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Book Reviews

LAW AND THE MODERN MIND, by *Jerome Frank*. New York: Brentano's, 1930. Pp. 362. Price, \$4.00.

Mr. Frank's valuable thesis is that law in action is not and cannot be the *mechanical* application of rules and principles. He sees clearly that the traditional syllogistic logic of legal literature provides phrases for the statement of conclusions, but plays an infinitely small part in the living process of deciding cases. He senses that the flux of the world in which men live and the individuality of situations which give rise to lawsuits make absolute predictability of law undesirable and impossible. All this is not novel, nor would Mr. Frank claim novelty for it.* But lack of novelty of this thesis is no criticism of Mr. Frank's book, for there is always room for an additional countercheck on the tendency of the legal mind to wander from its vital problems to logomachies. Further, Mr. Frank's keenness has enabled him to lay bare unswept corners that others have not penetrated; he has reduced to a negligible minimum the sphere in which mechanical jurisprudence can and should have any operation.

The inveterate tendency to disregard this thesis; the constant unwillingness of intelligent men to admit that law is not and cannot be the automatic application of a predetermined scheme, seems to Mr. Frank to demand an explanation. He offers this theory: Human beings have been children; children have been embryos. The life of an embryo is a very happy one. Other folks lead lives of vicissitudes, but they have a subconscious memory of their lives as embryos, coupled with a nostalgia for this perfect life left at birth. The parents, particularly the father, make a child's life comparatively secure; and the child, finding its wish for security satisfied by the father, harbors the illusion that the father is omniscient and omnipotent. When this illusion is dissipated he transfers his feelings from the father to the law—which he subconsciously considers capable of satisfying his longing for that comfortable world of which the midwife robbed him. This theory is Mr. Frank's theme song, interlarded at frequent intervals with his attack on mechanical jurisprudence. The final strain is ever this moral: Those who deal with law must grow up, be emotionally adult, be willing to face the facts of life which include adventures of uncertainty and insecurity, even in law courts.

The reviewer doubts the adequacy of this interesting psycho-analytical theory as the sole or most important element in the recurring failure of the legal mind to be "realistic."

Justice Holmes (Mr. Frank's perfectly adult legal scholar) has said that "general propositions do not decide concrete cases." It is also true that concrete cases do not decide themselves, but must be decided by men, preferably men who are addicted to the habit of thinking. And thought is always—to some extent—general (abstract). All will agree that each litigation has individuality, but at the same time all thinking (good or

* See, for instance, Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17, or Oliphant and Hewitt's introduction to the translation of RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES.

bad) is a process in which uniqueness and resemblances (assumed, invented, or discovered) are balanced. A completely unique experience can have no meaning, an entirely novel idea is a patent impossibility.

So the *proposition* that water is composed of hydrogen and oxygen is no more completely concrete than the *proposition* that contracts include a meeting of the minds; and the inventor of the former was probably no more adult than the inventor of the latter. The outstanding difference seems to be this: The chemists have hit upon a scheme of abstraction productive of generalizations more or less satisfactory in numerous "chemical situations," while juridical propositions seem to be of little use in "legal situations." The legal thinkers have been no less diligent, sincere, or competent than the chemists, and luck alone does not seem adequate to account for the success of the latter and the groping of the former. Nor can it be answered that the chemists' realm of study is objective and detached, while the jurist must study a social structure of which he is a part and which will, therefore, not lend itself to unemotional, detached study. Certainly the chemists study the same water which has emotional connotations for all men, including chemists; and certainly no chemist can claim more calm detachment than a Williston.

Dean Pound's conception of the "Period of Strict Law" has at least this much truth in it: There have been times when some legal propositions have been applied to reach decisions with almost ruthless certainty. For example, the common law proposition that a man was bound by an instrument sealed with his seal. At one time this rule admitted of no exception; it contained an adequate description of the decisions that had been reached and was an adequate prophecy of decisions that would be reached. The proposition "worked" as a *proposition* as nicely as any which mankind has ever been able to put. But cases arose in which the working of the rule produced results which were called in question; the decisions regarded as *means* rather than *ends* were unsatisfactory.

When legal decisions are regarded as means, any scheme of ends must implicate the lives of men as lived, the most complex subject for thought that has ever been chosen. Thought about "society," what it is, what it wants, where it is going, has always been too big a subject for human brains. But man, "the thinking animal," seems to be so constituted that he perceives (invents) social problems and attempts to solve them. And thought is selective (abstract); the thinker must necessarily develop or use schemes of thought; without an acquired or developed capital of abstract ideas the thinker is bankrupt. So philosophers, economists, sociologists, and politicians, as well as lawyers, are always building or using schemes of thought which crystallize into propositions, principles, laws, and rules. These schemes become entrenched in the ways of minds and die hard, even though their application in "concrete situations" is often undesirable and impossible.

Would Mr. Frank suggest that all thinking about "society" is ridden with a father fixation? It is guessed that he wouldn't; and that much which Mr. Frank labels as a suppressed desire for the security of the womb is more easily accounted for as a groping for the materials of a thoughtful jurisprudence, as distinguished from a decision of cases on intuition.

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