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LAW AND THE MODERN MIND

By Jerome Frank

With an Introduction by
Judge Julian W. Mack



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LAW
AND THE MODERN MIND

"Whenever an attempt is made to point out that in every step in actual thinking a person intervenes and directs the course of thought in accordance with his interests and ideas, and that therefore to understand the sequence and connection of thought this fact must be taken into account, the cry is raised that this is psychology, and an attack upon the dignity and integrity of logic. It may be so, but it does not follow that the fact can therefore be disregarded."

F. C. S. SCHILLER, "Formal Logic."

"I think that lawyers and judges too often fail to recognize that the decision consists in what is done, not what is said by the court in doing it. Every decision is to be read with regard to the facts in the case and the question actually decided. . . . The courts state general principles but the force of their observations lies in the application of them and this application cannot be predicted with accuracy."

JUDGE CUTHBERT W. POUND.

"General propositions do not decide concrete cases."

MR. JUSTICE OLIVER WENDELL HOLMES.

"If this discovery [of the fallibility of a previously accepted scientific law] comes to us as a great disillusionment, it is only because our minds are tinged from infancy with the hoary superstition of the absolute. We say, 'If this great law is not always true, what becomes of our other exact laws?' But can we have no reverence for any institution without making the childish assumption of its infallibility? Can we not see that exact laws, like all other ultimates or absolutes, are as fabulous as the crock of gold at the rainbow's end? "

LEWIS, "The Anatomy of Science."

INTRODUCTION

PERHAPS the time has come to enlarge Maitland's figure of the law as a seamless web. For while it is only in comparatively recent years that the interdependence of the social sciences has come to be recognized, it is today a generally accepted axiom that the law, as a means of social control administered by the courts, is but an integral part of the broader subject of the relation of the individual to the group. The manifestations of the new theory are legion: in the law schools it appears as the "functional" approach, with new groupings of the conventional divisions of the law to illustrate its relation to other branches of human knowledge; in the colleges it seeks its demonstration in a series of "liaison courses," *The Control of Economic Activity*, *Economics and the Law*, *Social Legislation*, *The Relation of Government to Business*, and the like. With the realization of the similarity in subject matter of the related sciences has come an appreciation of the advantages to be derived from an adaptation of method. A striking parallelism may be drawn, for example, between the advances made in the field of psychology in the first quarter of the present century and those made in biology in the middle of the last. Just as the acceptance of the theory of biological evolution profoundly affected man's religious, philosophical, and political thinking, so today the theories of the psychoanalysts are beginning to have a similar effect. The value of the new psychology has already been recognized to a considerable extent in the field of juvenile delinquency and criminal law; Dean, now President, Hutchins and others have begun to use it in a critical reëvaluation of some of our time-honored rules of evidence. Jerome Frank, however, is the first, I believe, to attempt to apply the teachings of the new psychology to a comprehensive examination of the whole nature of law and legal thought.

INTRODUCTION

Mr. Frank demonstrates, with convincing and provocative examples, that it is not only the historical and analytical jurist of yesterday but also the modern sociological jurist who is often enthralled by attitudes and predispositions traceable to early childhood. When lawyers recall how tenaciously and consciously they cling to the law taught them in their law school days — who among us has not begun the solution of many a problem by referring to his student notes? — it is not wholly surprising that their attitudes of early childhood should unconsciously deeply mould their legal thinking.

Trained as I was in the school of Langdell, Ames, and Thayer, I came to attach great value to their penetrating historical researches which cast out many an error and illuminated many a Stygian passage. Their disciples revelled in the Langdell inductive method, in the study of concrete cases, which revealed the law as a dynamic, vital growth and not as a bundle of static maxims. While age can never justify staid conservatism, it may well excuse a tendency to find merit in the old order. And I find myself today pleading in defense of my teachers, the legal giants of their day, that they were truly progressive and not wholly unaware of the relation between the law and the other sciences, in an age when sociology was virtually unknown and economics was far remote from the actual working world. It is never too easy to admit that the age of one's teachers has passed, that new leaders, no longer disciples, are to take their place, and that the living law must fulfill and justify itself in new forms. But the last two decades have made it abundantly clear that the just decision of causes requires a careful weighing of social and economic considerations not to be found in the strict body of the law itself. A realization that the law was but one strand in the fabric of community life began to appear in the cases, a reliance on extrinsic facts, often remote to the instant case, became necessary, and a new technique was evolved; the day of the great sociological jurists — Holmes, Brandeis, Cardozo, Hand, Pound, and Frankfurter — had arrived.

Now Mr. Frank serves timely notice that it does not suffice to consider merely the social and economic facts upon which legal decisions

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should properly be predicated, but that the very thought processes of the judge and jurist himself must be tested and freed from persistently resurgent childish notions that have no place in an adult civilization. We must become increasingly aware of the difficulties inherent in our necessary use of words to convey thought, of the limitations implicit in the use of formal logic, of the delusive manner in which an oft-repeated legal fiction becomes an axiomatic rule of law. Above all, we must come to appreciate the social reasons which make unwise and the psychological difficulties which make impossible any system of mechanical jurisprudence in a modern, dynamic world.

Not the least value of Mr. Frank's study is that it serves to bring home to lawyer and judge alike a better understanding of these deficiencies in his own thought processes, an awareness of his shibboleths and clichés, and an exposure of his hopes and fears which underlie the common fallacy that rules of law are predictable certainties. Only when thus awakened can bench and bar achieve their common desire to make the law "the trewe embodiment of justice."

JULIAN W. MACK

PREFACE

SOME of our ablest teachers of law have spoken of a blighting prepossession deep-rooted in the minds of lawyers. For years in my own thinking and in that of my betters at the bar I have encountered certain baffling characteristics. I have here attempted a *partial* explanation of those characteristics. I hope that this explanation may help to make the nature of the law somewhat less puzzling both to lawyers and laymen.

The notes in the text to which reference is made by numbers will be found in Appendix IX, beginning at page 325. These notes contain some bibliographical material and qualifying statements which the more casual reader may not care to consider. The italics in most of the quotations are mine.

For encouragement in undertaking and finishing this book I owe thanks to many of my friends and especially Dr. Bernard Glueck, Randolph E. Paul, Frederick Hier and Dr. David M. Levy. Thanks are also due Lee Pressman for assistance in preparing the index.

JEROME FRANK

JUNE, 1930

PREFACE TO SECOND PRINTING

FOR many reasons a revised edition of this book is now impossible and undesirable.

But this second printing has made it feasible to make minor corrections and to add a few cautionary comments in Appendix X (page 356) which may serve to avoid misunderstandings.

J. F.

FEBRUARY, 1931

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Part One

THE BASIC LEGAL MYTH, AND
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