and therefore aided in the communication of his central ideas, even if at times producing some obscurity of actual meaning in the occasional phrase or sentence or sending the reader in hurried

pleted, to both authors' satisfaction, on January 11, 1957. Jerome Frank suffered a heart attack the following day and died on January 13, 1957.

4. "He could not, to save his life, have revised *Law and the Modern Mind*. That represented a stage in his development and he found it impossible to return. A revision would not have done. He would have had to write a new book and that book would probably have been on another subject. The kinship which in his later years he felt with the author of the earlier book was only that of continuity in personality." Hamilton, *The Great Tradition—Jerome Frank*, 66 YALE L.J. 821, 822 (1957).

search for Roget's Thesaurus.

Not Guilty is a collection of thirty-six cases in which, according to subsequent executive or judicial examination and review of the record after at least some part of the sentence had been served, it was established that the wrong persons had been convicted in the first place. There is the case of a man framed for murder by Chicago bootleggers; a faulty trial and conviction for rape in Denver; a curious affair in which a bank robber, annoyed by the conviction of two men for his crime, spoke up in their behalf. In presenting these cases, and the casual factors of confusion of identification on the part of witnesses, errors on the part of defense counsel, overbearing tactics by the prosecution, that brought about the convictions, Frank recurs again and again to a life-long theme of the imperfections in the whole system of conduct of criminal trials in the United States. He is critical of the whole "combat" conception of criminal law adjudication (a "battle between opposing counsel") which he regards as tending frequently to obscure the search for truth. He strikes a major blow when he points to the general absence, in the U.S.A. in comparison to the Commonwealth countries, of any system of pre-trial "discovery" in criminal cases⁵—the committal and grand jury type of proceedings, in the Commonwealth countries, in which the Crown (prosecutor) has, in effect, to produce its evidence to establish a *prima facie* case before the accused can be put on trial, appealed strongly to Frank as eliminating the adverse operation of surprise and chance against the accused without sacrificing any of the prosecution's legitimate interests. Frank advances the merits of trial by a three-judge court, as opposed to a jury, in criminal cases:⁶ it was his private view, in this regard, that a judicially composed fact-finding tribunal, as distinct from the jury actually used, would have acquitted Alger Hiss on the evidence presented in the first trial. I hasten to add that Frank did not at any time, to my knowledge, assert that Hiss was innocent. His point was simply that the onus of proof in criminal cases, "beyond reasonable doubt," should be throughout on the prosecution and that in cases involving offenses against public morality (whether political morality or sexual morality) a jury is not a very reliable guardian of individual interests against the State, for their tendency is to blur and confuse the nature and apparent enormity of the crime charged with the question of the actual guilt of the individual person on trial before them. Certainly, the record of prosecutions for sedition, treason, obscene libel, and similar counts in English constitutional history over a number of centuries lends some support to this

5. FRANK AND FRANK, *NOT GUILTY* 242-48 (1957).

6. *Id.* at 224-25.

criticism of the jury system.

Do I sense, perhaps, an element of datedness in Frank's appeal in reading through *Not Guilty*? Our general plans for legal reform at present, our great research institutes (financed by \$2,000,000 grants from Ford and Rockefeller) are largely directed to problems of public law—international and comparative law, federalism, administrative law, trade regulation—remote from the practical concerns of the trial lawyer. The American Realists of the 1920's, in spite of their surface cynicism and mordant wit, were often interested in problems of individuation of justice—of its concrete application in day-by-day cases—in addition to their better-publicized and wider-ranging pleasures in destroying the cult of the robe and debunking the dull and pompous among the older pundits of the law. The literary and legal philosophers of the 1920's and 1930's—the Menckens and the Franks⁷—though iconoclasts and enemies of the established order, were also warm-blooded individuals who took time off to understand and sympathize with the problems of others less robust of mind and body. It is an index to these essentially Humanist interests on Jerome Frank's part that, amid the pressures of business of what was, during most of his judicial term, regarded as the strongest tribunal of the English-speaking world (the U.S. Court of Appeals for the Second Circuit),⁸ the demands, at the same time, of an active professorial career at the Yale Law School (he was euphemistically styled as a "Visiting Lecturer," though he kept an office in the Law School, that was open to students at all times, and he always gave a minimum of three hours and occasionally five hours of lectures per semester); and under the warning of an illness that he already knew would be fatal, Jerome Frank could find the extra energy to write a sustained plea for more efficient and fairer trial procedures in criminal cases, for greater executive disposition to review criminal convictions for possible errors, and for an abandonment of capital punishment.

The latter-day revisionist's temptations to write off the Legal Real-

7. The association between the Legal Realist impulse and major trends in American literary thought is particularly apposite in the case of Jerome Frank. Through his wife, Florence Kiper Frank, well-known poetess and playwright at the time of her marriage, Jerome Frank had access to the more important *avant-garde* literary and artistic circles of the United States after World War I. The Franks associated freely with such writers as Carl Sandburg, Rebecca West, Sherwood Anderson, and Max Eastman. As to this particular point, see further, McWhinney, *Judge Jerome Frank and Legal Realism: An Appraisal*, 3 NEW YORK LAW FORUM 113, 118 (1957).

8. Assertions of the legal pre-eminence of this sort are hard to document and even harder to prove; nevertheless, even before I first came to the United States to study law, I had heard the claim advanced, in the Commonwealth countries, in relation to the Second Circuit Court. The Second Circuit Court included at the time, apart from Jerome Frank, Learned Hand, Augustus Hand, Thomas W. Swan, and Charles E. Clark.

ists as amiable and amusing critics of the old order in American law who had, however, nothing constructive to offer in its place (it was the sociological jurisprudes, solid and sober citizens all, who built the new legal order of the 1940's and 1950's, after all) loses sight of the fact that before the new order could be built the old had to be overthrown. The Realists were the poets who made the Revolution though they may have lacked the broader administrative talents to build a durable regime in its place. If some of the Realist "Young Turk" group, surviving now on American law school faculties as middle-aged vestigial remnants of the exciting 1920's and 1930's, seem at times to be rather tormented, unhappy souls, it is perhaps because they took too much to their own hearts the purely negative, destructive aspects of their mission in life and are now experiencing in the 1950's the frustrations of having no more windmills to tilt at. Jerome Frank, however, was not one of these. His interest in people, his underlying Humanism, saved him from the gnawing hungers of self-criticism and self-doubt in middle age. Part of his creative energies could find outlet in crusades such as his campaign against capital punishment; part in advanced thinking in new areas of jurisprudence and legal theory. He already sensed that the main emphasis in American law in the second half of the twentieth century would have to be on comparative or integrative jurisprudence:⁹ a world rapidly shrinking under the impact of modern technology and the impact of mass communication media urgently demanded study in terms of minimum bases for agreement and reconciliation among diverse, and often apparently conflicting, bodies of first principles and systems of law.¹⁰ Jerome Frank did not under-estimate the difficulties of the task ahead, intellectual¹¹ as well as the more obvious political ones, but he felt that with courage and élan it could be attempted and eventually mastered. Had he lived, I believe he would have made it his major intellectual pre-occupation and responsibility for the future.

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9. See in this regard Frank, *Civil Law Influences on the Common Law—Some Reflections on "Comparative" and "Contrastive" Law*, 104 U. OF PA. L. REV. 887 (1956).

10. Thus Frank was intrigued to discover, in recent years, in reading St. Thomas, some parallelisms between Catholic thought processes and modes of reasoning and his own pragmatist-realist approach. Cf. REUSCHLEIN, *JURISPRUDENCE, ITS AMERICAN PROPHETS* 222-23 (1951). At a more facetious level, the delight in this particular discovery of important points of agreement with a rival body of legal thinking is reflected in his remark to Walton Hamilton—"Did you see that priest going out? He is alike a Jesuit and a pragmatist." Hamilton, *supra* note 4, at 822.

11. He would, I think, have regarded Comparative Jurisprudence as another welcome and much-needed antidote to the Langdell-produced "neurotic escapist character" of the contemporary American law school curriculum. Cf. Frank, *A Plea for Lawyer-Schools*, 56 *YALE L.J.* 1303, 1304 (1947).

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