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COURTS ON TRIAL. By Jerome Frank. Princeton : Princeton University Press, 1949.

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selves and follow in correct chronological order, there is something of an anticlimatic effect about them after the drama of the debate at Valladolid. Perhaps Dr. Hanke has done this deliberately, to emphasize his theme that the struggle which Montesinos started is not yet over.

For those readers whose Hispanic-American history has been gleaned from the few remaining writers who still glibly refer to the Spaniards as ruthless, thoughtless gold-seekers and Indian enslavers, Dr. Hanke's carefully- documented study of the Spanish struggle for justice in the conquest of America will come as a surprising but welcome revelation of the truth. This book, however, has a deeper significance than the mere setting straight of the historical record. In the shock of the impact of a new world culture on the Spanish character of the sixteenth century—with its individualism, legalism, religiosity, and passion for extremes—a struggle of ideas began, or took on new significance, to add important chapters in the story of man's attempt to get along with his neighbor. Dr. Hanke concludes:

> "Whatever means men develop, however, to destroy their fellow men, the real problems between nations do not lie in the realm of mechanics. They lie in the more difficult field of human relationships. Some Spaniards long ago discerned this truth, which the whole world must understand today if it is to survive. The specific methods used to apply the theories worked out by sixteenth-century Spaniards are now as outmoded as the blowguns with which Indians shot poisoned arrows at the conquistadores, but the ideals which some Spaniards sought to put into practice as they opened up the New World will never lose their shining brightness as long as men believe that other peoples have a right to live, that just methods may be found for the conduct of relations between peoples, and that essentially all the peoples of the world are men."

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COURTS ON TRIAL. By Jerome Frank. Princeton: Princeton University Press, 1949. Pp. xii, 441. $5.00.

LAWYERS, Judge Frank believes, "half believe a lot of stork-stories concerning the birth process of judicial decisions." Too few lawyers, judges and law professors have "been willing to speak out plainly, even to other lawyers, about the actualities of court-house behavior." "Legends and myths have grown up about the judiciary which serve to obscure realities." Consequently, there is a needless public cynicism about lawyers and courts. In this book, Judge Frank takes all lawyers and laymen into his confidence and tells them the facts of life about the judicial process.

To symbolize the judicial process, Judge Frank employs the familiar Frankian equation, $R \times F = D$. R signifies the rule of law, F signifies the facts, and D signifies the decision. If a judge's decision is wrong, it may be for any of three reasons: he may have adopted the wrong rule of law; he may have incorrectly found the facts; or he may have improperly applied the law to the facts.

According to Frank, most legal scholars are "wizards"—"addicts of legal magic"—who proclaim that in most cases the rules of law are fairly certain and their application practically automatic, thus enabling a competent lawyer to predict the outcome of most cases. This is due to their failure to understand the importance of trial court fact-finding. These "legal magic mongers" might "be described by a wag as mildly schizoid, since they insist on portraying as existent a legal system which plainly does not exist." In this category, Frank classifies such highly respected legal thinkers as Roscoe Pound, John Dickinson, Justice Cardozo, Morris Cohen and Edwin Patterson.

Contrasted with this group—which Frank seems to believe includes most of the legal profession—is the group of American lawyers known as the "legal realists."[1] This group Frank sub-divides into two classes, *viz.*, "rule skeptics" and "fact skeptics."

The "rule skeptics" are also "magic addicts." They strive for greater certainty and consider it socially desirable that lawyers should be able to predict for their clients the decisions in most law suits not yet commenced. They believe the formal legal rules enunciated in courts' opinions (the *paper rules*) too often prove unreliable as guides in the prediction of decisions. Behind the *paper rules*, they believe they can discover some *real rules* which will serve as more reliable prediction instruments. "These skeptics cold-shoulder the trial courts" and concentrate almost exclusively on upper-court opinions. Karl Llewellyn is "perhaps the most outstanding representative" and "perhaps the most brilliant" of the rule skeptics. But: "He is like a color-blind artist attempting to paint the vivid colors of a sun-drenched autumn landscape. His shying away from lower-court fact-finding indicates . . . the sort of reluctance to observe disturbing court-room realities which justifies classifying him as a second-class wizard."

The "fact skeptics" (lawyers "who abandon legal magic") include among others, Dean Leon Green, Max Radin, Thurman Arnold, William O.

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1. With reference to this group, Dean Pound once said, " . . . realism is used in the sense in which artists employ it rather than in the philosophical sense. Because the ugly exists in nature, the realist in art insists on portraying the ugly not merely in its ugliness but often in exaggerated ugliness. So, too, the juristic realist insists on the alogical and unrational features of the judicial process, and not only stresses them to the exclusion of other features, but often exaggerates them. The term 'realism,' therefore is a mere boast." Pound, *Fifty Years of Jurisprudence*, 51 HARV. L. REV. 777, 799 (1938).

Douglas (now Mr. Justice Douglas) and perhaps Professor E. M. Morgan. Fred Rodell, notwithstanding his excoriating book, *Woe Unto You Lawyers!*, failed to make the grade; he is "not a fact-skeptic but a rule-skeptic (although a radical one)." The fact-skeptics also peer behind the *paper rules*; but they go much further. "Their primary interest is in the trial courts. No matter how precise or definite may be the formal legal rules, . . . 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) law-suits not yet begun or not yet tried."

Judge Frank "was one of the original fact-skeptics."[2] He vividly illustrates their viewpoint by the following example. Mr. Sensible, who is about to sign a contract with Mr. Smart for the purchase of some goods, calls his lawyer and asks, "Will this contract fully protect me? If Smart fails to deliver those goods, and the market goes up, can I collect the difference from him?" According to the conventional theory, the lawyer should be able to advise Sensible as to his legal rights with a high degree of certainty. Frank denies the correctness of that theory; he says that, "Sensible's lawyer cannot tell him with any high degree of certainty what Sensible's rights are—that is, what the court will decide." Even though the contract is in writing, the parol evidence rule "is subject to so many exceptions that it resembles a swiss-cheese with more holes than cheese." *E.g.*, it would not prevent Smart from introducing evidence to show that his signature was forged; he was induced to sign the contract by fraud; it was intended as a sham; mutual mistake; a subsequent cancellation or release; and many other defenses. The decision, then, will depend upon such variable factors as mistaken witnesses, perjured witnesses, missing or dead witnesses, mistaken judges, inattentive judges, biased judges, crooked judges, inattentive juries, biased juries, incompetent lawyers, crooked lawyers, lost documents, etc. Therefore, "Only a soothsayer, a prophet, or a person gifted with clairvoyance, can tell a man what are his enforceable rights arising out of any particular transaction, or against any other person, before a law-suit with respect to that transaction or that person has arisen." "In short, a legal right is usually a bet, a wager, or the chancy outcome of a possible future law suit."

Besides his criticism of our lack of emphasis on the importance of trial court fact-finding, Judge Frank also discusses and severely criticizes the adversary method of conducting trials (the "fighting method," he calls it);

2. Although at times Judge Frank seems to be almost a complete skeptic, at other times he seems to be quite sure of his postulates. He does not seem to be as skeptical as Descartes professed to be when he said he was so skeptical that he doubted whether he doubted anything. (Descartes believed, however, that one who doubts cannot doubt the reality of his doubting.)

the jury system; the prevailing methods of selecting and training trial judges; the wearing of robes by judges ("robe-ism"); the present methods of legal education and many other aspects of "court-house government." He gives very interesting and enlightening discussions of the gestalt in trial court decisions, *legal science* and *legal engineering*, precedents and stability, codification, legislation and judicial interpretation, legal reasoning, natural law, classicism and romanticism, and numerous other subjects.

I was particularly interested in his chapter on legal education. He believes our "myopic 'case-system,'" which got its present mood from a "brilliant neurotic," Langdell, "has made the task of the teacher as complicated as possible"; even "the teacher who is a genius cannot overcome the obstacles." Under this system, "law students are like future horticulturists studying solely cut flowers; or like future architects studying merely pictures of buildings"; they "resemble prospective dog-breeders who never see anything but stuffed dogs." Judge Frank believes that three years is too long for teaching the "relatively simple technique" of analyzing upper court opinions, distinguishing cases, and constructing, modifying or criticizing legal doctrines. "Intelligent men can learn that dialectical technique in about six months." To get back on the track from which the law schools have "fatefully strayed under Langdell's neurotic wizardry," Frank recommends that "lawyer schools" be created in which students would study law in action in courts, administrative agencies and law offices. Like many other law professors, I also believe the casebook method (although probably the best single method of teaching) is decidedly overworked. We have become slaves to it. Many of Judge Frank's concrete suggestions deserve careful study. The problem is much more complex, however, than it is made to appear in this book.[3]

Other reforms which Judge Frank suggests (a few of which have been adopted to some extent) include: giving the government responsibility for seeing that "all practically available, important, evidence" is introduced in civil cases; having trial judges play a more active part in examining witnesses; requiring examination of witnesses to be more humane and intelligent; permitting trial judges to call *testimonial experts* to testify concerning the detectible fallacies of witnesses; abolishing most of the exclusionary rules of evidence; providing liberal pre-trial discovery in

3. I disagree with some of Judge Frank's factual assumptions as well as with many of his conclusions. For instance, I think law students and law professors are much more cognizant of court-room realities than he seems to believe. He says Professor Berle told him in 1931 that "90 per cent of teachers in our leading law schools had never so much as ventured into a court-room." That statement is not true today, and I do not believe it was true in 1931 or at any other time. Perhaps it will be corrected by application of the normal coefficient of exaggeration. I agree, of course, that personal acquaintance with practical realities is helpful to a law professor and that there are many professors who should have more practical experience.

criminal cases; requiring special education for trial judges, "such education to include intensive psychological self-exploration by each prospective trial judge"; educating future prosecutors so that they will obtain and introduce all important evidence, including that which favors the accused; abolition of the *third degree;* requiring judges to quit wearing official robes, conduct trials more informally and publish special findings of fact in all cases; abolition of jury trials except in major criminal cases or, at least, if we retain the jury system, require special verdicts in all cases, use informed "special juries" and educate men in schools for jury service; revising "most of the legal rules" so as to encourage the openly disclosed individualization of law suits by trial judges; permitting a trial judge to sit with the appellate court on an appeal from his decision, but without a vote; having talking movies of trials; and teaching non-lawyers that trial courts are more important than appellate courts.

Surprisingly, Judge Frank scarcely touches upon two of the most important aspects of court house government, *viz.*, the expense of litigation and the almost endless delays incident to obtaining a judicial decision. Undoubtedly he must be as disturbed by these problems as he is by those he discusses at length. Regardless of how much we improve trial court fact-finding, we still cannot secure justice unless the litigious process is made economical and expeditious.

Judge Frank's research in writing this book is anomalous. After indicting other legal scholars, the legal profession, the law schools and practically everybody else for their failure to make first-hand observations of court room realities, one would expect Judge Frank to tell us in this book about the study he has made of the trial courts and what he found. He does almost everything but that. To prove his thesis, he employs analogies and quotations from writings on almost all branches of learning—including history, psychology, theology, biology, philosophy, medicine, economics, primitive wizardry, sociology, mathematics, anthropology, physics, music, etc.—but he tells us practically nothing of his own observations of the goings-on in trial courts; and the authors of most of the books which he cites have probably thought no more about the problem than the average man in the street. What he says is very interesting, but his method seems to conflict with his thesis.

At any rate, Judge Frank has vividly discussed many important judicial problems. I, too, am more or less a "fact-skeptic." Contrary to Judge Frank, however, I have always supposed that most lawyers were of about the same view and, generally, openly admitted it. Even from laymen we quite frequently hear such remarks as, "The only sure thing about a law suit is the uncertainty," "A party must prove his case by a preponderance of perjury," "Justice is not blind if one of the parties is a pulchritudinous blonde wearing

a short skirt," and similar cynical maledictions. But, as Mark Twain said about the weather, everybody talks about it, but nobody does anything about it. Perhaps Judge Frank's caricature may incite people to action.

Most readers will be impressed by the author's intelligent criticism of our legal system and his bold suggestions for legal reforms. They will be even more impressed by his style of writing and the scope of his inquiry. Judge Frank's fluent style of writing (accentuated by vicious invectives, sterling similes, meteoric metaphors, and perhaps unconsciously hypercritical hyperboles), combined with his phenomenal erudition in a myriad of subjects, and interspersed with good sense and nonsense, give this book a satirical, titilating tingle like that of a Gilbert and Sullivan operetta.

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RELATIONS BETWEEN THE FEDERAL AND STATE COURTS. By Mitchell Wendell. New York: Columbia University Press, 1949. Pp. 298. $4.00.

To many it is familiar learning that the pronouncements of the United States Supreme Court indicating the instances in which federal courts exercising a concurrent jurisdiction with local state courts in which they apply state law, may or may not reach results at variance with those of the local state courts, have deep governmental as well as legal significations; and each of these meanings draws substance from the other. Lawyers who fail to see beyond the legal dogma in these decisions to their meaning in terms of division of governmental power, take a myopic and one-sided view of the judicial process which can result only in an incomplete understanding of the law. Political scientists who do not understand the pragmatic relations of these legal dogmas to our federal system of government can hardly understand that government, for in a real sense the nature of our government is largely what it is because the judicial evaluations and policies behind these dogmas have made it so.

Mitchell Wendell's *Relations Between the Federal and State Courts*, No. 555 of the Studies in History, Economics and Public Law, edited by the Faculty of Political Science of Columbia University, assumes that while political scientists are familiar with the governmental significance of judicial decisions interpreting the due process and commerce clauses of the United States Constitution, most of them do not understand the importance to the science of government of the judicial decisions in the field which lawyers commonly describe as federal jurisdiction and procedure. They do not even recognize that there exists any connection at all between such decisions and the science of government. The author finds that most political