

# JEROME FRANK'S FACT-SKEPTICISM AND OUR FUTURE\*

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## I

WHEN Dean Rostow asked me to describe the main features of Jerome Frank's legal philosophy, I resolved that—no matter how tentative my summary might be—I must speak in the perspective of the future. For one thing, this is the way he habitually faced and spoke and wrote; it is the way to be faithful to his thought. For another, his philosophy—which he called “fact-skepticism”<sup>1</sup>—is nothing more or less than a bold confrontation of the future and a flinging of gages at its feet. I believe that Jerome Frank's fact-skepticism represents an epoch-making contribution not only to legal theory and procedural reform, but also to the understanding of the entire human condition. The history of our time will record whether we profited by the challenges he bequeathed to us.

For about twenty-five years Jerome Frank's coruscating and marvelously restless mind planned and built and developed the meaning of fact-skepticism. Fully aware that his approach was novel, he deliberately repeated and reiterated his doctrines, phrased them first this way then that, and summoned analogies from every corner of the cultural world to make his ideas clearer. To justify the repetitions, he used the following story:

“Mr. Smith of Denver was introduced to Mr. Jones at a dinner party in Chicago. ‘Oh,’ said Jones, ‘do you know my friend Mr. Schnicklefritz, who lives in Denver?’ ‘No,’ answered Smith. Later in the evening, when Smith referred to Denver, Jones again asked whether Smith was acquainted with Schnicklefritz, and again received a negative reply. As the dinner party broke up, Smith remarked that he was leaving that night for Denver, and Jones once more inquired whether Smith knew Schnicklefritz. ‘Really,’ came the answer, ‘his name sounds quite familiar.’”<sup>2</sup>

Gradually, beneath the surface of the repetitions, the essential doctrine cumulated and moved forward. In 1930 when he wrote *Law and the Modern Mind*, the final chapter, filled with uncritical enthusiasm, was entitled “Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist.” Holmes had originated the so-called “prediction theory” of law. He had declared that “the prophecies of what courts will do in fact, and nothing more pretentious are what I mean by the law. . . . The primary rights and duties with which juris-

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1. As the title indicates, this paper does not purport to cover all of Jerome Frank's juristic views. It is restricted to “fact-skepticism,” which he rightly considered his most characteristic and significant contribution.

2. FRANK, *COURTS ON TRIAL* viii (1949).

prudence busies itself . . . are nothing but prophesies."<sup>3</sup> Such was the basis of Holmes' approach, which Jerome Frank accepted as unimpeachable in 1930. By 1949 when *Courts on Trial* was published, it began to be apparent that fact-skepticism either cancelled the value of Holmes' theory or at least required a drastic reformulation.<sup>4</sup>

Finally, in 1954 Jerome Frank acknowledged openly that he had traveled far from his initial discipleship. Here in a single passage we have an epitome of fact-skepticism and of its relation to Holmes' doctrine:

"More than twenty years ago, I tried pragmatically to apply Holmes' prediction theory to future specific decisions of trial courts. If such decisions could not be prophesied, then usually lawyers' prophesies would be of comparatively little worth, since very few trial court decisions are appealed and the upper courts affirm most of those that are appealed. So I enquired whether, before suits commenced, lawyers usually could, with some high degree of accuracy, foretell the specific decisions of the trial courts in particular cases. . . .

"I discovered that this sort of prophesying was markedly uncertain. Why? Briefly stated, these are the reasons: Most law suits are, in part at least, 'fact suits.' The facts are past events. . . . The trial judge or jury, endeavoring (as an historian) to learn those past events, must rely, usually, on the oral testimony of witnesses who say they observed those events. The several witnesses usually tell conflicting stories. This must mean that at least some of the witnesses are either lying or (a) were honestly mistaken in observing the past facts or (b) are honestly mistaken in recollecting their observations or (c) are honestly mistaken in narrating their recollections at the trial. . . . [T]he trial court (judge or jury) must select some part of the conflicting testimony to be treated as reliably reporting the past facts. In each law suit, that choice of what is deemed reliable testimony depends upon the unique reactions of a particular trial judge or a particular jury to the particular witnesses who testify in that particular suit. This choice is, consequently, discretionary: The trial court exercises 'fact-discretion.' . . . No one has ever contrived any rules (generalized statements) for making that choice, for exercising that fact-discretion. It therefore lies beyond—is uncapturable by—rules, and it is 'unruly.' Being unruly, it is usually unpredictable before the law suit commences.

". . . [T]he upper courts in most cases accept the trial courts' 'unruly' fact-findings, i.e., the trial court's exercise of its fact-discretion remains, ordinarily, unreviewable, final, undisturbed. . . . Lawyers can often (not always) make fairly accurate guesses as to what rules the courts will apply in uncommenced law suits. The difficulty lies in guessing to what facts the courts will apply those rules. Only in a modest minority of cases is that element of the decisions foreseeable. Therefore, seldom can a 'bad' man or a 'good' man obtain from his lawyer the sort of prophesy Holmes' theory envisioned. . . .

"The foregoing represents but a sketch of a complex subject. However, it will suffice to show the shakiness of Holmes' prediction theory. For the most part, that theory succumbs to what I call 'fact-skepticism.'"<sup>5</sup>

3. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897), reprinted in COLLECTED LEGAL PAPERS 167 (1920).

4. Book Review, 59 YALE L.J. 809 (1950).

5. Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 RUTGERS L. REV. 425, 447-49 (1954).

## II

As we know, Jerome Frank had not set out to answer or criticize Holmes: in point of fact the outcome proved a surprise to him, a rather curious by-product of his enterprise. His chosen goal was quite different. He wished to dispel various popular myths about courts and trials so that truth might light the path to a more rational and humane judicial process. Fact-skepticism led him to advocate a number of procedural and administrative changes, which he hoped would be informed by special studies in comparative law. Though even fact-skeptics may dispute the desirability of this or that detailed proposal, no one can doubt that Jerome Frank's disclosures have helped make American judges and lawyers increasingly impatient—as they should be—with the wooden technicalities in traditional procedure. If you apply the goad often enough, even an ox may eventually move.

Nevertheless, the philosophy of fact-skepticism far transcends any question or program of procedural reform. It cannot be understood if one regards Jerome Frank merely as a penetrating, critical and imaginative jurist. "Merely," forsooth; there is an entire image of him implicit in that "merely." To know him at all was to be overwhelmed by the extraordinary scope, the opulent universality of his reading and thinking. Fortunately for fact-skepticism, it grew and developed in that phenomenally gifted mind of his. There it acquired depth and spaciousness, and became coordinate with the other main currents of his philosophy.

The first neighboring current was Jerome Frank's historiography.<sup>6</sup> From the 1920's until the very end of his days, he consistently defended the attitude called "historical relativism." Among the various relativists, he found particular clarity and candor in Carl Becker. It was Becker who told the American Historical Association in 1926:

"The historian has to judge the significance of the series of events from the one single performance, never to be repeated, and never, since the records are incomplete and imperfect, capable of being fully known or fully affirmed. Thus into the imagined facts and their meaning there enters the personal equation. The history of any event is never precisely the same thing to two different persons; and it is well known that every generation writes the same history in a new way, and puts upon it a new construction. . . ."

"In this way the present influences our idea of the past, and our idea of the past influences the present. We are accustomed to say that 'the present is the product of all the past'; and this is what is ordinarily meant by the historian's doctrine of 'historical continuity.' But it is only a half truth. It is equally true, and no mere paradox, to say that the past (our imagined picture of it) is the product of all the present. . . ."

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6. See FRANK, *FATE AND FREEDOM* pt. I (1945).

7. Becker, *What Are Historical Facts?*, 8 *WESTERN POL. Q.* 327, 336-37 (1955). Professor Leo Gershey, distinguished historian, has kindly supplied me with this archetypal statement of historical relativism.

This was the first of the persistent currents that fact-skepticism met and blended with in Jerome Frank's philosophy. The second was typified by William James and Horace Kallen. As Becker vitalized the dry records of the past, these philosophers humanized the dry notions of conceptual thinking. Concepts, though necessary and valuable, must be treated as implements and ministers, not as monarchs. Every human being is more than a member of the genus, he is also a unique individual. In fact, a human being's most generic characteristic is his very uniqueness. Many of the relations and transactions that make human experience are fortuitous, exuberant, filled with uncaptured residues, at best pluralistic, not to be domesticated completely by any of our abstract terms. To Jerome Frank's delight, William James used to refer to "wild facts,"<sup>8</sup> that is, those which furnish so much of the spirited element in our existence and which our logical propositions and scientific laws simply fail to net. It takes a more alert and compassionate nature than most men possess to sense the presence of "wild facts" and respect their worth and influence.

But it was in the juristic thought of Aristotle that fact-skepticism found its closest affinity. I mean, in Aristotle as Jerome Frank read and understood Aristotle. Not that I disagree with his interpretation of Aristotle; I find it completely valid. Nevertheless, since there are various and conflicting interpretations, and since I have just referred admiringly to William James' pluralism, I can hardly insist here that Jerome Frank was alone equipped to understand Aristotle.

What did he find in Aristotle? He found: that the general rules of any legal order, if applied automatically and impersonally, are often unfit to handle the "wild facts," the subtle, unexpected particulars and the infinite diversity of human affairs; that general rules must be continually adjusted, individualized and alloyed with considerations of equity to make them more malleable; and that the excellence of equity consists not in its following but in its refusing to follow established propositions of law.<sup>9</sup> Apparently Aristotle realized that if the rigid, abstract, impersonal norm is made our king and hero, our tale is liable to become a tragedy, for the hero suffers from a fatal flaw. In this view of things, what Carl Becker did to the inflexible past, what William James did to the abstract concept, Aristotle in his wisdom had done to the mechanical and impersonal rule of law.

These were the three currents of thought with which fact-skepticism merged, and among them Aristotle was foremost. On the only occasion I recall when Jerome Frank wrote as though he were speaking through the mouth of another, it was Aristotle whom he chose for his alter ego. This is what he suggested Aristotle would say if he were to return after 2300 years:

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8. Frank, *Some Tame Reflections on Some Wild Facts*, in *VISION AND ACTION: ESSAYS IN HONOR OF HORACE M. KALLEN* 56 (Ratner ed. 1953). See also Frank, *Civil Law Influences on the Common Law—Some Reflections on "Comparative" and "Contrastive" Law*, 104 U. PA. L. REV. 887, 921-24 (1956).

9. Frank, *Modern and Ancient Legal Pragmatism—John Dewey & Co. v. Aristotle*, 25 NOTRE DAME LAW. 207, 460 (1950). For the criticism involved in Dewey's different approach to Aristotle see his *EXPERIENCE AND NATURE* c. 2 (1925).

"It is shocking, of course, to see how this personal element in justice has been shamefully exploited by totalitarian governments. They have put the best of things to the most evil uses. But that personal element, whether one likes it or not, is an inherent part of the decisional process, under any form of government. It is therefore folly to conceal its presence in the working of courts in a democracy. To conceal it, indeed, is to ensure that it operates at its worst, surreptitiously, without such intelligent ethical restraints as experience and wisdom show us both can be and should be imposed. Here, as elsewhere, we must distinguish the desirable and the possible. The wise course is openly to acknowledge the personal element, and then to do whatever can practically be done to get rid of its evils and to bring about its constructive uses. For the rest, we shall have to put up with it, however bad, as we do with ineradicable sickness and death."<sup>10</sup>

These, I believe, are the main attributes of Jerome Frank's skeptical philosophy—it is vitalistic, pluralistic, and above all, personalistic. Suppose now a lawyer is willing to say that everything in this exposition is true: will that make him an authentic fact-skeptic? No, it will not, for acquiescence is not enough. Even the naive lawyers who still live in the conceptualistic murk of the 1920's will acknowledge that past incidents may not always be reconstructed accurately in court. They will concede quite cheerfully that predictions are very uncertain before a controversy has developed—provided, of course, no one objects to their being paid, as all of us are, for making the predictions.

Acquiescence does not suffice. Too many who aver they have acquiesced are ready to rejoin their colleagues in the same old idolatry of concepts, where they chant the same old platitudes in praise of a wholly impersonal "government under law," "a government of laws and not of men." No wonder this sort of self-delusion provoked John Dewey to remark, "A government of lawyers and not of men!"<sup>11</sup>

Who then is a genuine fact-skeptic? I should say, only those who employ fact-skepticism among the constant postulates of their thinking, who use it as lenses to read the daily newspaper, and who endeavor to respond to its profound and manifold challenges. What are these challenges?

### III

Before listing them (quite incompletely, of course), let me recall that fact-skepticism is a single doctrine with three associated prongs. It criticizes our capacity to ascertain the transactions of the past; it distrusts our capacity to predict the concrete fact-findings and value judgments of the future; and finally, it discloses the importance of the personal element in all processes of choice and decision. Now we can begin with:

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10. Frank, *supra* note 9, at 491.

11. Private remark quoted in T. R. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 24 (1956).

*The challenge to the law*

Wherever we look at the law, fact-skepticism has a leading role to perform. Consider, for example, the application of the Fourteenth Amendment. It would seem very curious if the fundamental human fabric of the world's most powerful nation were to be determined by what a few senators of varying intellectual caliber may have intended—or hinted they intended—during the remote and unattractive year of 1868. Curious it would be; curious enough to be insupportable, I should think. We were rescued from any such tyranny of the dead, at least in respect of desegregation, by the way the Supreme Court treated the strictly historical arguments in *Brown v. Board of Education*.<sup>12</sup> It was fact-skepticism that emancipated us. The Supreme Court declared that if 1868 aspired to rule the 1950's, 1868 ought to have been less ambiguous. With this profitable example to work with, the legal profession's next question may be: How many other despotisms of past over present can we undertake to subvert by the same technique; how many more historical bonds can fact-skepticism loosen, then dissolve?

Yet it is wise to remember that the shackles of the anticipated future can be tighter than those of the conceived past. Our entire juristic order—civil, criminal and administrative—is permeated with uncritical assumptions about future deterrence. The law takes property, liberty and even life under the supposed warrant of deterrence. What the judges call "public policy" they deduce in large part from inarticulate premises of deterrence. Deterrence shapes the rules of tort liability; deterrence attempts to vouch for censorship and sedition laws. In short, cool, self-possessed deterrence has its roster of victims no less than hot vindictiveness.

Fact-skepticism challenges us to make a detailed and radical re-examination of the entire rationale of deterrence. Does this or that assumed deterrent really deter? What other, uncalculated effects does it have? If in many instances it does deter, then how far dare the community go in penalizing one person to influence the behavior of others?

Let me mention a single practical application among many. Fact-skepticism, in and of itself, would provide two severally sufficient reasons for ending that national infamy of ours, capital punishment: First, because capital punishment is not demonstrated to deter in fact; second, because under our system there is substantial danger of convicting and executing the wrong person. Jerome Frank concurred that each of these reasons is more than sufficient for abolishing the death penalty.

*The challenge to political theory and cultural anthropology*

Here I suggest that fact-skepticism calls for a thoroughly candid review of what is taken for granted in phrases like "the rule of law," "representative

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12. Cf. Order for Reargument, questions 1 and 2, 345 U.S. 972 (1953); *Brown v. Board of Education*, 347 U.S. 483, 489-90 (1954).

government," "popular mandate," and "the consent of the governed." Let the timorous have no misgivings: our fabric of government is so superior to Russia's that we can easily afford to turn the full force of fact-skepticism on it. For example, Cold War or no Cold War, no American needs to deny or disparage the important human and personal factors that animate every variety of so-called "constitutionalism," including our own. One of the best features of fact-skepticism is that it warns men away from false supports and treacherous comforts. In this way, it impels them toward truth, which remains their faithful ally.

*The challenge to philosophy in general and pragmatism and analytic empiricism in particular*

A few years before the publication of *Courts on Trial*, a professor of philosophy and historian of American pragmatism declared that Holmes' analysis was "the only systematic application of pragmatism that has yet been made."<sup>13</sup> If then fact-skepticism should edify the legal profession, how much more should it excite philosophers, ethicists and all who are concerned with the meaning of language and the foundations of moral responsibility! Surely they will wish to consider how deeply and how far fact-skepticism may affect Peirce's doctrine that the meaning of a concept is to be found in its conceived consequences and James' doctrine that "the true" is the long-run expedient in our way of thinking. In basic respects, are not these also prediction-theories? In so far as they are, it seems fair to analogize them to Holmes'. Since their subject matter is so very general, they may prove even more vulnerable to the prongs of fact-skepticism. Pragmatists and instrumentalists in every profession will appreciate the force and imminence of the challenge. . . .

Now we approach fact-skepticism's ultimate contribution. Let us suppose along with Jerome Frank and Carl Becker that accurate knowledge of the past is generally elusive. Let us suppose along with Jerome Frank and William James that our abstract concept is often like the iron claw of a toy crane in an amusement arcade: while it may succeed in grasping the ordinary, humdrum objects in the cage, it will continually miss the things that are interesting, deviant or eccentric. Further, let us grant—for grant we must—that though occasionally we may be able to foretell certain direct and immediate consequences of a proposed statute or decision, we cannot pretend to prophesy the spreading network of eventual, indirect, mediate, oblique consequences. As Judge Learned Hand has said, "Such prophesies infest law of every sort, the more deeply as it is far reaching; and it is an illusion to suppose that there are formulas or statistics that will help in making them."<sup>14</sup> No substitutes for critical judgment, no escapes from personal responsibility, no formulas? Yet

13. Fisch, *Justice Holmes, the Prediction Theory of Law and Pragmatism*, 39 J. PHIL. 85, 87 (1942).

14. Hand, *The Future of Wisdom in America*, *The Saturday Review*, Nov. 22, 1952, pp. 9, 10. See particularly Frank, *The Lawyer's Role in Modern Society*, 4 J. PUB. L. 8 (1955).

prophesies and the making of prophesies "infest" not only the law but the totality of human experience. Surely then our account has reached its climax, which is:

*The challenge to American society*

If fact-skepticism can accomplish its full work of emancipation, perhaps we shall at last be free to realize the pristine American dream. In the years when our nation began, there was a sort of axiomatic expectation that this "new order of the ages," this unprecedented experiment in republican government would develop a wholly superior breed of human beings. On American shores men would flourish as never before, and gain new personal stature. Here nature and society would invite them to unfold their individual talents, to discover themselves—as it were, to reach out and push back the cultural frontiers. Eventually this democratic republic of ours would exhibit a new kind of political community composed in large part of moral aristocrats.

Today most of us would acknowledge that what was then a charming vision has become a matter of arresting urgency. It is no longer merely desirable, it is virtually indispensable that American society produce a multitude of superior human beings, men and women of understanding judgment and moral rectitude, of expansive horizons and humane sensibilities, who can feel the full pathos of individual misfortunes and predicaments, yet venture to act on occasion as though the world were plastic.

By insisting on the personal element in all processes of decision, fact-skepticism underscores our state of need. It admonishes that the best and wisest propositions of social ethics, politics and law will not preserve us if the men who apply them to concrete transactions are themselves Philistines and mediocrities, even affable mediocrities. Nothing earthly can preserve us without sharply improved human qualities of leadership and citizenship.

Here, at this critical juncture, the fact-skeptic may be heard speaking a message of (perhaps) unexpected but entirely reasonable optimism. Once he has shown that the grip of the past is loose and the grip of the future even looser, he may fairly contend that we enjoy considerable new elbowroom in the realm of the present. He relishes the present with a special confidence. His very questionings and doubtings have earned him the right to declare that men possess an enormously wider and more diverse register of individual and social choices than they have ever exercised. He may go on to explain that fact-skepticism is as suspicious of alleged impossibilities as it is of pseudo-scientific nostrums. He may add—rather firmly—that one approved way to lift the heart is to exert the intellect. Who knows?—he will ask—while his congeners sit and fret in the darkness, some powerful source of enlightenment may be dangling there, within easy reach. This was the vital pattern of Jerome Frank's faith. He incessantly prodded and encouraged all our social institutions to produce *qualitative* men, and thus he paid a supreme tribute to the ideal of human dignity.

There—in the dignity of individual human beings—was the very core of Jerome Frank's religion. Though he counted himself as one of the "un-churched," he served and worshiped the divine through countless deeds of righteousness, charity and loving-kindness. Orthodox religions of every sort repelled him; by claiming despotic authority, they always prompted him to deny when he yearned to affirm. Then, not many years ago, in a novel by St. John Ervine, he happened upon something quite close to the belief he had been searching for. Here is the quotation:

"It seemed to him that God was not a Being who miraculously made the world, but a Being who labored at it, suffered and failed, and rose again and achieved. He could hear God, stumbling through the Universe, full of the agony of desire, calling continually, 'Let there be light! Let there be light!'"

So it was with you, beloved friend, and so it must be with us. There will be many times when the vision grows dim, the judgment stumbles and the courage falters. Yet we will never give ourselves to despair. Guided and sustained by your example, we will never leave off calling, "Let there be light, let there be justice, and above all else let there be compassion!"