THE JUDGING PROCESS AND THE PERSONALITY OF THE JUDGE – THE CONTRIBUTION OF JEROME FRANK

GERARD QUINN*

> If the personality of the judge is the pivotal factor in law administration, then [the] law may vary with the personality of the judge…
>
> (Jerome Frank, *Law and the Modern Mind*, p. 111)

I. THE ADDED-VALUE OF JURISPRUDENCE IN A PERIOD OF LEGAL REFORM

The Irish judicial system has expanded and modernised very rapidly in the last decade or so. The concrete achievements and future plans of the Courts Service in particular inspire confidence that the system can yield greater efficiency and transparency without sacrificing fairness and justice. The eminent American jurist, Roscoe Pound, had earlier developed a theory that long periods of decay were often punctuated periodically by bursts of creativity and energy in the legal order.[1] There is no doubt that the Irish legal system is now going through such an unprecedented period of creativity.

Such periods of creativity are often characterised by a mix of fruitful reflection about how well the system is performing together with ambitious planning for the future. The Working Group on the Jurisdiction of the Courts led by Mr. Justice Fennelly is a prime example of this process of

---

* B.A. (NUI), LL.B. (NUI), B.L. (King's Inns), LL.M. (Harvard), S.J.D. (Harvard), Professor of Law, National University of Ireland, Galway.

[1] Pound, *The Theory of Judicial Decision*, 36 Harv.L.Rev. (1923), 641.

fruitful reflection. Jurisprudence has something – if not a lot - to offer this mix. One argument for jurisprudence is that it creates an opportunity to develop deeper insights into law which ultimately translates into better practical skills. In this regard Oliver Wendell Holmes once wrote that

> happiness…cannot be won simply by being counsel for great corporations and getting an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.[2]

Furthermore, reflective speculation is not merely good in itself – it is becoming more of a necessity as the legal system is being constantly re-shaped. Contending models for reform ultimately rest on different value systems and on different perspectives on the mix between efficiency and fairness. Every concrete proposal for change rests on some, usually unstated, value or value-system. John Maynard Keynes was fond of saying that anyone who thinks they are totally free from theory are usually the slaves to some defunct theory.[3] The process of revealing what these value-systems are and how paradigms shift is useful in producing more knowledgeable choices about the options for reform. That is not to say that theory should determine practical solutions. It is only to say that the process of stepping back from the coal-face has a value.

---

[2] Holmes, "The Path of the Law", (1897) 10 Harv.L.Rev. 461, 478.

[3] Keynes quoted in Lowi, *The End of Liberalism* (2nd. ed., 1979), p. 1.

The great pity is that most debates within legal theory seem to take place in a parallel universe to the real world. One result is a field of study that is becoming ever more rarified and disconnected. Another result is a legal system that is not benefiting as fully as it might from useful currents of thought about the nature and possibilities of the legal order. While these theoretical debates may have a cash-value in the context of contemporary legal problems, this value is seldom realised because they run in separate streams.

One such debate – but only one such debate - concerns the question of how judges should decide cases and how they actually decide cases. This debate is not new and is extremely rich. It stretches back to the birth of ancient Greek City-States and finds current expression in debates about the nature of 'public reason' on the bench.[4] One constant and perplexing theme through time is the role of the personality of the judge as a factor in deciding cases.

This essay recounts the views of an often neglected member of the Legal Realist School of jurisprudence in the 1930s on the role of the personality of the judge in the judicial process; namely, Jerome Frank. Although Frank was often wrong he was always clearly wrong and clarity is not generally a virtue of jurisprudence. Yet even where he was clearly wrong his views were always thought provoking. He at least posed the right set of questions and indeed set an agenda that continues to consume those interested in the right relationship between formal legality and the human factors that inevitably affect the legal process.

II. The Personality of the Judge – Contradictory Public Expectations

This debate about the role of the judicial personality brings to light an interesting and fruitful paradox. This

---

[4] On the concept of 'public reason' see Rawls, *Justice as Fairness: A Restatement*.

paradox is rooted in our apparently contradictory expectations as citizens of how judges ought to behave.

On the one hand, strict fidelity to the 'rule of law' seems to point toward a more or less automatic form of justice disconnected from human realities. From this perspective, the role of the judge is to clearly identify the governing law and to apply it dispassionately and disinterestedly to the facts at bar. Such a judge is obviously not without his own personal views. However, a form of self-forbearing ordinance is expected to be imposed by the judge upon himself to the effect that such preconceptions and opinions are to be firmly left to one side in order to reach decision.

This healthy reflex against allowing one's own values and views to play a part in decision-making fits neatly with a theory of justice that is mainly formal. That is, justice is defined largely by adherence to the existing law. Though the result may be unpalatable and though the judge himself may feel more than a pang of conscience, the judgment can at least be stoutly defended as strictly legal. We are, after all, a nation of 'laws and not of men'. It may be that the 'rule of law' demands too much of mortals. It may be that this reading of the 'rule of law' exaggerates the extent to which law can, or indeed should, be disembodied from the environment that gives it life. In sum, strict fidelity to one reading of the 'rule of law' ideal impels us to either eliminate or minimize the personal element in the judging process.

On the other hand, the ordinary man on the street tends not to want judges to be mere functionaries no matter how technically proficient. We seem to like the idea that our judges are men (and women) of robust constitution and passion. Further, there seems to be a public expectation that, somehow or other, judges should temper the law in order to do 'justice'. The concept of justice at play here goes beyond fidelity to the existing law – it sweeps in a substantive conception of justice whether grounded on religious or secular notions of natural law or indeed otherwise. It is

possible (as another Legal Realist Karl Llewellyn pointed out) that while people do value the stability and certainty offered by the 'rule of law' ideal, they also nevertheless expect the law to keep pace with change and further expect that the courts themselves should be the agents of this change within limits. What those limits are and how they are to be found is the proper subject of applied jurisprudence.

In sum, this latter posture toward the 'rule of law' ideal creates space for substantive ideals or values that may be sourced outside the law. Or to put the argument more cleverly, it would perhaps assert that these ideals live deep within the law and no contradiction therefore arises between fidelity to the 'rule of law' and the invocation of these ideals.[5] Predictably, the conservative retort is that this simply amounts to abusing the existing law as a kind of Trojan horse with which to insert 'alien' values to the existing law.[6] In any event, this openness of the law would also seem to create some greater room for the play of the personality of the judge in reaching decision.

It is, of course, one thing to temper a law in order to bring it into better alignment with a theory of justice through creative interpretation. This assumes that it can be brought into better alignment without fundamentally altering the law. It is quite another to subvert it in the name of an extra-legal theory of justice or one that finds no anchor in the legal realm. It has to be frankly admitted that such activism (or 'philosophical adventurism' to use the language of Judge Bork[7]) is plainly on the defensive and begs strong justification from within the 'rule of law' theory.

Whether one sees justice as purely formal, or whether justice is conceived of in substantive terms, it is hard to see how it might be possible to hermetically screen out the

---

[5] See e.g., Dworkin, *Hard Cases*, 88 Harv.L.Rev. (1975) 1057.

[6] See, e.g., Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*.

[7] Bork, *The Tempting of America: The Political Seduction of the Law*.

vagaries of the human personality from the task of interpreting and applying the law. The human element seems inescapably at play at some level in the judging process. The net question is not so much whether the judge's personality plays a part but whether there is some acceptable level of personal involvement compatible with the essence of the 'rule of law' ideal and whether satisfactory safeguards can be devised to effectively protect against excessive personal engagement. Where, then is the cut-off between 'acceptable' and 'unacceptable' personal engagement on the part of the judge?

The debate itself has no natural end-point. It will go on for as long as there are debates about the nature and interaction of formal and substantive theories of justice and for as long as there are debates about the true provenance and meaning the 'rule of law' as a legal ideology.

III. Backdrop to Jerome Frank: The Problem of 'Legal Formalism' within the 'Rule of Law'

Two things must be understood before approaching Frank's theory of the role of the personality of the judge; firstly, the strictures of the 'rule of law' tradition must be parsed and, secondly, the various assertions of legal formalism as a method of legal reasoning must be identified.

From a jurisprudential viewpoint, the 'rule of law' ideology has been described as a complex of doctrines that in their own way serve the goal of individual liberty in an ordered society.[8] Although focused more on the formalities of law, the 'rule of law' ideal is intimately connected with the fundamental postulates of constitutionalism. The constitutionalist tradition places the person at the heart of political legitimacy.[9] It posits the primacy of the person over collective power and further posits an imaginary line

---

[8] Hayek, *The Road to Serfdom*.

[9] See generally Rosenbaum, *Constitutionalism: The Philosophical Dimension* and Vol. XX *Nomos* on constitutionalism.

separating out the public sphere of political authority from the private sphere of the person. It views the private sphere as primary and puts in place a variety of doctrinal tools to keep this space open. It holds the line through the enforcement of prohibitions against State action (through negative civil and political rights) and indirectly through the doctrine of the separation of powers. The latter serves to ensure that power will not concentrate which makes it less likely that the line protecting the private sphere will be transgressed upon.

In its essence, the 'rule of law' ideal concedes that even the minimalist constitutional State must rule. What matters, however, is the *manner* by which it rules. The 'rule of law' is in essence a complex of doctrines that serve to channel public power through to the person and, in the process, to defuse it of any tendency to intrude too deeply on the private sphere. In order to advance the overall goal of liberty, and in order to qualify as 'good' law from within the 'rule of law tradition', such law must meet certain adjectival conditions. It must, for example, be clear, foreseeable, general in its pitch and equal in its application. From an institutional point of view it must be administered by an independent entity (that is, one that is disinterested in the outcome such as the courts) which applies (but, crucially, does not create) the law.

The delicate edifice of constitutionalism and the 'rule of law' rests on certain assumptions. Is it possible, for example, to keep the legal realm from being 'contaminated' by other realms where warring creeds contend over first principles? Is 'law making' inescapably bound up with 'law application'? How is the 'law' to be found and identified? Can the law be exhaustively captured in written texts and can the judge – through the use of the correct canon of interpretation – derive the right meaning of the law and apply it to produce the right result? Is there always only one right result or can the 'rule of law' theory live with multiple or equally right results? If law cannot be meaningfully screened from other realms and if it proves impossible to rule strictly

in accordance with pre-ordained law, then the risk is that the 'rule of law' becomes simply an apologia for naked power.

It will be recalled that in *Marbury v Madison*[10] Chief Justice Marshall held that the Constitution was law and that the courts had the exclusive right to determine the meaning of the 'law' of the constitution. That being so, it follows that the strictures of the 'rule of law' apply to decision-making under the constitution. Indeed, one might argue that the strictures of the rule of law apply with even grater rigour at the Constitutional level since the danger of interpolating one's own values completely negates the very purpose of Government under law.

There are some, Joseph Raz for example, who hold the view that evil law can still be good law from within the 'rule of law' ideal provided all the technical desiderata of the ideal or met.[11] There are many others how hold the view that the 'rule of law', though formal in its focus, is nevertheless tied to some substantive concept of justice and that evil law can never be considered 'good' law from within this ideal. Franz Neuman was of this view.[12] It is interesting to note in passing that Kennedy C.J. castigated Article 2A of the Irish Free State Constitution as "the very antithesis of the rule of law".[13] It is unclear whether he meant to set up the 'rule of law' ideal as an independent ground for determining the validity of law and even of the Constitution itself (raising the spectre of an 'unconstitutional' Constitution).

Legal Formalism can be understood as one view on law and adjudication - a view that was superficially in alignment with the 'rule of law' ideal.[14] Formalism was

[10] 5 U.S. 137 (1803); 2 L.Ed. 60(1803). On the life of Marshall see generally, Baker, *John Marshall: A Life in Law*.

[11] Raz, *The Authority of Law*.

[12] Neuman, *The Rule of Law* (translated from the original in German and reprinted by Berg, 1989).

[13] Kennedy C.J. in *The State (Ryan) v. Lennon* [1935] I.R. 170 at 198.

[14] On formalism as a theory of the judicial process see, generally,

mostly a theory of the common law. It almost elevated the common law into a religion. It suited the common law at a time when statute law was the exception and not the rule. It can be unpacked into a series of assertions as follows.

First, formalism commonly asserted that the common law was *comprehensive* in the sense that it absorbs and resolves all justiceable controversies. Secondly, formalism took the view that the common law is *complete* in the sense that it is sufficient unto itself and does not require any (or much) statutory adjustment to be able to resolve even hard cases. Thirdly, formalism took the view that *formal rationality* in the form of deductive logic provided an agreed method of reasoning which, when applied expertly, provided the 'right' answers. Fourthly, formalism took the view that although the common law world looked chaotic that it had in fact a certain *conceptual order*. The universe of rules was a closed set and ultimately referable back to overarching principles such as liberty. Dean Christopher Columbus Langdell of Harvard Law School was characterised as the foremost exponent of formalism.[15]

The exaggerated claims made for formalism by Langdell and others were quickly punctured by Oliver Wendell Holmes[16] both on the bench and in his extra judicial writings as well as by Dean Roscoe Pound.[17] Both men believed passionately in the 'rule of law' ideal but felt that aberrations in the courts had seriously dented public confidence in the law and in the legal process. Both wished to rehabilitate the integrity of the 'rule of law'.

Schauer, "Formalism", (1988) 97 Yale L.J. 509.

[15] See Quinn, "Legal Theory and the Casebook Method of Instruction in the United States" in 3 *Research on Cases and Theories*.

[16] See generally, White, *Justice Oliver Wendell Holmes: Law and the Inner Self*; Novick, *Honourable Justice: The Life of Oliver Wendell Holmes*; and Bowen, *Yankee from Olympus*.

[17] See Pound, "The Theory of Judicial Decision", (1923) 36 Harv. L.Rev. 641.

Holmes famously quipped in the very opening page of his classic text, *The Common Law*, that the 'life of the law is not logic, it is experience'.[18] By this he meant to deny that formal rationality played a predominant part in the evolution of the law and that the lifeforce of law often came from human experience. Of course, this formulation begs many questions about which aspects of experience count and how and whether it is ever right, in principle, to import some consideration of it within the law. Pound observed that formal rationality tends to dominate the law only after particularly creative periods come to an end. Rules and indeed systems tend to decay once the impulses that gave them life decline. Formalistic legal reasoning, to Pound, was a symptom of decay in the legal order.

But whatever its source and whatever the cogency of the early criticisms of Holmes and Pound, formalism had very visible political effects that would eventually undo it as a legal method.

One effect was that it pre-ordained a negative attitude on the part of the courts toward legislation. Legislation that intruded, even mildly, on an area already governed by the common law was interpreted not to disturb the common law unless a very clear legislative intention to the contrary could be demonstrated.[19] This was, in essence, a delaying tactic since sooner or later the various State legislatures would draw the appropriate lesson and ensure that the legislation could be read only one way and against the common law. However, formalistic legal reasoning also crept into constitutional analysis. Key and supposedly immutable principles of the common law were constitutionalised through formalistic legal reasoning. At least that is the way the matter was perceived at the time.

---

[18] Wendell Holmes, *The Common Law*, reprinted and edited by DeWolfe Howe, 1961.

[19] See Horwitz, *The Transformation of American Law – 1780-1860*.

The *cause célèbre* was *Lockner v. New York*.[20] Irish and German immigrants among others were beginning to make their political presence felt at both State and Federal levels in the US in the late nineteenth and early twentieth centuries. Slowly but surely the State legislatures began enacting regulatory laws that, for example, governed health and safety conditions in the workplace. The only obstacle (or rather, the last obstacle) to the legislation was to be found in the courts. The infamous Supreme Court decision in *Lockner* was to the effect that the *due process* protection of the 14th Amendment reached beyond purely procedural protections to include certain substantive limits on Government power. These substantive limits were additional to the ones already expressed in the text of the Constitution and the Bill of Rights - hence the term *'substantive'* due process. They were derived from liberal or libertarian theories of natural law. One new substantive protection embraced the dogma of free contract which enabled the courts to characterise regulatory law as a denial of the worker's freedom to contract.[21]

Justice Oliver Wendell Holmes issued one of his many famous dissents in *Lockner*. He wrote that "the 14th Amendment does not enact Mr Herbert Spencer's *Social Statics"*. He basically accused the plurality of the Court of usurping the Constitution. Partly because of his own experiences as an officer in the American Civil War, he was long a disciple of William James' brand of pragmatism.[22] Pragmatism meant a turn away from fixed principle and deductive reasoning and a move toward power. If the overwhelming political power of the land called for progressive legislative change then it was futile to obstruct it and even dangerous to do so from the perspective of the institutional legitimacy of the Supreme Court in

[20] 198 U.S. 45 (1905).

[21] See generally Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (2nd. ed., 1976).

[22] See Dooley, *Pragmatism and Humanism: The Philosophy of William James*.

circumstances where no explicit warrant for such obstruction could be found in the Constitution.

The blockage in the Supreme Court was eventually removed when the Court reversed itself in 1937 but not without a threat by President Roosevelt to pack the Court with new appointees who would overturn the precedent.[23] The reversal of *Lockner* gave rise to the quip 'a switch in time saved the nine'.[24] Interestingly for us in Ireland, the Supreme Court foreswore any future recourse to natural law thinking as a ground of decision.[25] Of course, when the Supreme Court became activist again in the 1950s and 1960s (but now for civil rights as opposed to property) exactly the same problem of legitimacy arose which has not been quelled to this day.

Legal Realism played a large part in exposing what was perceived to be the political abuse of the law by the Courts in the 1920s and 1930s. The problem was, and is, that the methods the Realists used to prove their thesis called into account not merely the actual use made of the law by the judiciary but also the very viability of the 'rule of law' ideal in the first place.

IV. Legal Realism as a Reaction Against 'Legal Formalism'

The Legal Realists were, in a sense, the shock troops of the New Deal.[26] Without them and without their eventual

---

[23] The *Lockner* decision was overturned in *West Coast Parish Hotel v. Parrish* 300 U.S. 397 (1937). See generally Sunstein, *Lockner's Legacy*, (1987) 87 Col.L.Rev. 873.

[24] See generally, White, *The Constitution and the New Deal*. This switch left contract law open to the regulatory reach of the State – see Gilmore, *The Death of Contract*.

[25] See generally Quinn, "The Rise and Fall of Natural Law in Irish Constitutional Adjudication", (2000) 1 Am.Phil.Assoc.Newsletter 89.

[26] See generally, Fisher & Horwitz (eds.), *American Legal Realism*; Horwitz, *The Transformation of American Law: 1870-1960: The Crisis of Legal Orthodoxy*; White, *Patterns of American Legal Thought*; Schlegel,

success there would be precious little space for the legislative innovations of the New Deal which we take for granted today. The targets of Realist analysis were threefold.

First, they critiqued formalistic methods of legal reasoning.[27] Secondly, they critiqued the results of formalistic legal reasoning in fields such as property and contract. They did this with a view to creating space for the regulation of supposedly immutable 'private' law. Thirdly and ultimately, they critiqued the very viability of the public/private distinction – a distinction that is so foundational within the liberal-democratic theory of law and politics. In this they overreached themselves.

The Realist attack on judicial reasoning is what interests us here. They attacked formalistic conceptions of legal reasoning – a form of reasoning that led to 'mistakes' like *Lockner*. Their criticism was often withering and deliberately exaggerated. One author (Morris Cohen), for example, even suggested that

> Judicial opinions have been viewed as no more and no less reliable than the statements in which octogenarians, golf champions or successful bankers explain their achievement.[28]

Felix Cohen even characterised the belief in formal rationality in law as 'transcendent nonsense'.[29]

American Legal Realism and Empirical Social Science; Kalman, *Legal Realism at Yale: 1927-1960*.

[27] See, e.g., Fred Rodell, *Woe Unto You Lawyers*. See also Dewey, "Logical Method and the Law", (1924) 10 Cornell L.Q. 17, and Grove Haines, "General Observations on the Effects of Personal Political and Economic Influences in the Decisions of Judges*",* 17 Ill.L.Rev. (1922) 96.

[28] See Quinn, "Legal Theory and the Casebook Method of Instruction in the United States" in 3 *Research on Cases and Theories*, 10.

[29] Cohen, "Transcendent Nonsense and the Functionalist Approach", (1939) 35 Colum.L.Rev. 809.

V. LEGAL REALISM AND PSYCHIATRY – THE VIEWS OF JEROME FRANK

Jerome Frank began his career as an associate with a Chicago law firm when he graduated from the University of Chicago Law School. At about the time he started with the firm two things happened. First he was told that he needed psychiatric counseling at least once a day for one year. We are not told why. The other thing that happened was that he was posted to Manhattan for a six month period. So he did the logical thing! He went to a psychiatrist in Manhattan twice a day for six months. History does not record whether he felt any better or worse for his treatment. But he did resolve not to let the experience go to waste. He promptly wrote a famous – or infamous - book entitled *Law and the Modern Mind* (1931). This book brought together the study of the judicial process with psychiatry for the first time.[30]

To put the point more accurately, this book was the first time that behaviourist theories of psychiatry were applied by a jurist to a specifically legal environment. The behaviourist tenor of the times was bleak and pessimistic about the nature of man. Its overall thrust was deterministic. The space left for free will and creativity was considered negligible. There was a faith that the factors controlling human behaviour – whether lower or higher – could be identified. Human behavior could, in turn be predicted or perhaps even influenced or manipulated. This strand of psychiatry did not then, and certainly does not now, exhaust the field of psychiatry. But it was in particular vogue at the time of Frank and he intended to use it to good effect in the legal field. Chapter 12 was entitled '*The Judging Process and the Judges Personality'* and went to the core of his thesis.

Given his behaviourist leanings, it was no surprise that Frank started his analysis of the judicial process by

---

[30] See also Kristein (ed.), *A Man's Reach: The Philosophy of Judge Jerome Frank*.

emphasizing that judges were men and were therefore inveterate rationalisers of their actions and inactions. He wrote

> The process of judging, so the psychologists tell us, seldom start with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around – with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusions and afterwards tries to find the premises which will substantiate it.[31]

He acknowledged that the traditional descriptions of the judicial process do not concede such a backward-looking explanation for judgment. In theory, "the judge begins with some rule or principle of law as his premise, applies this premise to the facts, and thus arrives at his decision."[32] But to Frank this theory is fantasy. He wrote

> Now, since the judge is a human being and since no human being in his normal thinking processes arrives at decisions … by the route of any such syllogistic reasoning, it is fair to assume that the judge, merely by putting on the judicial ermine, will not acquire so artificial a method of reasoning.
>
> Judicial judgments, like other judgments, doubtless, in most cases, are worked out backwards from conclusions tentatively formulated.[33]

This is, of course, heresy from the perspective of the 'rule of law' ideal. Frank concedes that one will find no clear

---

[31] Frank, *Law and the Modern Mind*, p. 108.

[32] Frank, *Law and the Modern Mind*, p. 109.

[33] Frank, *Law and the Modern Mind*, p. 109.

evidence of this in judicial opinions. Yet he claims that this is not where one should look for the evidence. He states that

> ... you will study these opinions in vain to discover anything remotely resembling a statement of the actual judging process. They were written in conformity with the time honoured theory.[34]

Interestingly, Frank's assertion coincided in point of time with the publication of a famous article by a judge in the federal courts system (Judge Hutcheson) who announced that he seldom decided cases on the law but waited instead for the 'jump-spark' connection to resolve matters.[35] This was the so-called 'hunch theory' of Judge Hutcheson.

The question arises that if the law was not the most immediate stimulus for decision then what was? At this point Frank went on to develop his theory that the character of the judge was the most operative factor in determining decision. He discounted ideology and political bias as being too gross. He focused more on the personality of the judge. Ideology and political opinions are always parsed through an individual's perspective. So what matters is not the ideology but the prism of the judge's personality through which it is refracted. And in any event, it is the personality of the judge that helps determine which facts are deemed salient and how they should be interpreted. He wrote

> So, the judges' sympathies and antipathies are likely to be active with respect to the persons of the witness, the attorneys and the parties to the suit. His own past may have created plus or minus reactions to women, or blonde women, or men with beards, or ministers, or college graduates, or Democrats. A certain

---

[34] Frank, *Law and the Modern Mind*, p. 109.

[35] Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions", (1928) 14 Cornell L.Q. 274.

> cough or twang or gesture may start up memories painful of pleasant in the main. Those memories of the judge, while he is listening to a witness with such a twang or cough or gesture, may affect the judges initial hearing of, or subsequent recollection of, what the witness said, or of the weight or credibility which the judge will attach to the witness testimony.[36]

Frank was known for his 'rule skepticism' or for his view that legal rules are not the decisive factor in determining judgment. This he shared with all other Realists. But he also became famous for his 'fact skepticism' or for his view that, since facts must always be understood through a human construct, the possibilities for distorting them are always manifold. He cited a famous experiment in the criminology law class of Professor Von Lizt at Berlin University. Unknown to his students, Professor Lizt arranged that two students would storm into the classroom and one would pretend to shoot the other dead. Upon the miraculous recovery of the 'dead' student, the Professor asked different sections of the class to record the experience at intervals of a few days. With respect to the student reports received a few days later Frank summed up the findings

> Words were put into the mouths of men who had been silent spectators during the whole short episode: actions were attributed to the chief participants of which not the slightest trace existed; and essential acts of the tragic-comedy were completely eliminated from the memory of a number of witnesses.[37]

This form of 'fact skepticism' is highly corrosive of a faith in the 'rule of law' since the identification of the correct

---

[36] Frank, *Law and the Modern Mind*, p. 115.

[37] Frank, *Law and the Modern Mind*, p. 116-117.

rule depends in no small measure on which facts are first determined. Frank continued,

> No one can know in advance what a judge will believe to be the 'facts' of a case. It follows that a lawyer's opinion as to the law relating to a given set of facts is a guess as to (1) what a judge thereafter will guess were the facts and (2) what the judge will consider to be the proper decision on the basis of the judge's guess as to the facts.

If the personality of the judge is the most vital factor in determining how cases are handled then how should one best prepare for trial? Frank asserts that the conventional image of the judge is not in fact shared by the Bar. Or, if the Bar professes belief in the 'time honoured' method, they do not in fact act as if they believe in it. In this regard Frank quotes from an ex-President of the American Bar Association that

> The way to win a case is to make the judge want to decide in your favour and then, and then only, to cite precedents which will justify such a determination. You will almost always find plenty of cases to cite in your favour.[38]

Frank thought that "the directing impulses of judges will not so readily appear from analyses of their rationalizing words". The logical conclusion is aptly put by Frank,

> It is fantastic then, to say that usually men can warrantably act with reliance upon 'established law'. Their inability to do so may be deplorable. But mature persons must face the truth…[39]

---

[38] Frank, *Law and the Modern Mind*, p. 111.

[39] Frank, *Law and the Modern Mind*, p. 125.

So, if legal certainty is an illusion then why not face the reality? Here Frank gets carried away by his reading of psychiatry. He asserts that lawyers use the concept of certainty as a 'father-substitute figure'. He almost advocates that lawyers and judges should go through some form of psychoanalysis in order to become more aware of the personal elements in the judging process. Of course his theory leaves open the question about how judges are to judge even when fully aware of their own personal foibles. He extols Oliver Wendell Holmes as a truly adult and mature judge.

VI. Assessment of the Views of Frank

If the Realists were often portrayed as 'frenzied locust eaters', then Jerome Frank was seen as the most extreme. His views on law and psychiatry were almost immediately and comprehensively attacked by no less a figure than Mortimar J. Adler in a special symposium issue of the Columbia Law Review dedicated to *Law and Modern Mind.*[40] Adler criticised Frank for his poor understanding of the science of psychiatry. If the dogma of formalism was what had worried Frank then Adler warned that science could be even more dogmatic and authoritarian. Frank was defended by fellow-Realists, Karl Llewellyn and Walter Wheelar Cook in the same symposium issue of the Columbia Law Review.

Frank's extreme view that the personality of the judge was the law could not stand. It too obviously ignored the substantive autonomy of law and the real constraints which legal doctrine can place on the judging process. It also ignored the disciplining virtues of using canons of construction which can channel judgment in specific directions. It further ignored, the discipline that comes from being part of an 'interpretative community' on the bench. No one wants to be overruled. Everyone searches for a common

---

[40] *Symposium: Law and the Modern Mind*, (1931) 31 Col.L.Rev. 82-115.

ground that can link the past with the present without binding one's hands into the future.

If Frank's more extreme views did not stand the test of time, he did leave a lasting legacy in two other respects. They both had to do with legal education.

The dominant method of law teaching in his day was through the casebook method of instruction. Legal Formalism had heavily influenced the shaping of casebooks to the point that the entire genre was given over to providing enough data to students to enable them to decide for themselves what the governing principles were. However, if one of the insights of Realism was that there was no law – and hence no principles – until the judge decided the case – then the traditional casebook was misconceived. One impact of Realism was that although the casebook method survived it was transformed. Since there is no post-formalist consensus about what the determining variables of the law are, it follows that the casebook should include as much 'extraneous' material. The real point is that if the law is opening outwards to other disciplines then there is no post-Realist consensus as to which disciplines it should look to and to what extent. As Goldsten pointed out:

> Legal Realism…infiltrated legal education through the same Langdell case method which had been the object of its attack. But where Langdell used the appellate opinion as a way of finding the 'true' rule of law … we have shifted our emphasis and have made the 'case' the occasion for a much broader enquiry – one which will enable the lawyer to capture the dynamic of a given field, to cope with the changing legal scene and call into question the old rules.[41]

---

[41] Goldstein, "The Unfulfilled Promise of Legal Education", in Hazard (ed.), *Challenges to Legal Education*, p. 157.

Frank was also a pivotal figure in paving the way for clinical legal education in the US. Frank wrote a highly influential essay in 1933 on the need for clinical legal education.[42] He argued that "law students should be given the given the opportunity to see legal operations" and that the student should be made to see "... among other things, the human side of the administration of justice including … (a) how juries decide cases, (b), the uncertain character of the 'facts' of a case when it is contested, (c) how legal rights often turn on the faulty memory of witnesses … (d) the effects of fatigue … on judges, (e) the methods used in negotiating contracts and settlements of controversies …"[43]

The rest is history. It is now almost impossible to study law in the US today without taking clinical modules connected to substantive courses or in their own right. The most important argument for the introduction of clinical legal education was not, unlike in Ireland, that academic education needs to be complemented with practical experience before the novice is allowed out into the world. It is that the academic education is itself incomplete unless the clinical dimension is added as integral. To understand 'the law' it has to be seen in action. If the law in action is not experienced then universities are teaching something but it is not the law.

Many of the Realists later resiled from positions they once held. Frank himself went on to write a more balanced book on the legal process called *The Courts on Trial: Myth and Reality in American Justice*. Llewellyn went on to write a classic tract on the case law system: *The Case Law System in America*. The main reason for their decline is that they had succeeded in creating legal space for progressive legislation. Their brand of radicalism had outlived its usefulness. Also, they were becoming an embarrassment. If law simply masked

---

[42] Frank, "Why Not A Clinical Lawyer School?", (1933) U.Pa.L.Rev. 914.

[43] Frank, "Why Not A Clinical Lawyer School?", (1933) U.Pa.L.Rev. 914, 916-917.

uncontrollable power then where was the dividing line between the emerging dictatorships of Europe and the US?

VII. CONCLUSIONS

Legal Realism dealt a death blow to legal formalism and especially to the pretense that formal rationality alone solved hard problems in law. Indeed, the sheer force of the critique of Oliver Wendell Holmes was enough to do this even without the contribution of the Realists. Henceforth balancing tests would displace formal rationality both in private law and eventually in public law – with all its attendant problems.

Frank's theory of the centrality of the personality of the judge could not hold. Yet the debate that Realism inspired concerning the proper remit of the judicial sphere continues unabated. This field of enquiry within applied jurisprudence is both rich and useful. Theories of the judging process abound in other jurisdictions and especially in the U.S.

It is time to open up the continuum of these jurisprudential debates in a specifically Irish context. We tend to critique judgments in this country on the basis of the results ('result-oriented' jurisprudence). We need a more developed theory of the legitimacy of the process of activism in this country. To a certain extent that requires a reawakening of applied jurisprudence within our Law Faculties. Professor David Gwynn Morgan has made a very useful start to this debate with his recent book, *A Judgment Too Far? – Judicial Activism and the Constitution*. Others should and, hopefully, will follow.