

April 1931

## Law and the Modern Mind

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### Recommended Citation

D. F. Cavers, *Law and the Modern Mind*, 37 W. Va. L. Rev. (1931).

Available at: <https://researchrepository.wvu.edu/wvlr/vol37/iss3/20>

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BISPHAM'S PRINCIPLES OF EQUITY. Eleventh edition by J. D. McCoy. New York: Baker, Voorhis and Company. 1931. Pp. xxiv, 491.

This eleventh edition of Bispham's Principles of Equity is, to say the least, disappointing. The author suggests that very few cases have been cited for the purpose of confining the edition to a compact volume. There are other ways that this might have been done than by the omission of citations. For instance, the book might have been printed on thin paper. The cases cited, for the most part, are those in which the controlling principles of equitable jurisdiction are stated and these citations could have been omitted for the sake of compactness and at the same time cases which illustrate exceptions and variations of the general doctrines added. There may be other ways in which this compactness, so sought for by the reviser, could have been accomplished.

There is too much dogmatic statement inferring that the principles of equity are immutable and universal, both as to time and place. In fact, one seems to sense that statements, from particular cases which appeared in the former editions of Bispham with copious citations, have here been set forth as axiomatic truths, with quotation marks omitted. The reviser has seen fit to state the principles as he sees them with very little history and less logical reasoning in their support. A Story, a Cooley, a Pound, or a Wigmore may do this and the name carries sufficient weight that the law is clearly stated.

The arrangement of the subject matter of the book could scarcely be improved upon. The index is certainly adequate. To one who is familiar with the principles of equity, who will not accept a statement just because it appears in ten point type, this book may serve a valuable purpose in refreshing his memory as to this great body of the common law. One cannot but feel, however, after a thorough examination of this volume that its sole justification is the desire to capitalize upon a great name.

—CLIFFORD R. SNIDER.

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LAW AND THE MODERN MIND. By Jerome Frank. New York: Brentano's. 1930. Pp. xvii, 362.

A generation ago the legal world was awakened to a realization that law was made, not found, by the courts. Of recent years we have become aware that, since courts are composed of judges who, inevitably, if unhappily, must be human beings and not oracles,

judge-made law is likely to exhibit those infirmities which characterize human thinking, even at its highest levels. Much exercised by these revelations, legal students have been engaged of late in searching out their implications, aided and abetted in their task by the writings of some of our ablest jurists who have had the insight and the candor to know and acknowledge the nature of their judicial labors.

Quite naturally, these first stirrings of a newly-conceived school of legal thought have made themselves felt chiefly in the law schools and among the elect of their graduates who continue to cherish a lively interest in law as learning and not solely as a craft. The "new realists", to borrow Dean Pound's apt designation,<sup>1</sup> have heretofore lacked a vehicle to bring their ideas before the bar as a whole and to the attention of such of the thinking public as refuse to consider law too esoteric for lay comprehension. In short, the school has needed a publicist. It is because Mr. Frank's book fills this want that its importance is wholly disproportionate to any original contribution to legal thinking which the author himself has made.

Mr. Frank's work is witty, extreme in statement, brilliant in spots, and challenging throughout. For a thorough development of the ideas he merely suggests, for a fair appraisal of competing considerations, for the "constructive" contribution of the next step, the reader must turn elsewhere. But, happily, the author has done his work so well that the reader will want to make this inquiry. Mr. Frank's arguments may not always carry conviction, but, in their pummelling of the reader's preconceptions, they do produce that state of mental disequilibrium which is a *sine qua non* to independent thinking.

So much for the reviewer's reaction to the book as a whole. It is not difficult to sketch its major thesis. Mr. Frank discerns a "basic myth" pervading most legal thinking.<sup>2</sup> This "myth", as entertained by some, is that the law is certain and predictable; by others, that it can and ought to be made so. The author contrasts the lawyer's veneration for the static with the more venturesome attitude of the natural scientist, and he has an explanation ready.

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<sup>1</sup> See Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697 wherein the writer, with something of the weariness of the Preacher, finds less of the novel in the proposals of neo-realism than some of its adherents would concede.

<sup>2</sup> Part II is devoted to an analysis, necessarily superficial, of the writings of "certain brilliant legal thinkers", including Pound, Jhering, and Cardozo. The author finds more than a trace of the father-authority complex in each. Only Mr. Justice Holmes emerges as "the competely adult jurist".

The lawyer is not deficient in intellectual acumen, but its exercise meets with an emotional block. As a child, he has relied on the infallible authority of his father for the solution of this world's perplexities; as an adult, the desire for this external support persists but it can find satisfaction only in the fabrication of a non-existent body of law, equally infallible and equally authoritative. In brief, the lawyer is given to wishful thinking.

One cannot accept so simple an explanation of so complex a psychic phenomenon. Indeed, one is left to wonder what experience of the author's nursery days could have left him so dogmatic and unscientific<sup>3</sup> in his explanation of that want of scientific open-mindedness in the law which he lays bare with such acuity and gusto.

Fortunately it is the fact and not the explanation which is of the essence, and Mr. Frank is at his best when his attempt at demonstration leads him to an examination of the judicial process. He finds that judges reach their decisions intuitively and then dress them in the garb of syllogistic deductions from accepted principles; that precedents are illusory, first, because they portray only a selection of the facts as the judge sees them, and, second, because an adroit judge can always find or remodel previous decisions to fit his needs; that an uncritical use of "magic" words vitiates most legal rationalizing; and, finally, that the jury, for all our legal formulae, is essentially judge both of facts and of law, and its verdicts defy prediction.

In the light of such findings, it is idle, he argues, to maintain that rules, principles and standards, whether judge-made or statutory, constitute "law", for what concerns the litigant is not the abstract formulations of doctrine in the books but the "dollar - and - cents" outcome of his case. Law, Mr. Frank maintains, plunging into logomachy with a right good will, must not be confused with its sources, among which he grudgingly concedes a place for the doctrine of the courts. Unhappily, the author is too prodigal in his definitions of what "law" is to enable this reviewer to

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<sup>3</sup>The author examines a number of other explanations of "the quest for certainty", but, with something of the zeal of a barrister distinguishing away embarrassing precedents, finds them all wanting. For the basis of his own thesis, Mr. Frank relies chiefly on the work of Piaget, a French psychologist noted for his investigation of thought processes in children. Even granting the validity of Piaget's observations (an admission many psychologists seem unprepared to make), one is not obliged to accept the author's reason for the persistence of these thought modes among lawyers. At this point, Mr. Frank leaves the laboratory for the forum.

report a single one as authoritative. The truth of the matter is that so long as that term is put to many uses, it must have as many definitions, and the test of the validity of any one is no more than its fitness for the task of achieving a desired communication of thought.

One may differ with Mr. Frank as to the extent to which law is and must be charged with uncertainty; one may suspect him of exaggerating the baneful influence of the "basic myth" in at least some fields of the law; yet one cannot deny the truth of many of his accusations or dismiss them as valueless or irrelevant. But unless the contributions of the author and those thinkers on whom he draws so freely are themselves to become "a sterile, metaphysical gymnastic";<sup>4</sup> a methodology for the utilization of this truer picture of the judicial process must be evolved. It is not enough that we exhort ourselves to become adult.

Fortunately, this aspect of the problem is already being attacked.<sup>5</sup> It is too early to assay the ore brought forth by the current delvings in the mind of man where the devil himself (*per* Brian, C. J.<sup>6</sup>) fears to penetrate, or to weigh the harvests of "relevant facts" which investigations into the complex phenomena of modern society are yielding. In the pursuit of such ends the legal scholar is become scientist. But it must not be forgotten that the adjudication of causes is not a science but an art, a truth which the work of men like Mr. Frank paradoxically serves both to emphasize and to obscure. The legal scientist may augment and refine the instruments and media of this art; he cannot alter its fundamental character.

—D. F. CAVERS.

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<sup>4</sup> See Beale, *Marriage and the Domicil* (1931) 44 HARV. L. REV. 501. Professor Beale has been accorded by Mr. Frank the doubtful distinction of serving as the archetype of "legal fundamentalism" for which the author coins the briefer sobriquet of "Bealism". It is illuminating to contrast the author's depiction of Professor Beale's views as to the nature of law and the role of rule and precedent with Professor Beale's own description contained in this number of the QUARTERLY, *supra*, p. 237.

<sup>5</sup> Law school periodicals contain many proposals along this line, notably Llewellyn, *A Realistic Jurisprudence—The Next Step* (1930) 30 COL. L. REV. 431; Turner, *Changing Objectives in Legal Education* (1931) 40 YALE L. J. 576. Dean Pound's recent article, *supra* n. 1, is especially valuable for his outline of a program for the new realists along the lines of which he (although not an acknowledged member of the group) believes their work will prove most fruitful.

<sup>6</sup> "The thought of man shall not be tried, for the devil himself knoweth not the thought of man." Y. B. 7 Ed. IV, f. 2, pl. 2 (1468).