

## LAW AND THE LIBERAL MIND\*

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Two decades ago Judge Jerome Frank published his arresting book, "Law and the Modern Mind." It came off the press at a time when men were stunned and reeling from the early effects of a great financial collapse, the repercussions of which were being felt throughout the land. It was natural in those hectic days that a distraught populace should welcome convenient scape-goats on which to heap blame for their misfortunes. None could have been more acceptable than the one here offered up in the combined form of lawyers, courts and the legal system in general, especially when it was being haled to the altar of public opinion by one who himself belonged to that profession. When a member of the bar yearns for loud applause he can readily satisfy his appetite by roundly scoring his own profession. The public relishes this spectacle, and responds liberally.

Judge Frank's book created a profound impression, bordering almost on a sensation. It was widely read and quoted. It became a sort of inspired text for those who regarded themselves as legal "liberals" and "realists." Here indeed was to be found an uncovering of some of the basic causes of society's ills. While the book in no way charged the legal fraternity with responsibility for the economic depression, it did charge them with about everything else. It abounds in such terms as "hypocrisy," "delusion," "deception," "myth," "childishness" and the like.

The natural result was a decided impetus given that heterogeneous school which for years had been using Holmesian epigrams in attacking current legal thinking. Their attacks were intensified, their barbs were sharpened. They did not agree among themselves, nor did they offer any common substitute for that which they so caustically criticized. In fact one great apostle of legal "realism," Walter Wheeler Cook, boldly stated the position of himself and his followers thus: "Having given up the quest for certainty, we have no guaranties to offer." Their insistence was that we must rid ourselves of standards in the law, even though these demolition experts had no substitute to bring forth.

Shortly after the appearance of Judge Frank's volume, as you well know, a political upheaval occurred in this country that vitally affected not only the executive branch of our government, but the legislative and judicial branches as well. The crusade was carried on under the banner of "liberalism," and to that banner repaired in great numbers those who would reshape our laws as well as our institutions. In venturing to discuss

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before you this thing I have called the "liberal mind," it is not my purpose to deal with its effects upon either the executive or legislative departments of government. To do the first would, of course, lead us into a purely political discussion which would hardly be appropriate for this occasion. To undertake the latter would lead us far afield into ramifications of legislative policies. It will suffice to say on these points that the average citizen is now convinced that a "liberal" in politics or in the legislative field is merely one who believes in the liberal squandering of public money.

What I am interested in specifically, and what I want to talk to you about, is the impact of the so-called "liberal mind" upon our law through the courts, its discernible effects upon the output of the judicial branch of government.

I am aware that when one launches upon a discourse the title of which is couched in abstract terms, he should properly begin by giving his definition of those terms, so that his hearers may at least have some inkling of what he is driving at. To follow this precept would mean that I must start by defining "law," and that I decline to do. Every lawyer and student of jurisprudence will sympathize with my shunning that futile task. Judge Frank, in his book already alluded to, undertook to give his definition of law. He has recently written that such an attempt was a serious blunder on his part. The trouble is that no satisfactory definition of law has ever been worked out. Fortunately, that fact does not preclude our considering particular aspects of law as manifested in its workings. It is to one of those manifestations that I direct your attention, to wit, that aspect of law disclosed in judicial decisions. Whether this is a process of applying pre-existing law, or making law, or merely deciding controversies without law, are questions we are not now called upon to answer. It is enough to say that what I am here speaking of is law in the sense of court adjudications.

The other abstract part of my title is the "liberal mind," and I confess it is even more undefinable than is the first part, so much so that one would despair of dealing with it except out of sheer necessity. When a term is appropriated into common usage we are forced to try to find its meaning, especially when it is directly related to that which vitally concerns our happiness and well-being. Today, when a judge dies or resigns, or a successor is appointed to the bench, the first point of discussion appears to be whether the court has lost or gained a "liberal." This very fact denotes that far-reaching implications are involved. The liberal mind, it is conceived, must profoundly affect our law in the final output of judicial decisions; and this effect stems not alone from the mind of the judge on the bench, but also from the thinking of counsel before the bar, of legal educators who have had to do with the training of counsel, and of public opinion itself. It is time, therefore, that we began carefully to scrutinize this bent of mind, if

happily we may come to understand that which may be shaping our very destinies.

I began by harking back to a book published twenty years ago. I did so largely because it is one of the earlier valuable side-lights on the make-up of the liberal mind as applied to law. While the cult of legal liberals would not endorse all that Judge Frank had to say (and, as I shall later point out, he himself no longer endorses much of it), the book was so avidly seized upon by professed followers of this school of thought that we are justified in looking to it for insight into the workings of these minds. That the text continues to serve its original purpose is shown by the fact that it has now gone through six unrevised printings, the last of which appeared only a few months ago.

Those of you familiar with the work will recall that the author begins with a chapter entitled "The Basic Myth". The nature of this myth, as Judge Frank portrays it, is a vulgar notion, cleverly sought to be kept alive by lawyers "through elaborate pretense," that there exist established and predictable rules of law dealing with human relations. He goes further and argues that the existence of such rules is socially undesirable. This theme runs throughout the book, and leads, of course, to a cynical attack, in the chapter entitled "Illusory Precedents," directed against "stare decisis". This attack culminates in a foot note which the author saw fit to have printed in italics, which reads as follows:

*"On the continent there is a movement in favor of free legal decision which emphasizes the subjective sense of justice inherent in the judge. The question is not whether we shall adopt free legal decision but whether we shall admit we already have it."*

Those words were written originally in 1930 at which time the author was holding up the example of courts in Europe which were soon to show the world just what "free legal decision" and a judge's "subjective sense of justice" could do to people in Germany and Italy.

Constitutional limitations are lightly brushed aside by the author as "self-delusions," and practically meaningless. By implication at least, he derides the concept of "Natural Law," and in more direct and virulent fashion trains his batteries against "Scholasticism." In short he stands for personalized justice, personally arrived at.

Of course, Judge Frank was not the lone expounder of such views, nor did he run or undertake to run the entire gamut of the "liberal mind" in law. Other voluble spokesmen by their writings shed further light. Time will not permit detailed review of these, but at least one or two common themes deserve mention.

The liberal mind is apparently resentful of that American doctrine of judicial review whereunder our courts assert the right to hold invalid those legislative enactments deemed violative of our written constitutions. This

“usurpation of authority,” as it has been styled, is anathema to the legal liberal. Volumes have been written to prove that such authority was never vested in the courts, and to establish the contrary doctrine of legislative supremacy.

Again, the liberal mind in its view of the judicial process goes beyond bare personalized justice. It apparently claims for courts a sort of “dynamic creative statesmanship” that should mould their decisions (unhampered by rules, prior decisions, or constitutional limitations) to fit what are deemed currently desirable or desired economic, political and social ends.

Within this all too brief compass I have sought as fairly as I can to present what would seem to be characteristic predilections of what is commonly known as liberal legal thinking. To attempt to go into detail or to exhaust the subject would be to exhaust ourselves.

With these preliminary understandings settled, we may now proceed to the real subject of this inquiry, to wit, what has been the effect of this type of mind upon our law as disclosed in judicial decisions? That there has been an effect cannot be denied, for following the political upheaval already referred to, the liberal mind was liberally projected onto the bench as well as into other departments of American life. This is a fitting time to take stock, at the turn of the half-century mark and after the lapse of a decade or more of dominance of legal liberalism and realism. You and I as citizens, whose lives and property and happiness are directly concerned, are entitled to know just what has been the effect of this mind upon the administration of justice. It behooves us to try to find out.

To get at some sort of definite appraisal it is fair to focus attention upon our highest Court, the Supreme Court of the United States, for here is a judicial tribunal which with the passing of time has been purged, or presumably was meant to be purged, of all non-liberal minds. Its workings may be contrasted with those of the so-called conservative courts that preceded it. I realize that there sat on the old Court two men, Holmes and Brandeis, who were well-nigh idolized by the liberals, but even they did not entirely fit the pattern, for Holmes had an unfortunate way of bowing to a decision of the Court once it had been rendered, even though he had previously dissented; while Brandeis had at times indulged in such heresies as talk about the individual's right to be let alone, even at the hands of his own government, and about government's being most dangerous when it appeared most benevolent! Time duly removed even these obstructions to progress, so that by the opening of the present decade liberals could point with pride to a reconstituted Court which would usher in a new judicial era.

You may recall that one of the strongest points pressed against the old Court, at the time when the liberal mind was demanding admission, was that the nine old men had so frequently disagreed among themselves that

by their own admissions they did not know the rules they were professing to administer. The number of split decisions was held up as an ominous sign of judicial impotence and as a cause for undermining confidence in the vital function of the administration of justice. You have but to review the record of that great fight on the Court to see how strongly this ground for attack was advanced. By inference the argument was that if nine liberal minds could be brought together on the Court, all would be serene, they would move in parallel channels, and virtual unanimity would be achieved, so that the citizen would with confidence know what to expect at the hands of the Court. This sounds highly amusing in the light of what has come to pass. The plain facts are these: In 1930, under the old Court 10 per cent of the Court's judgments were rendered by split decisions; today such decisions have risen to approximately 66 per cent. Not only is the Court now divided in the big majority of cases decided, but these cleavages are at times marked by displays of temper and vituperation that would scarcely befit the decorum of the court of a police judge or a justice of the peace. Obviously, the liberal mind is not as settled, as serene, or as productive of public confidence as originally portrayed. If a so-called conservative court was incompetent because it split 10 per cent of the time, one is at a loss for words to describe a judicial tribunal that disagrees within itself two-thirds of the time. The cause for this disagreement is something that must be inquired into. It cannot result from lack of intelligence, for these are educated men; it cannot result from improper motives, for these are honorable men; it cannot result from sheer laziness, for these are conscientious men who devote hours of hard labor and reams of paper to the exposition of their views. I have my own explanation of the cause, and I submit it to you. These constant divisions result from the liberal mind's misconception of the proper function of a court. Instead of working toward the establishment and the application of more or less uniform rules, the Court in its decisions is primarily concerned with not only personalized but also socialized justice, and with what has been euphoniously called judicial creative statesmanship. These considerations lead to all shades of opinion and to hopeless disagreements. When judges undertake to enter the fields of economics, sociology and political science so as to mould decisions into results deemed currently desirable, they are headed for bitter conflicts in opinions. Those are matters about which men hotly differ.

Moreover, a tribunal that functions in that manner ceases to be a court according to the Anglo-American concept. It is some other kind of institution, more like that found on the continent of Europe and which Judge Frank deemed worthy of emulation some years back.

In his recent book entitled "The Law of the Soviet State," Mr. Vishinsky has said that a court is merely another implement of a dominant class to be used in advancing its interests, that is, in furthering the social and

economic policies of those in control of the state. He denounces as utterly false the bourgeois theory that courts are "organs above classes and apart from politics."

When the liberal mind casts aside legal rules and standards, and by "free decision" decides litigation in accordance with what appears to be socially desirable from the point of view of the currently dominant class, it begins to look as if the Vishinsky definition of a court, or something closely akin thereto, were being adopted.

Of course, all this means that the doctrine of "stare decisis" must go. On this direct point the Supreme Court is not committed. The record does disclose that in the twelve year period of 1937-1949, the reconstituted Court overruled thirty prior decisions, which was almost double the bare seventeen overruled in the thirty year period of 1860-1890. Two of the justices are well known to hold little if any regard for the rule of "stare decisis," especially with respect to constitutional questions. Other members of the Court in extra-judicial utterances have paid it some degree of lip service. But in the light of the record it can now be said that this liberal minded Court does not feel itself bound by earlier decisions, whether rendered by itself or by its predecessors. This attitude led to the well known outbursts of the then Mr. Justice Roberts in 1944. In *Mahnich vs. Southern S. S. Co.*, 321 U. S. 96, he said:

"The tendency to disregard precedents in the decision of cases like the present has become so strong in this Court of late as, in my view, to shake confidence in the consistency of decision and leave the courts below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow."

In *Smith vs. Allwright*, 321 U. S. 649, after making use of the stinging simile of a restricted railroad ticket, good for one day and one train only, he added:

"I have no assurance in view of current decisions that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light upon the subject."

Surely, if independence of established legal rules, if freedom from the constraints of prior decisions, if entanglements in the meshes of social, political and economic trends, are the ear-marks of a liberal minded court, then the present Supreme Court of the United States has qualified. It ought to delight the soul of Judge Frank. But it does not delight him, for reasons I shall presently point out. Before doing so, however, there is another feature of the workings of our Supreme Court we must consider.

As I have already mentioned, exponents of the liberal mind for years devoted some of their bitterest utterances to denouncing judicial review and

to upholding the doctrine of legislative supremacy as against the courts and the Constitution. Books and articles were turned out, addresses were made and campaigns were waged, against this thing labeled a bold and unwarranted assumption of power by our courts. That occurred before the liberal mind became dominant on the Supreme Court. One was led to believe that once the liberals gained control of the Court we should revert immediately to the excellencies of the British constitution whereunder Parliament is supreme and no right of judicial review exists. But a strange thing has happened. This liberal Court continues to declare some legislative enactments and ordinances invalid, and to strike them down as violative of due process or other constitutional guaranties. Such a course has produced a strange silence in the liberal camp. We no longer have diatribes against this form of "judicial usurpation." The wind seems to have been removed from this portion of the sails. It obviously would not do to have the Court placed under attack by members of their own school of thought. There is something stranger still. The liberal minded Court has developed a sort of selective process whereby it will protect some constitutional guaranties against legislative action and not others. Now, it would seem clear that the doctrine of judicial review must apply to the entire Constitution or not at all. By what process of reasoning can it possibly be said that a sovereign people who have carefully written into their Constitution clauses to protect themselves against governmental interference, meant that courts should select and choose which of those protecting clauses they will give effect to? Yet, that kind of selecting is exactly what the Supreme Court now engages in. We must look into the nature of this eclecticism.

In a recent case Mr. Justice Douglas frankly said:

"Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position." (334 U. S. 558).

The opinion embodying this pronouncement was concurred in by a majority of the justices. Opposed to this view is the striking dissent of Mr. Justice Jackson:

"I disagree entirely with the idea that courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. It is for the local communities to balance their own interests—that is politics—and what the courts should keep out of. Our only function is to apply constitutional limitations."

Here is a clue to what the liberal minded Supreme Court is doing on this subject. It has no intention of giving up the right of judicial review with respect to certain parts of the Constitution, such as those embodied

in the First Amendment. Here, thinks the Court, is a field for its judicial statesmanship, for its furtherance of currently desirable political and social ends. In recent years much attention has been devoted to civil liberties by minority groups and by politicians seeking their support. Conditions in Europe accentuated the emphasis given to these phases of human liberties. They have become a popular political slogan. The Court apparently takes pride in defending them against all legislative encroachments. But, the old, orthodox liberal need not despair, for the Court is following him part way. It will accord to legislative bodies practically unrestrained license to deprive the citizen of his property and to interfere with his economic activities. In this area the Court clothes itself with robes of true liberalism, and spurns the idea that it should interfere with a coordinate branch of government.

Thus it appears that the liberal mind on the Court is really running true to form. The use of the judicial function to attain desired social, political and economic ends, is paramount to any notion of enforcing or applying established rules and standards, or to giving effect to the Constitution as a whole. Right now those ends are closely related to so-called civil liberties, and these the Court means to defend, even as against hostile legislation. The citizen may well wonder what good will these intangible rights do him, if meanwhile he is despoiled of his means of subsistence and his enjoyment of the fruits of his labor. Such a citizen, of course, is lacking in proper appreciation of the liberal mind.

Now, to return to our author, Judge Frank. One might think that having lived to witness the fruition of all his preachments, he could now see "everything that he had made, and behold it was very good." Not so, for he tells us by his own pen that he either did not mean much of what he preached, or he now no longer believes it.

In this sixth printing of "Law and the Modern Mind" which has recently appeared, Judge Frank begins with a newly written preface of some twenty pages wherein he makes some exceedingly frank confessions. In this preface he states that if he had it to do over again he would not now write the book "precisely" as it was written. He protests at length that he did not mean to deprecate legal rules and standards, or to hold up for scorn their uncertainty and unpredictability; on the contrary, he now says that the only uncertainty he was writing about was that which is involved in the fact-finding process in trial courts, which renders the outcome of litigation highly unpredictable. If this was the underlying theme of the book, then the author wasted considerable time and effort on that which is well known to everyone who has had even remote connection with litigation. Just how the facts will ultimately appear and how they will be found by the tribunal, are obviously results that no one can accurately foresee. To say that the fact-finding body's final decision is unpredictable is a truism.

Witnesses may die or disappear, they may be discredited, or they may be found to be honestly mistaken. No doubt, there are faults and defects in the fact-finding process that might be remedied. There always will be, as long as human agencies must be relied upon. The trouble with Judge Frank's present effort to explain away the text which he again gives to the public is that it will not support the narrow interpretation he now seeks to engraft upon it. The text as written is replete with references to legal "rules," and that does not mean mere fact-finding.

When it comes to "stare decisis" Judge Frank is now quick to affirm his faith in that doctrine, despite anything to the contrary in the text. Thus, he writes in the new preface:

"This doctrine demands that, when a court has laid down—expressly or by implication—a rule in one case, the court should, except in unusual circumstances, apply that rule to later cases presenting substantially similar facts. . . Yet no sane informed person will deny that, within appropriate limits, judicial adherence to precedents possesses such great value that to abandon it would be unthinkable."

Just how Judge Frank means to square this language of the new preface with the reissued text of the chapter on "Illusory Precedents," and the note on "free legal decision," he does not bother to explain.

In further expiation of what he now acknowledges to be other errors in the book he states that his references therein to Scholasticism and to Aristotle are "superficial," "unfair" and "glib," for which he has apologized and sought to make amends in other writings.

To correct any aspersions he may have cast upon the Natural Law he inserts the following:

"I want now to say this: I do not understand how any decent man today can refuse to adopt as the basis of modern civilization, the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas."

In the light of recent world events and the necessary resort to principles of natural justice in international affairs, the writer has evidently come to realize the error of his sophisticated jibe at Blackstone's deference to Natural Law.

The amazing thing is that in this year of 1949, Judge Frank has reissued the book with a revised preface, but with no revision in the text.

I am interested in his confession of errors as set out in that new preface, not because it must come as a shock, if not an affront, to his erstwhile fellow liberals, but because more significant implications are involved. If we are to take the original text and the new preface at face value, then it is clear that Judge Frank's views have altered since 1930. He is no longer the liberal he once was. One can but admire his confession of that

fact, even if it be encumbered to some extent with circumlocutions. When such a reversal takes place in the thinking of one who began by drawing to himself such a high degree of public attention, we are warranted in seeking an explanation for the change. An obvious answer might be that Judge Frank is now a man of more maturity and of far more experience than he was twenty years ago. Then he was a young though brilliant member of the bar. Today he is a seasoned jurist, having for the past eight years sat as an appellate judge on an important Federal Court. He has now had time and opportunity to test his earlier incursions into legal liberalism.

I venture to believe, however, that there may well exist a sounder explanation, whether it will be admitted or not. No open-minded, fair-minded seeker after truth can view the output of the present Supreme Court, liberal minded as it avowedly is without being appalled at the chaos to which we have been brought. If this is what legal liberalism is to mean, then the administration of justice is indeed in a sorry plight. Honest thinking liberals must now be impressed with some realization of what their creed has done to our law. Perhaps this has begun to dawn upon Judge Frank. If so, it is going to take more than apologies and confessions to rectify the unhappy situation. How that is to be accomplished is not within the scope of my subject. What I have tried to do is to lay before you a simple statement of the true nature of the liberal legal mind, coupled with a showing of how it affects law as disclosed in the workings of our highest Court. Truly, the result is a deplorable one. If legal liberals are disposed to face the situation honestly, they will join Judge Frank in a forthright repudiation of much of their specious sophistry, and unite in a common demand that our courts return to their true function of applying established rules and following fixed principles in the administration of justice. To depart therefrom can only lead to Mr. Vishinsky's concept of a court.

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