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JEROME FRANK'S VIEWS ON TRIAL BY JURY

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I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death.—JUDGE LEARNED HAND.[1]

As one who professes to be a thoroughgoing democrat, Jerome Frank has a respect for the historical basis of trial by jury, but as a lawyer and now a judge, he finds the jury system not only a grossly inefficient system of finding the facts, but also a system that has dangerously outgrown its original functions.

> In most jury cases, then, the jury determines not the "facts" but the legal rights and obligations of the parties to the suit. For the judgment of the court follows the general verdict of the jury, so that the verdict, since it produces a judgment which determined the respective rights and obligations, decides the law of the particular case. But this decision is made by persons with little understanding of the pre-existing "rules of law" and scant will to adhere to or employ these rules even so far as they are comprehended.[2]

This usurpation of the powers of the judge by the jury is termed "surreptitious" by Frank, who finds this sleight-of-hand technique another example of the negation of the myth of legal certainty.

> The general-verdict jury-trial, in practice, negates that which the dogma of precise legal predictability maintains to be the nature of law. A better instrument could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions—utter unpredictability . . . .[3]

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1. Learned Hand. *The Deficiencies of Trials to Reach the Heart of the Matter*, N.Y. City Bar Ass'n. 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).
2. FRANK, LAW AND THE MODERN MIND 172. (1930). In a note on the same page, Frank adds: "In criminal cases the verdict, if for the accused, is conclusive and, therefore, there should be little doubt that the jury, in such cases, decides the law."
3. *Id.* at 172.

But why have men who craved for certainty allowed this craving to be placed in the hands of twelve men who are incapable of even approaching this ideal? The answer lies in the desire for father-authority and the basic legal myth:

> For while men want the law to be father-like, aloof, stern, coldly impartial, they also want it to be flexible, understanding, humanized. The judges too emphatically announce that they are serving the first of these wants. The public takes the judges seriously, assumes that the judges will apply hard-and-fast law to human facts, and turns to the jury for relief from such dehumanized justice.
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> . . . . . .
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> . . . The result is that, to preserve the self-delusion of legal fixity, tainty and impartiality, in many cases we hand over the determination of legal rights and liabilities to the whims of twelve men casually gathered together. Seeking to escape judge-made law, we have evolved jury-made law.[4]

This "jury-made" law is not the same as judge-made law. It is a unique type of law, according to Frank's description.

> Jury-made law, as compared with judge-made law, is peculiar in form. It does not issue general pronouncements. You will not find it set forth in the law reports or in textbooks. It does not become embodied in a series of precedents. It is nowhere codified. For each jury makes its own law in each case with little or no knowledge of or reference to what has been done before or regard to what will be done thereafter in similar cases. Yet jury law, although not referred to as law, is real law none the less. If all cases were general-verdict jury cases and if judges directed a verdict, the law of all decided cases would be jury law.[5]

According to Frank, the results of this phenomenon, for the legal system, as well as for the social order that is being deceived by this process of jury-made law, are harmful and dangerous.

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4. *Id.* at 175, 177.
5. *Id.*, note at 174.

> The demand for an impossible legal stability, resulting from an infantile longing to find a father-substitute in the law, thus actually leads, in the use of the jury, to a capriciousness that is unnecessary and socially harmful.
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> . . . . . .
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> The jury, then, are hopelessly incompetent as fact-finders. It is possible, by training, to improve the ability of our judges to pass upon facts more objectively. But no one can be fatuous enough to believe that the entire community can be so educated that a crowd of twelve men chosen at random can do, even moderately well, what painstaking judges now find it difficult to do. It follows that the use of fact-verdicts, while it may slightly reduce the evils of the jury system, cannot eliminate them. The jury makes the orderly administration of justice virtually impossible.[6]

These are harsh words of dispraise for the jury system; yet Jerome Frank is not a man without pity in his heart, especially for the jurors in this inadequate system of administering justice.

> Are jurors to blame when they decide cases in the ways I've described? I think not. In the first place, often they cannot understand what the judge tells them about the legal rules. To comprehend the meaning of many a legal rule requires special training. It is inconceivable that a body of twelve ordinary men, casually gathered together for a few days, could, merely from listening to the instructions of the judge, gain the knowledge necessary to grasp the true import of the judge's words. For these words have often acquired their meaning as the result of hundreds of years of professional disputation in the courts. The jurors usually are as unlikely to get the meaning of those words as if they were spoken in Chinese, Sanskrit, or Choctaw. "Can anything be more fatuous," queries Sunderland, "than the expectation that the law which the judge so carefully, learnedly and laboriously expounds to the laymen in the jury box becomes operative in their minds in true form?" . . . .[7]

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6. *Id.* at 178, 180-1. In a note, Frank adds: "Sunderland, who urges the use of fact verdicts, admits that they would merely palliate the fundamental difficulty." *Id.* at 181.

7. COURTS ON TRIAL. p. 116 (1949).

But sympathy for the role that jurors are forced to play does not exonerate the jury system from its inherent defects, which are numerous. They are present, nonetheless, and Frank feels a strong need for exposing these defects to public scrutiny and for suggesting reforms. The harm done by such a system is too serious to ignore in an age such as the present one.

> The jury system, praised because, in its origins, it was apparently a bulwark against an arbitrary tyrannical executive, is today the quintessence of governmental arbitrariness. The jury system almost completely wipes out the principle of "equality before the law" which the "supremacy of law" and the "reign of law" symbolizes—and does so, too, at the expense of justice, which requires fairness and competence in finding the facts in specific cases. If anywhere we have a "government of men," in the worst sense of that phrase, it is in the operations of the jury system.
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> . . . . . .
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> If we want juries to act as legislators, we should tell them so. Instead, we have the judges tell them the exact opposite. . . .[8]

Thus, the essential defects in the jury system, according to Frank's analysis of the problem, are: usurpation of the judge's function of rule-making; inefficiency and incompetence in finding the facts; an exaggerated sense of a "government of men" in their usurpation of legislative functions; and the preservation of the worst elements of court-house government.

> I have told you of the excessive fighting spirit in trials which still unfortunately dominates too much of court-house government, and which prevents needed improvement in court-room fact-finding. The jury helps to keep alive this fight-theory. More than anything else in the judicial system, the jury blocks the road to better ways of finding the facts.[9]

Perjured evidence is one of the major problems that Frank feels ought to be seriously considered in any proposed jury reform, for juries "discover" the facts principally on the basis of what they hear and see in the

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8. *Id.* at 132, 133. To Frank, who has been a staunch opponent of this type of "government of laws," the opposite phenomenon, in this case at least, is equally undesirable in his theory of democracy. See the preface to the sixth printing of LAW AND THE MODERN MIND p. xxiii (1949); IF MEN WERE ANGELS 9, 190-211 (1949); COURTS ON TRIAL 405-6 (1949).

9. *Id.*, at 138.

court room. How can this type of evidence be reduced or perhaps even eliminated from the trial process? Jerome Frank suggests two devices: pre-trial investigation and procurement of evidence by impartial government officials for presentation to the trial court (similar to the type used by administrative agencies such as the Securities and Exchange Commission); and special findings of fact by the judge himself. The first suggestion irked many of Frank's critics, including Federal Judge John C. Knox, who wrote:

> Unfortunately, neither Judge Frank nor I can give any figure for the amount of perjury there actually is, and I certainly agree there is too much. But I myself am entirely convinced that perjury plays a vastly less important part in our trials than does the inaccurate testimony offered by completely honest witnesses.[10]

Insofar as special findings of fact are concerned, even Frank is dubious of the practical value of his own suggestion:

> Nevertheless, to require the trial judge to make and publish his findings of fact will yield no panacea where, because of a conflict in the oral testimony, the credibility of witnesses becomes crucial. Frustration of the purpose of the requirement occurs where, as too often happens, the judge uncritically adopts the findings drafted by the lawyer for the winning side. For then the judge may ostensibly make a finding of some facts of which—although they are based on some testimony—the judge never thought, and which, had he done his own job, he would not have included; in that event, his finding does not represent any real inference he drew from the evidence—does not reflect his own actual views concerning the witnesses' credibility. With conscientious trial judges, however, the difficulty is not insurmountable.[11]

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10. *Just Justice*, 216 Sat. Eve. Post 22, 72 (July 24, 1943). This article was written as an answer to *Frank's White Collar Justice*, 216 *id.* 22, 55 (July 17, 1943). Justice according to Frank's formula did not please his colleague, Judge Knox, who went on to severely criticize Frank's suggestion of pre-trial procurement of evidence as a dangerous administrative inroad on our legal system that might do more harm than good. See FRANK, COURTS ON TRIAL 97-99 (1949).

11. COURTS ON TRIAL, 185. This was written sixteen years after the Saturday Evening Post article mentioned above, and perhaps represents a view that benefited from these years spent on the Federal Bench. Frank continued: "But a graver difficulty remains: the facts, as 'found', can never be known to be the same as the actual past facts—as what (adapting Kant's phrase) may be termed the 'facts in themselves'. How closely the judge's 'findings' approximate those actual facts he can never be sure—nor can anyone else." *Id.* at 185.

Not only is the witnesses' credibility of importance to the judge and the jury, but the *manner* in which evidence is presented by the witnesses is sometimes a crucial part of the process of finding the facts.[12]

As a result of these many defects in the jury system, Jerome Frank, in another article, recommended the following reforms:

> For the truth is that, in general, the courts don't want to know, and won't permit themselves to learn, how juries reach their verdicts . . . . To sum up, here are the reforms I think would improve our jury system:
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> (1) Use "special" or "fact" verdicts in most cases.
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> (2) Have the judge, at the trial's beginning, roughly outline the issues for the jurors.
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> (3) Let the jurors take with them to the jury room a transcript of the evidence and of the judge's charge.
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> (4) Supply the jury with an expert's report of complicated facts.
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> (5) Employ, in many cases, "special juries" composed of jurors having a knowledge of the customs of the trade involved.
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> (6) Strictly enforce the ban against jurors who have defective hearing or eyesight or who are physically or mentally ill.
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> (7) Require all prospective jurors to take a detailed course of study dealing with the function of juries.
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> (8) Eliminate many of the "exclusionary" evidence rules.
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> (9) Discourage publication, in the press or on the air, of anything but straight reporting of the courtroom evidence in a jury trial, until the case ends.

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12. The New York Times carried an article which included a statement by Charles C. McCloskey, Jr., Sheriff of Chautauqua County and a former special agent with the Federal Bureau of Investigation, advising law enforcement officers who have to take the witness stand always to give strictly factual answers and never to volunteer information either for the prosecution or the defense. "A good case may be destroyed by a single bad impression given to the jury." He said, "The juror is a human being, subject to the same feelings as you. He may not like the way you part your hair or the way you walk into court, even though your manner is strictly proper." McCloskey also urged law enforcement officers "to be natural" as witnesses and to remember that their role is "to collect the facts and then present them in court impartially." New York Times, August 5, 1953, p. 32.

> Although trial by jury can be improved, in my opinion it will remain the weakest spot in our judicial system—reform it as we may. But the judges (like me) who want to see the civil jury abolished and the use of the criminal jury limited, will, of course, as long as the jury system endures, comply with their oaths of office and strive to make the jury system work as best it can.[13]

Some of these suggestions have found approval in other quarters. Judge Charles Wyzanski, Jr., for instance, has written:

> Indeed, except for tort cases, I find myself in agreement with Judge Frank that the trial judge ought to use special verdicts to a much larger extent, though it is more difficult than may at first be realized to frame questions to the satisfaction of counsel and to the comprehension of juries.[14]

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13. *Something Wrong With Our Jury System*, 126 Colliers 28, 64 (Dec. 9, 1950) at 29, 66. *Cf.* FRANK, LAW AND THE MODERN MIND, note, p. 185: "Our complicated and cumbersome rules of evidence could be simplified immeasurably if we did away with the jury. The hearsay rule, for instance, is largely due to the mistrust of the jury's competence to weigh evidence." This statement was written in 1930. Frank's ninth point of his suggested reforms, or variations of it, has been an extremely controversial issue at all levels of our judicial system in recent years. In respect to "trial by newspapers," see Shepherd v. Florida, 341 U.S. 50 (1951), especially Justice Jackson's concurring opinion, Stroble v. California, 343 U.S. 181 (1952), and Moore v. Dempsey, 261 U.S. 86 (1923). At the state and local level, New York and Ohio courts have recently dealt with the public nature of trial by jury. The Ohio Supreme Court unanimously adopted a rule of judicial ethics (Canon No. 35 in the Adopted Canons of Judicial Ethics) prohibiting the photographing, broadcasting or televising of proceedings of any state court, based on recommendations of the American Bar Association and the Ohio State Bar Association. (New York Times, January 28, 1954, p. 23). The Ohio Court of Appeals upheld the conviction of three Cleveland Press employees on contempt of court charges which resulted from the taking of a photograph in a courtroom of the Cleveland Common Pleas Court, and the Ohio Supreme Court affirmed this decision in State v. Clifford, 162 Ohio St. 370, 123 N.E.2d 8 (1954). The Appellate Division, First Department of the New York Supreme Court in a 3-2 decision reversed the conviction of Minot Jelke because of the exclusion of the press and of the public during his celebrated trial on compulsory prostitution, and this was affirmed by the Court of Appeals of New York in People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954). This same court decided differently in the case of the newspapers that had appealed the ban. United Press Association v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954). Also, see the following notes, *Due Process For Whom—Newspaper or Defendant*, 4 STAN. L. REV. 101-11 (1951), and *Freedom of the Press—A Menace to Justice*, 37 IOWA L. REV. 249-61 (1962).

14. *A Trial Judge's Freedom and Responsibility*, 190 Atlantic Monthly 55, 57 (July, 1952). See Frank, *The Case for the Special Verdict*, 32 J. AM. JUD. SOC'Y. 142 (1949); Julius Stone, *Book Review* of COURTS ON TRIAL, 63 HARV. L. REV. 1466, 1471 (1950).

Another member of the profession, Judge Curtis Bok of Philadelphia, is more humble than Judge Frank in his criticism of the jury system in America:

> The jury system is not necessarily a bad system. If it fails, it will be because it is worked at less than top capacity and intensity, which is the reason most things fail. Even so, it might no longer be considered flexible enough to fill the bill. In that event, legal solutions will be left to judges or to fixed administrative tribunals; but whatever happens, the social fabric will not be rent asunder. Thus far no better guaranteed method has been found than a verdict by a jury of the vicinage.[15]

Jury Verdicts and the Problem of Cadi-justice

Proposals for the improvement of the administration of justice usually include reforms in the field of jury verdicts. Jerome Frank believes that the best suggestion is still the special (or fact) verdict, where the jury reports its specific findings on specified issues of fact to the judge, who then applies the appropriate legal rule. Of course, this does not eliminate the possibility of perjured evidence, or the fallible elements of the human mind, whether it be the judge's or the jurors'. But at least the false appearance that a jury gives of finding *the* facts can be partially alleviated.

Perhaps next to the special verdict, Frank would regard the most important element in jury reform that is practical and feasible at the present time to be the training of future jurors. Yet, regardless of the kind or the degree of jury reform, Frank does not believe it is possible to establish a perfectly desirable jury system, short of its total abolition.[16] The "perfect

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15. *The Jury System in America*, 278 Annals 92 (May, 1953), p. 96. The earlier Jerome Frank would have vehemently stressed the point that the jury system *was* able to achieve plasticity and flexibility, but only by circumvention of its original aims. But after thirteen years on the Federal Bench, Judge Frank is still critical of the jury system, but also more practical in his basic analysis of the jury. Unlike his earlier criticism, he is no longer content with a complete defloration of the system, but recognizes the *human* elements in the picture, and the necessity for practical solutions.

16. "Were all those reforms adopted, trials by jury would be less dangerous to litigants than they now are; but I think they would still be far less desirable than jury-less trials before well trained honest trial judges." Courts on Trial, p. 145. Desirability is one thing and practicality quite another; Jerome Frank *as judge* realizes the limitations under which he labors, although the jury is not one of them. Judge Frank is an appellate judge.

jury'' is an impossibility, in view of the limitations of the human mind (especially memory), and the circumstances that surround any type of judicial trial.[17]

Jerome Frank characterizes the jury system in America as the *Cadi* system of justice at its maximum and its worst. By Cadi-justice, he means the use of one man or a group of men serving as both fact-finder and witness-audience; the term Cadi derives from Islamic practice.[18] The Cadi element in our present jury system, in the opinion of Frank, would be impossible to eliminate. All that we can do is to be more aware of Cadi-justice as it really operates in courthouse government, understand its true nature, use it more efficiently and, if and where possible, improve it.[19]

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17. *Cf.*, the story related by Governor Goodwin J. Knight of California on the "perfect jury": ". . . It seems that a judge got tired of the hemming and hawing that a jury of laymen was likely to engage in; so he drew up a panel of twelve lawyers. Being experienced in the law and in logic, they would surely get to the point immediately and return an intelligent verdict in record time. However, the jury, once it had heard all the evidence in the case and retired to ponder it, was out for an extraordinarily long time. Finally a bailiff came in from the jury room. The judge asked eagerly, 'Have they reached a verdict yet?' 'Reached a verdict?' said the bailiff. 'They haven't finished yet with the nominating speeches for foreman.' . . ." Ernest Havemann, *California's "Excellency" Excels at Jokes as Well as Politics*, 36 Life 117, (Mar. 29, 1954).

18. The Problem of "Cadi-justice" and the "Cadi" elements in both the judge and the jury is thoroughly discussed in Frank, *Are Judges Human?* 80 U. PA. L. REV. 17, 233, at 24-31 (1931). Whereas Frank regards the jury as the Cadi element in American justice, Roscoe Pound and other leading figures in American law regard the *administrative tribunal* as the best example of "Cadi-justice" in the United States. On the "Kadi" elements in Supreme Court litigation, see Frankfurter, J. in Terminiello v. Chicago, 337 U.S. 1, 11 (1948).

19. *Cf.* Max Weber: "The 'rational' interpretation of law on the basis of strictly formal conceptions stands opposite the kind of adjudication that is primarily bound to sacred tradition. The single case that cannot be unambiguously decided by tradition is either settled by concrete 'revelation' (oracle, prophetic dicta, or ordeal that is, by 'charismatic' justice) or—and only these cases interest us here—by informal judgments rendered in terms of concrete ethical or other practical valuations. This is 'Kadi-justice,' as R. Schmidt has fittingly called it. Or formal judgments are rendered, though not by subsumption under rational concepts, but by drawing on 'analogies' and by depending upon and interpreting concrete 'precedents.' This is 'empirical justice.' Kadi-justice knows no reasoned judgment whatever. Nor does empirical justice of the pure type give any reason which in our sense could be called rational. The concrete valuational character of Kadi-justice can advance to a prophetic break with all tradition. Empirical justice, on the other hand, can be sublimated and rationalized into a 'technology.' All non-bureaucratic forms of domination display a peculiar coexistence: on the one hand, there is a sphere of strict traditionalism, and, on the other, a sphere of free arbitrariness and lordly grace. Therefore, combinations and transitional forms between these two principles are very frequent . . . ." "Bureaucracy and Law" in FROM MAX WEBER: ESSAYS IN SOCIOLOGY, 216-17 (ed. and transl. by H. H. Gerth and C. Wright Mills, 1946).

Perhaps, if there is any viable solution or even partial solution to the problem of the jury system as it now exists, that solution will be found in *education,* whether it be of the jurors, the judge, and/or the lawyers. While training jurors would be a short-term process, the training of lawyers and future judges is a much more complicated and difficult task. Invariably, Jerome Frank's quest for legal reform ends on a note of cautious optimism. But only when the "myth" of trial by jury and its results are fully understood and eradicated in the public mind can the real job of jury reform begin.[20]

20. For a fuller treatment of this entire subject, see Julius Paul, "The Legal Thinking of Jerome Frank: A Study in Contemporary American Legal Realism" (Unpublished Ph.D. dissertation, Dept. of Political Science, The Ohio State University, 1954). A research project on trial by jury that has attracted much interest in the public press and in the Senate Judiciary Committee is the University of Chicago Law School study financed by the Ford Foundation. See Arthur Krock, *Sociological Tests in the Jury Room,* New York Times, October 14, 1955, p. 26.

*After this article had been sent to the printer, word was received of Judge Frank's death, on January 13, 1957.—*Editor.*