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Book Reviews

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THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON. By *Michael Les Benedict.*† New York: W.W. Norton and Company, 1973. Pp. x, 212. $6.95.

An embattled President of the United States stands accused of usurping the powers and prerogatives of Congress, failing to insure that the laws are faithfully executed, and perverting the Constitution in a quest for personal, political power. Such charges resound in the corridors of Capitol Hill, and in living rooms throughout America. While remarkably similar to a compendium of allegations arising from the morass of political intrigue and crime popularly denominated today as "Watergate," the above scenario is a description of the environment in which the impeachment and trial of Andrew Johnson took place over 100 years ago. In researching and writing his concise essay on the complicated political and legal maneuverings attendant the abortive effort to remove the first President Johnson, Michael Les Benedict could hardly have imagined how relevant his topic would shortly become. It was from the halls of academe that Benedict concluded:

> In many ways, Johnson was a very modern President, holding a view of Presidential authority that has only recently been established. Impeachment was Congress's defensive weapon; it proved a dull blade, and the end result is that the only effective course against a President who ignores the will of Congress or exceeds his powers is democratic removal at the polls. . . . [I]t is almost inconceivable that a future President will be impeached and removed.[1]

Time, of course, will determine the accuracy of Benedict's prophesy, but the conclusions he draws are not what recommend his book to the lawyer or student of Constitutional history. Rather, it is Benedict's analysis of the intricate relationships of Constitutional theory and Post-Civil War politics that commends the book to those who seek to acquaint themselves with the complex issues that arise in interpreting the scope and meaning of article II, section IV, of the Constitution:

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1. M. BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 180 (1973) [hereinafter cited as BENEDICT].

> The President, Vice-President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high Crimes, and Misdemeanors.

Historians, it should be noted, will view *The Impeachment and Trial of Andrew Johnson* with interest for an additional reason. As a result of extensive research, and with accompanying documentation, Benedict forcefully presents a view of Johnson and his "radical" Republican opponents which is much different than that traditionally advanced by most historians. In *The Growth of the American Republic,* noted historians, Henry Steele Commanger and Samuel Eliot Morison, present the traditional view:

> Altogether the impeachment of Johnson was one of the most disgraceful and vulgar episodes in the history of the Federal Government, and barely failed to suspend the Presidential system. For had impeachment succeeded, the Radicals would have established the principle that Congress may remove a President not for high crimes and misdemeanors as required by the Constitution, but for purely political considerations. . . . . [T]hen the Radicals would have triumphed over the Constitution as over the South.[2]

Challenging the conclusions of most prior works, Professor Benedict finds that there were legitimate constitutional grounds on which unbiased Senators could have convicted and removed Andrew Johnson.

At the outset, Professor Benedict describes the personalities and politics of Andrew Johnson and his Republican opponents and discusses American Reconstruction after the Civil War. The author emphasizes that Reconstruction was a time of crisis for America, the immediate aftermath of a bloody internecine struggle which claimed thousands of lives. At the end of the war, northerners who had fought a long struggle with ultimate victory never a certainty were not at all convinced that reunion was secure. In the South, President Johnson's mild reconstruction policy had permitted rebel backed officials to assume leadership of many southern state provisional governments. Benedict declares that Johnson emasculated Congressional plans for reconstruc-

2. H. BEALE, THE CRITICAL YEAR: A STUDY OF ANDREW JOHNSON AND RECONSTRUCTION (1930); D. DEWITT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON, SEVENTEENTH PRESIDENT OF THE UNITED STATES: A HISTORY (1903); S. MORISON & H. COMMANGER, THE GROWTH OF THE AMERICAN REPUBLIC 36 (1965). *Compare* J. FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR (1961); H. TREFOUSSE, THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE (1968).

tion without breaking any law—utilizing only the power and discretion vested in him by the Constitution:

> He willingly pardoned virtually any Rebel upon the recommendation of his provisional governors. The provisional governors were politicians, interested in political power, and they knew that their political futures would be more promising if they conciliated white Southern leaders. When Johnson made it obvious that he would support such a policy by pardoning Rebel leaders, and when he made alternatives impossible by opposing black suffrage, most provisional governors began to work with former Confederates and to proscribe former Unionists who refused to cooperate. By December, 1865, nearly every Southern state had returned to confederate leadership.[3]

Renewed power and belligerence of formerly active supporters of the Confederacy was the cause of great alarm to northerners. The fact that the ultimate fate of the nation was still an issue during the immediate post-war period is indispensable to an understanding of the impeachment and trial of President Johnson.

Generally, historians have termed those Republicans who opposed Andrew Johnson's reconstruction policy and ultimately replaced it with one of their own as "Radicals." However, the term "Radical" as it was used during the Civil War referred only to those Republicans who favored a more activist anti-slavery policy than President Lincoln. These "Radicals" were only one faction of a generally more conservative reconstruction Republican party. When Andrew Johnson vetoed key Congressional reconstruction legislation in 1866 and moved to force his own reconstruction policy on the nation while disregarding or failing to enforce Congressional measures passed over his veto, he broke with the entire Republican party, radical and nonradical. Benedict suggests that Johnson and his primarily Democratic supporters hung the tag "Radical" on all Republicans in an effort to discredit them politically.

While it is true that the radical Republican faction sought the impeachment of Johnson almost as soon as he attempted to implement his own scheme of reconstruction, more conservative Republicans took a different approach. Throughout 1867, as the Radicals clamored for impeachment, Nonradicals sought to force President Johnson to accept Congressional reconstruction policies through the enactment of further

3. BENEDICT, *supra* note 1, at 40.

legislation. The Nonradicals, according to Benedict, strongly believed in the concept of separation of powers. Thus, by clearly defining the scope and intent of Congressional reconstruction policy by law, and thus narrowing the President's discretion, a majority of Republicans believed that the President would have no choice but to cast aside his own policies which conflicted with his Constitutional duty to execute laws passed by Congress. The nonradical Republicans would not go so far as to remove all discretion from the President for such an approach would be to corrupt the very system of separation of powers which they sought to protect.

However, President Johnson chose not to implement the various reconstruction acts, denouncing them as unconstitutional, and challenging the motives of their Republican draftsmen. Moreover, Johnson continued to implement his own policy of Southern reconstruction. When it became clear that the nonradical Republican policy toward Johnson had failed, Radicals went "all out" for impeachment in late 1867. The Judiciary Committee to which impeachment resolutions had been referred filed a majority report in favor of impeachment. But when the matter came before the full House in December, 1867, it was voted down by the margin of 108 to 57. The Radicals did not even muster a majority in their own party, 66 Republicans having voted against impeachment.

His confidence bolstered by the defeat of impeachment and the mediocre Republican showing in the fall 1867 elections, Johnson pressed his opposition to Republican reconstruction with renewed vigor making wholesale replacements among military commanders in the South who had conscientiously carried out the mandate of the reconstruction acts. Forcing the impeachment issue to the fore again, in February of 1868, Johnson brashly removed Secretary of War Stanton from office and appointed a successor without obtaining prior consent of the Senate —a violation of the Tenure of Office Act.

Startled by Johnson's arrogance and outright defiance of the law, every Republican member of the House of Representatives voted for impeachment and, thus, sent the case to the Senate for trial. It is Benedict's view that:

> The radicals could not impeach the President alone. The President himself made it possible, and the conservatives were leading the movement. By his decision to disregard the laws Congress had

passed to circumscribe his power to obstruct Reconstruction, Johnson left them no choice.[4]

Within the foregoing historical setting, Benedict reviews the often heated discourse which took place between proponents and adversaries of Andrew Johnson's impeachment. This detailed discussion of the differing interpretations of the Constitution, legal precedents and the method by which the House and Senate ultimately decided the myriad issues involving the scope of impeachment and the form of the subsequent trial was most revealing.

Of particular interest for the lawyer is the chapter dealing with the law of impeachment. The question of initial import for those considering the propriety of impeachment of the President was the determination of its scope, that is to say the meaning of "high crimes and misdemeanors."[5] Those opposing impeachment took a narrow view, arguing that the House could act only on a violation of a criminal statute—an indictable offense. Impeachment, so the argument went, was for criminals so powerful that they might overawe the ordinary judicial process. Neither English nor American precedents supported this narrow construction, for in both jurisdictions, impeachments had not been limited to indictable crimes. Dispensing with English precedent as somewhat irrelevant to the American experience, Nonradical Republicans and Democrats who opposed impeachment sought to base their argument on how the Senate had decided prior cases of impeachment. For example, in two cases the Senate had acquitted federal[6] judges on charges which did not include any indictable offenses. Senate precedent was hardly determinative, however, for in a third case, Federal Judge John Pickering was impeached and convicted on non-indictable accusations of drunkenness and profanity on the bench.

Benedict briefly discusses other arguments of the narrow constructionists, but dismisses them out of hand as almost frivolous. Nevertheless, Benedict criticizes the advocates of a broad power for their failure to meet these fallacious arguments of the opposition. This failure, Benedict contends, weakened their case before Congress and the public. For example, the narrow constructionists had asserted that the require-

4. *Id.* at 104.

5. Recent commentary on the scope of the impeachment power includes: R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); Ferrick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1 (1970); Thompson & Pollit, *Impeachment of Federal Judges: An Historical Overview*, 49 N. CAR. L. REV. 87 (1970).

6. Supreme Court Justice Samuel Chase was impeached and tried in 1805; United States District Court Judge James H. Peck's impeachment and trial took place in 1833.

ment in article III, section 2, of the Constitution, that all crimes be tried by jury, *except those tried on impeachment*, means that impeachment lies only for *crimes* that otherwise would have to be tried by jury. Benedict's answer is that impeachment is proper for both criminal and noncriminal offenses. If the offense for which impeachment is brought is criminal, the accused cannot object to the absence of a jury trial. Benedict seems astonished that this argument was not made at the time by those favoring the broad view of the impeachment power. It seems to me, however, that the failure of radical Republicans to respond to such arguments was perhaps based on a well-founded assumption that they were so specious that a reply was not necessary.

In contrast to his skeptical presentation of the narrow scope argument, Benedict forcefully presents the Radical's broad construction position, a view that he also espouses. In essence, this view is that the framers of the Constitution intended impeachment as a check on the power of the executive and thus abuses of power by government officials amounting to misfeasance or malfeasance in office are the proper subject of impeachment. Impeachment then, according to this rationale, is a political remedy for an offense against the state itself, and the "punishment" fits the "crime"—removal from office and disqualification from holding further government positions. Moreover, if the offense upon which the official's impeachment is based also is one for which an indictment may lie, the constitution permits criminal prosecution and the imposition of penal sanctions.

If impeachment is in fact a political remedy, in the hands of a political body it is obvious that partisan politics will play a role in the ultimate decisions of whether to impeach and/or convict. Moving from his discussion of the law of impeachment, Professor Benedict, thus delves into the political considerations of the day. He describes the conflicting interests of Radicals and Nonradicals, the impact of the upcoming Presidential election (1868) and the effect impeachment and conviction would have on the various candidates. Benjamin Wade, for example, was the President Pro Tem of the Senate, and thus, according to the law at that time, would have been elevated to the Presidency upon Johnson's removal from office. Wade favored high tariffs and "soft-money," a view that bordered on anathema to conservative Republicans. On the other hand, if Johnson remained in office, it seemed likely that the Republican Presidential candidate in 1868 would be General Grant who was greatly distrusted by Radicals who felt that he had

been too cooperative with Johnson and shared none of their zeal for equal rights for Blacks. Thus it was that Presidential politics drove a wedge into the unity of the Republican party, for no matter what the outcome of impeachment, the result would be unfavorable to one segment of the Party.

The conflicting philosophies and political considerations which accompany any discussion of the impeachment process are perhaps more weighty and intellectually stimulating but no less interesting than an analysis of the procedure by which a President is actually tried before the Senate. To that question, I brought no preconceived notions. From Benedict's account, the establishment of such a procedure to try the President was the product of politics, concession and chance. Thus the trial of Andrew Johnson, which had been expected to last for no more than ten days by radical Republicans like Senator Sumner, in fact lasted over three months.

The prosecution of the President was under the direction of "managers" who were members of the House. The President was represented by counsel which included two conservative Republicans and his former Attorney General.

Initially the question arose as to the nature of the Senate when trying an impeachment—was it to be transformed into a court or continue as a legislative body sitting in judgment of the President? Ultimately, it was decided that Senators would sit as a "court" and would adjourn before resolving once again into the Senate.

The role of the Chief Justice was also a matter of controversy. He was required by the Constitution to preside at the trial of a President—but would he have the absolute right to vote as a Senator on acquittal or conviction, or at least cast a tie breaking vote?; would he have the ultimate say on the admissibility of evidence? These questions were of immense importance not only because their resolution was basic to the whole inquiry, but also because of the political implications which attached to the determination of the scope of the Chief Justice's control of the proceeding. Chief Justice Salmon P. Chase was a political fellow who was, at the time of the trial, himself under consideration as a possible Presidential candidate. Moreover, many Senators feared that if Chase was given at least the initial power to decide questions of evidence, his eminence as the country's highest judicial officer would

lend so much weight to his decisions that Senators would hesitate to reverse him on important questions of law.

After considerable debate, it was ultimately decided that the Chief Justice would initially rule on evidentiary and procedural matters, but upon objection of one Senator, the whole body would be called upon to decide the challenged ruling by majority vote (it is interesting that the effect of this was that the prosecutors—the House managers—could not appeal a ruling of the Chief Justice to the Senate themselves).

As the trial wore on, moderate and conservative Republicans who were narrow constructionists voted consistently to sustain the Chief Justice, not only because they agreed with his rulings but also because they wanted to separate politics from law in the proceeding. Benedict criticizes these Senators, suggesting that it was impossible to judge the President on purely legal principles and by legal procedures. Nevertheless, Benedict finds a measure of reassurance in the Senate's caution. American politicians, says Benedict, attempted to give a political officer a full and fair trial in a time of political crisis.

Professor Benedict recounts in considerable detail the charges lodged against President Johnson and the defenses raised by his counsel. Having been accustomed to the traditional historian's accounts of the trial, I was surprised to find that quite sophisticated legal arguments were made on both sides.

Having recounted the basic outline and theme of *The Impeachment and Trial of Andrew Johnson*, it should be obvious that Michael Les Benedict has written an essay rather than a purely objective history. The book has the character of a polemic in its strident advocacy of the anti-Johnsonian, pro "Radical" view of the impeachment and trial. Frankly, Professor Benedict's attempt to "sell" his thesis to the reader was rather distracting. I found myself wondering whether prior historians could have been as wrong about Johnson and his contemporaries as Benedict suggests. However, if Benedict's position is sustained after receiving close scrutiny by his colleagues, then I suppose one would have to concede that the tone of the book was justified as an attempt to correct ingrained distortions of a very important event in American history. Such criticism, however, is best left to the historiographer. Suffice it to say that *The Impeachment and Trial of Andrew Johnson* is worthwhile reading for the lawyer or law student. In the Spring of 1974, when there is a very real possibility that a President

of the United States may once again stand before the Senate accused of high crimes and misdemeanors, it might be helpful if we all made an effort to learn from the past.

*Patrick Charles McGinley**

1973 LEGAL MEDICINE ANNUAL. Edited by *Cyril H. Wecht.*† New York: Appleton-Century Crofts, 1973. Pp. xv, 522. $19.25.

Law is law and medicine is medicine and never the twain shall meet.

Not so long ago many legal and medical professionals, especially the latter, would have accepted such a paraphrase of Kipling's famous citation as a fair representation of the mutual rapport between medicine and law. Such a position is obviously today not only obsolete but untenable.

The mechanization and depersonalization of modern medicine has induced a marked change in the social and legal attitudes vis-à-vis the image of the healer physician. The geometrical increase in traffic, environmental and drug-related injuries and diseases, as well as the unbelievable growth of the insurance industry, have all brought about a dynamic and steady growth of a new bridging discipline, the specialty of legal-medicine.

However, even today, significant communication gaps in medico-legal problems separate the members of the two professions. Wecht's annuals on legal medicine appear to have filled part of this gap successfully on a regular, yearly basis.

The contributors of the *1973 Legal Medicine Annual,* many of whom are both physicians and lawyers, demonstrate a remarkable capability of discussing the basic and most critical medico-legal issues of today in a clear, accurate and interesting way.

With a couple of minor exceptions of over-technical subjects, such as matching of trace materials, the twenty-three chapters appear to be well geared to the trial attorney, the medico-legal expert and the foren-

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sic pathologist, both as current instructive readings and reference material.

The first chapter on the "American Attorney and the Medico-Legal System," sets the scene by defining the main problems, different fields of expertise and quality of available manpower, in the medico-legal field. The presentation includes a critical discussion of the historical perspective and current structure of the heterogeneous American medico-legal system. Particular emphasis is laid on the description of the qualifications, training and professional approach of the forensic pathologist, a much more useful and appropriate medico-legal expert than the typical hospital pathologist.

The other chapters deal with specific subjects related to various medical legal subspecialties, such as forensic pathology, forensic anthropology, toxiocology, forensic psychiatry, and medical jurisprudence, and to the practical trial techniques of selection, preparation and cross examination of expert medical witnesses.

Despite the technical complexity of the material, the presentation of the complete autopsy reports on John F. Kennedy and Robert F. Kennedy represents a unique opportunity for both forensic pathologists and trial attorneys to compare the standards of an inadequate, superficial medico-legal autopsy with an excellent and very complete postmortem examination and documentation.

The forensic toxicology chapter highlights the medico-legal problems related to the collection and sampling of biological fluids for drug and poison detection. A succinct review of the health hazards associated with alcohol, carbon monoxide and barbiturates is also included. Dr. Charles Winek, a leading toxicologist, has updated a very necessary and unique reference tabulation of therapeutic, toxic and lethal levels of a large variety of drugs, that are commonly involved in poisonings, overdoses and therapeutic misadventures.

Amongst the many chapters dealing with medical law in general and hospital and drug laws in particular, and their impact on malpractice and other types of civil and criminal litigation, one should be mentioned in particular. David L. Beller, a Washington attorney, has written a brilliant, in-depth presentation on malpractice suits against the United States and government employed physicians. The impact of the Federal Tort Claim Act is thoroughly studied and evaluated on the basis of an exhaustive review of the pertinent case law. The loop-

holes in the protective legal shield of the government are exposed in detail.

Space does not permit a full review of all the subjects treated, which include legal identification problems in forensic anthropology and dentistry, medico-legal ramifications of sterilization procedures and artificial insemination, informed consent in clinical investigation and human experimentation, and forensic psychiatry problems in contested divorces and custodianship of children.

All in all, and with only very minor exceptions, the *1973 Legal Medicine Annual* represents useful, easily readable, and very interesting material to anyone actively moving across the chessboard of legal medicine.

*Joshua A. Perper**

CASE HISTORIES IN CONSTRUCTION LAW—A GUIDE FOR ARCHITECTS, ENGINEERS, CONTRACTORS, BUILDERS. By *William Jabine.*† Boston: Cahners Books, 1973. Pp. vi, 233. $12.50.

Developments and cases in the law affecting the construction industry are fertile and popular subjects for regular columns in numerous magazines and other periodicals directed toward architects, engineers and contractors. When read singularly, and with the respite of a month's grace between articles, the capsulation of these cases can provide the non-lawyer with fresh insights into his chosen endeavors. For the lawyer, too, whether intimately involved with construction related problems or merely a casual participant, these articles should be of significant interest—if only because their clients are reading them.

Over the years, Mr. Jabine has authored a series of such articles for the *Actual Specifying Engineer Magazine*, and he has now reorganized and compiled a number of them in book form. This book is not a case book for a course in construction law, nor does it contain material on every aspect of regularly encountered legal problems in the construction industry. It does, however, give specific case histories in abbreviated form to illustrate legal principles related to the topics chosen by the author. As a lawyer writing for a primary audience of

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non-lawyers, Jabine's style facilitates a comprehension of the legal principles involved by interspersing scholarly comment with excerpts from the opinions under consideration. Although this approach is particularly germane for the magazine articles in which the cases first appeared, I believe the anthology format for transposing it to book form will make it difficult to hold the attention of laymen. It is difficult even for lawyers, particularly when a quoted case cites another case "*supra*," and that case is not included in this book.[1]

The reformatting of material from a series of articles has resulted in another shortcoming: excessive brevity caused by the limitations of space in the original articles. It would have seemed advantageous for the author to have used this opportunity for republishing the material to expand on some of the cases, and to have added sufficient new material to reduce the somewhat disjointed sequence of a series of magazine articles.

The Table of Contents[2] gives a broad indication of the subject areas covered, including plans and specifications, exceptions to strict compliance, engineer or architect as supervisor, licensing, bidding, consequences of missed deadlines and arbitration, among others. Unfortunately, current topics of interest such as the statutes of limitation[3] for claims arising out of improvements to real property and strict liability for professional services are omitted, although the latter is alluded to in one case in the section on the engineer's responsibilities.[4]

Despite the few shortcomings noted above, *Case Histories in Construction Law* is a worthwhile addition to the literature in this area, and its availability should be of interest to any attorney with clients in the construction field.

*Arthur T. Kornblut**

1. W. JABINE, CASE HISTORIES IN CONSTRUCTION LAW 86 (1973). Peerless Ins. Co. v. Cerney & Associates Inc., 199 F. Supp. 951 (D. Minn. 1961), referred to but not included in this book is recommended for further reading on the subject of surety recovery against an architect.
2. *Id.* at iii (table of contents).
3. These special statutes of limitation are a very recent innovation in the law, the first having been enacted in Wisconsin in 1961. At present, approximately 43 states have enacted similar statutes, and courts in nine jurisdictions have ruled on their validity in one way or another. The statute presents an interesting legal question, since in most cases the statutory period commences at the time performance of services end rather than when an injury occurs. A majority of cases have upheld the statutes as valid exercises of legislative authority in weighing the relative interests of all affected parties—particularly in light of the fact that architects, engineers and contractors normally have no control over the project after they complete their services.
4. W. JABINE, CASE HISTORIES IN CONSTRUCTION LAW 165-70 (1973).

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COURTS ON TRIAL—MYTH AND REALITY IN AMERICAN JUSTICE. By *Jerome Frank*.† Princeton: Princeton University Press, 1973. Pp. xii, 441. $15.00 cloth. ($3.45 paperback).

As a freshman law student I was repeatedly told by one of my learned professors, "If you change the facts, you change the law." Indeed, this very statement can be said to be the theme of Judge Frank's refreshing work describing the true aspects of the trial court's operation in the American system of justice.

Justice Douglas more than accurately describes Judge Frank's book on the back cover when he states, "A book which laymen should read for insight into the operations of the courts of this country . . . . Judge Frank does away with the mystery and the magic. A brilliant demonstration of the use of all the 'social sciences' in analyzing a legal problem. These criticisms . . . will stimulate the modern lawyer, anthropologist, psychiatrist, and philosopher." I would only add that "these criticisms" will also be of immeasurable value to all judges both on the trial and appellate level.

Judge Frank begins his book with several chapters on the workings of the jury system. He emphasizes that it is at the trial level that the facts of any particular litigation must be revealed. It is the trial judge or jury who has the duty of finding the facts of a case in order to arrive at a just decision. What he says about the facts, especially in chapter three, are revealing thoughts to the layman who may have a somewhat different idea of how facts come into play in a law suit, which Judge Frank terms "to go to law."[1] In chapter three, entitled "Facts are Guesses," Judge Frank dispels the axiom that an appellate court can correct mistakes of fact which may have occurred at the trial level. He says, "An upper court can seldom do anything to correct a trial court's mistaken belief about the facts . . . . [T]he upper court usually feels obliged to adopt the trial court's determination of the facts."[2] But what may be more disheartening to the layman is his statement that the facts in a law suit are mere guesses.

The author sets out the following traditional formula of the decisional process: $R \times F = D$, where R is a rule or rules of law, F are the

† Judge, United States Court of Appeals, Second Circuit (deceased).

1. J. FRANK, COURTS ON TRIAL—MYTH AND REALITY IN AMERICAN JUSTICE 5 (1973) [hereinafter cited as FRANK].

2. *Id.* at 23.

facts and *D* is the decision.[3] This formula, says Judge Frank, although good in theory, may not work out in practice. Legal uncertainty is generally ascribed to the "indefiniteness of the *R's*."[4] What is forgotten is that the facts play the most important part in arriving at the *D* of a law suit. Usually, when "men 'go to law' the facts are not admitted, and the testimony is oral and in conflict . . . . [T]he 'Truth-Will-Out axiom' . . . often . . . does not jibe with reality."[5] Frequently the facts as they are told to a lawyer by a client or a witness prior to trial are not at all like the facts as they later show up in the court-room. Judge Frank attributes this fact problem to three sources of possible error: (1) the witness may erroneously have observed the past event at the time it occurred; (2) a witness may erroneously remember that correct observation; and (3) a witness may inadvertently misstate his recollection, may inaccurately report his story.[6] Furthermore, coaching of the witness by his lawyer is suggested as a possible effect on error in the facts.

The above formula must also be changed in that the *F* in the formula usually is interpreted to mean *OF, i.e.*, objective facts. But the facts which come out in a trial are really *SF, i.e.*, subjective facts. Therefore, the formula should read $R \times SF = D$. "The facts as they actually happened are . . . twice refracted—first by the witnesses, and second by those who must 'find' the facts. The reactions of trial judges or juries to the testimony are shot through with subjectivity. Thus we have subjectivity piled on subjectivity."[7]

The *"SF"* problem creates several difficulties for the lawyer who is asked to advise a client about a particular rule of law or to project the outcome of future litigation. For, says the author, legal rights and duties depend on the existence of presently unknowable facts, not legal rules. The *SF*'s are the important part of our legal formula and with them follows the predictability, constancy and determinability in the law.

In chapters four and five, entitled respectively "Modern Legal Magic" and "Wizards and Lawyers," the author deals with some of the mystical aspects of today's legal thought. In so doing he presents an historical view of legal thought and relates the past to the present

3. *Id.* at 15.
4. *Id.*
5. *Id.* at 16-17.
6. For an elaboration of the reasons for error in testimony, *see id.* at 16-21.
7. *Id.* at 22.

through an historical perspective. He reiterates and elaborates on what he feels are the two factors which make subjectivity in a trial a necessary element: (1) the problem of witnesses who are not able to mechanically relate the events which they saw and heard, and (2) the fact that trial judges and juries are "fallible witnesses of the fallible witnesses."[8] Legal magic comes into play when modern legal thinkers attempt to hide this subjective element. Rather than facing the realities of our legal system, modern lawyers and legal thinkers tend to cover up the practical drawbacks of the trial by "high sounding names (like) 'legal philosophy' or 'jurisprudence.'"

Furthermore, the author elaborates when he states:

> The legal theory of the pundits carries over to the less reflective lawyers. They, in turn, invoke that theory when explaining our courts' operations to non-lawyers. So that, if at the core of the pundits' legal theory we find magical notions, those magical notions will be likely to affect public attitudes towards, and beliefs about, our judicial system.[9]

An example of this process might be the fiction that established rules are always the basis for and the controlling influences affecting trial court decisions, or the magic involved when it is said that legal rules can effectively safeguard us against judicial ignorance or weakness or improper judicial motives.[10] In chapter five the author describes his legal magicians "as mildly schizoid, since they insist on portraying as existent a legal system which plainly does not exist."[11]

In chapter six, Judge Frank continues his quest for the true facts in litigation by comparing the historical and still lasting "fight-theory" of litigation with the "truth-theory." Alas he concludes that although the trial court's job of finding facts is one of the most important ones in modern court-house government, it unfortunately is a job which is seriously lacking. To prove his point he quotes Professor Morgan of Harvard who wrote that a law suit is not "a proceeding for the discovery of truth," but "a game in which the contestants are not the litigants but the lawyers."[12]

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8. *Id.* at 47.
9. *Id.* at 50-51.
10. The author, using quotations from Dickinson, *Legal Rules*, 79 U. OKLA. L. REV. 833 (1931), gives an excellent example of what the term "legal magic" means. FRANK, *supra* note 1, at 51-53. He further explores the notion of legal rules mechanically applied citing the works of Bentham, Jhering, Kantorowicz, Pound, Cardozo, Cohen and Patterson. *Id.* at 55-61.
11. FRANK, *supra* note 1, at 15.
12. *Id.* at 102.

Judge Frank sees two necessary elements to the success of a trial, *i.e.*, a trial which is limited to ascertaining the truth. The first of these factors, the evidence or fact finding process, was covered in the first chapters of his book. In chapter eight he turns to the second factor—the competence of those conducting the inquiry—the judges and/or the jury. He begins this look with a review of the development of the jury system. One aspect of juries which is little noted, points out Judge Frank, is the fact that a jury seldom reveals the facts which it has found which have led it to the arrival of a decision. For this reason the author suggests more frequent use of the special verdict and even goes so far as to suggest that a trial be completely recorded, both audio and video, for presentation to appellate courts or to be used as a learning device to aid in the discovery of the true facts in a given case. Other suggestions presented in defense of the jury system and its continued functioning in our judicial process include the revision of the exclusionary rules of evidence, the use of more experts by the trial judge himself to aid him in uncovering the truth or falsity of various witnesses' testimony, the recording of jury-room deliberations and educational training for jury service.[13]

In chapter ten, "Are Judges Human?," the author turns to an analysis of the judges' role in our system of justice. Judge Frank concludes with a comparison between the historian and the judge in dispelling the "myth" that judges are super-human beings. After speaking about judges in general, the author turns to the trial judge in chapter twelve. Here he again alters the formula for arriving at a decision; now, he presents the formula $S \times P = D$, where S represents the stimuli that affect the judge and P represents the trial judge's personality. Although Judge Frank notes the futility in trying to use the written opinion as a basis for an evaluation of trial court fact-finding, he recommends that trial judges more often use the process of finding a decision with the pronouncement of special findings of fact. This practice, he suggests, will enable the trial judge to break down his decisional process into two parts—the rule and the facts.

In chapter fourteen Judge Frank shows us that the idealistic notion that law can be considered a science rather than an art is just that—idealism. The theory breaks down when we analyze the predictability of legal decisions. The author illustrates the breakdown of the idea of a "science of law" by looking at the theories in the writings of two

13. *Id.* at 143-45.

great legal thinkers, Lasswell and McDougal. Lasswell and McDougal, using the formula $R = E/P$, attempted to show the feasibility of a science of legal prediction. In the above formula, E symbolizes typical environmental factors such as testimony, exhibits, briefs and arguments and P symbolizes the predispositions of the court before the lawsuit began. Examples of this P may be the judge's bias for or against rich or poor, or attitudes toward certain legal rules and principles. R, which symbolizes the court's decision (response) derives from the impact of E on the court's P.[14]

The formula breaks down because there are too many variables among the E's and P's and, therefore, no statistical accuracy can be attained by the use of the formula. Law in the final analysis must be considered an art.

In subsequent chapters the author has a few words to say about both legal education and the special training needed for trial judges. He states that much of the myth associated with our legal system can be blamed on American legal education.

> . . . [C]ontemporary law-school teaching got its basic mood at Harvard, some seventy years ago, from a brilliant neurotic, Christopher Columbus Langdell. . . . The raw material of what he called 'law,' he devoutly believed, was to be discovered in a library and nowhere else. . . . Practicing law to Langdell meant chiefly the writing of briefs, examination of published 'authorities'. . . . The lawyer-client relation, the numerous non-rational factors involved in a trial, the face-to-face appeals to the emotions of juries . . . was virtually unknown (and was therefore all but meaningless) to Langdell.[15]

In other words, the foundation of our present day methods of legal education was based upon knowledge of the theory of the law as opposed to the learning of any of its practical aspects. Judge Frank, both in this book and in numerous other works, supports the slowly growing trend towards clinical legal education. The case system now used almost exclusively in the law schools of America is rejected by Judge Frank. It is rejected because it does not teach the student the facts of a particular case, but rather "upper-court opinions." Judge Frank, on the other hand, favors a more intimate contact between courts, lawyers and the law student—a return back to the legal apprentice system.

He makes the following suggestions as factors to be considered to

14. *See id.* at 202 n.38.
15. *Id.* at 225-26.

improve our system of legal education: (1) law school teachers should be men with at least five to ten years of actual law practice; (2) a revision of the case system to a true case system rather than the present sham system; (3) supplementing legal studies by frequent visits to both trial and appellate court proceedings; and (4) by analogy to the practice of many medical schools, the use of legal clinics such as the now existing Legal Aid Societies and Neighborhood Legal Services Associations. The above suggestions would enable the law student to see the human side of the practice of law. Some law schools have begun to realize the truth in Judge Frank's remarks; a limited number of law schools now do offer some sort of "clinical legal education" over and above the traditional trial and appellate moot court programs. But much more can be done in this area to better equip the graduating law student to cope with the most important aspect of his future law practice—people!

With respect to the training of trial judges, several suggestions are presented: (1) the future trial judge should be shown, "in great detail," the problems relating to the facts which he must determine in a law suit; (2) he should learn all that is presently known about psychological devices for testing the trustworthiness of witnesses; (3) he should learn about the interpretation of demeanor; (4) he should have first hand observation of how trials are conducted and become acquainted with the various tactics of trial lawyers (probably the most important criteria); each prospective trial judge should undergo a psychoanalysis in order to aid him in finding his own biases; (5) after experience as a trial lawyer, he should serve an apprenticeship with a trial judge; and (6) before his election or appointment to office, the potential trial judge should be required to pass a stiff exam and be officially certified to the position.

In chapter nineteen, Judge Frank looks at the *R* in his formula for arriving at legal decisions. In so doing, he sets forth some of the traditional philosophical ideas behind judicial rule-making, outlines the judicial use of stare decisis, explains the precedent system and the use of the ratio decidendi device. Here the layman has an opportunity to explore the theories behind the use of precedents to maintain some sort of stability in the decisions of trial courts.

But the stability of judge-made rules can be easily disrupted as is shown in chapter twenty-one, "Words and Music: Legislation and Judicial Interpretation." The title to this chapter gives an indication of the author's approach to the topic of the interpretation of statutes by the

courts. This approach is to use a comparison between the interpretation of statutes by judges and the interpretation of a musical composition by musical performers. The legislature is likened to a composer who leaves his interpretation to others—the trial judges. The comparison is summarized by saying that the legislature as does the composer delegates some subordinate activity, *i.e.*, the creative activity of judicial legislation to the courts.

In the closing chapters of his book, the author gives the reader a view of legal reasoning, especially the reasoning involved when a court makes a decision by distinguishing the facts of one case from those of another to arrive at a decision, the anthropological approach to the development of legal rules, where he dispels another persistent "magical belief," that legal rights and duties correspond to the customs of the community, and a higher law—natural law. Of natural law, he says it does not furnish a standard for viewing the fact-determination of trial courts in most law suits, nor does it provide assistance in ensuring uniformity, certainty or predictability.[16]

A summary of his suggested reforms in our judicial system is provided in chapter thirty-one. I list them here both because they bear repeating and because of the unique approach that they present:

1. Reduce the excesses of the present fighting method of conducting trials:
   (a) Have the government accept more responsibility for seeing that all practically available, important, evidence is introduced at a trial of a civil suit.
   (b) Have trial judges play a more active part in examining witnesses.
   (c) Require court-room examination of witnesses to be more humane and intelligent.
   (d) Use non-partisan "testimonial experts," called by the judge, to testify concerning the detectable fallibilities of witnesses; circumspectly employ "lie-detectors."
   (e) Discard most of the exclusionary evidence rules. (Not, however, the major privilege rules, especially those relating to evidence obtained by unlawful searches and seizures.)
   (f) Provide liberal pre-trial "discovery" for defendants in criminal cases.
2. Reform legal education by moving it far closer to court-house and law-office actualities, largely through the use of the apprentice method of teaching.

16. *Id.* at 367.

3. Provide and require special education for future trial judges, such education to include intensive psychological self-exploration by each prospective trial judge.
4. Provide and require special education for prosecutors which, among other things, will emphasize the obligation of a prosecutor to obtain and to bring out all important evidence, including that which favors the accused.
5. Provide and require special education for the police so that they will be unwilling to use the "third degree."
6. Have judges abandon their official robes, conduct trials less formally, and in general give up "robe-ism."
7. Require trial judges in all cases to publish special findings of fact.
8. Abandon jury trials except in major criminal cases.
9. At any rate, while we have the jury system, overhaul it:
   (a) Require fact-verdicts (special verdicts) in all jury trials.
   (b) Use informed "special" juries.
   (c) Educate men in the schools for jury service.
10. Encourage the openly disclosed individualization of law suits by trial judges; to that end, revise most of the legal rules so that they avowedly grant such individualizing power to trial judges, instead of achieving individualization surreptitiously as we now largely do.
11. Reduce the formality of appeals by permitting the trial judge to sit with the upper court on an appeal from his decision, but without a vote.
12. Have talking movies of trials.
13. Teach the non-lawyers to recognize that trial courts have more importance than upper courts.[17]

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17. *Id.* at 422-23.

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