Michigan Law Review

Volume 84
Issue 4 *Issues 4&5*

1986

The Iconoclast as Reformer: Jerome Frank's Impact on American Law

Matthew W. Frank
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Judges Commons, and the Legal Biography Commons

Recommended Citation

Matthew W. Frank, *The Iconoclast as Reformer: Jerome Frank's Impact on American Law*, 84 MICH. L. REV. 866 (1986).
Available at: https://repository.law.umich.edu/mlr/vol84/iss4/29

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW. By *Robert Jerome Glennon*. Ithaca: Cornell University Press. 1985. Pp. 252. $24.95.

In the first half of this century, Jerome Frank achieved prominence as a corporate attorney, a legal realist, a New Deal administrator, and finally as a federal appellate court judge. A study of Frank's career does more than testify to the man's extraordinary breadth of interest, energy, and ability; it serves as a pane through which one may witness the enormous changes in law and legal theory from 1930 to 1957. In *The Iconoclast as Reformer: Jerome Frank's Impact on American Law,* Professor Robert Glennon[1] traces Frank's career and attempts to evaluate Frank's influence in these areas. The result is an interesting and valuable work for those curious about Frank, but one that is only mildly successful in meeting its ambitious goal.

Frank is perhaps best remembered as a vocal proponent of legal realism. In 1930, publication of *Law and the Modern Mind* propelled Frank, then a Wall Street attorney, into the forefront of the realist movement. This seminal work, written in a lucid and engaging style and drawing heavily upon psychology, traced the origins and conse-

1. Professor of Law, Wayne State University Law School. A.B. 1966; J.D. 1969, Boston College; M.A. 1972; Ph.D. 1981, Brandeis University.

quences of the myth of legal certainty, "substituted American pragmatism for Hegelian philosophy," and called upon legal thinkers to confess and reject "the bugaboo of certainty in the law."[2] From the time of *Modern Mind*'s publication until Frank's death in 1957, he produced a steady stream of books and articles on issues of law, politics, government, and philosophy, all of which displayed their author's excitement and originality.[3]

In 1932, Frank left Wall Street and, with Felix Frankfurter's aid, moved to Washington as General Counsel to the Agricultural Adjustment Administration. There, Frank assembled a talented legal staff, including young attorneys Abe Fortas, Alger Hiss, and Adlai Stevenson, and during the course of the decade immersed himself in legal and political debate. In 1937, Frank joined his friend William O. Douglas on the Securities and Exchange Commission, and two years later succeeded Douglas as chairman.[4] In 1941, Frank's tenure in Washington ended; he returned to New York, and from 1941 to 1957 legal realist Frank sat as judge on the United States Court of Appeals for the Second Circuit. Frank's tenure as a jurist is Glennon's principal focus.

The Iconoclast as Reformer is composed of six parts, each approxi-

---

2. Douglas, *Jerome N. Frank,* 10 J. LEGAL EDUC. 1, 6 (1957).

3. In one article, Frank even turned literary critic and challenged the prose of Cardozo, concluding that the late Justice wrote in an alien, worked-over style more befitting the eighteenth century than the twentieth. In an atypical display of reserve, Frank published the essay under the pseudonym Anom Y. Mous. *See* Mous, *The Speech of Judges: A Dissenting Opinion,* 29 VA. L. REV. 625 (1943).

Professor Philip Kurland, once a clerk for Judge Frank, recalls:

> I entered the Judge's chambers for the interview with all the smug self-assurance which the editorship of a leading law review and the certainty of a future job could afford. He invited me to sit down and "say something . . . anything." I picked up the guantlet and brashly told him that his article on Cardozo's style was 1) in poor taste because it was anonymous, and 2) displayed bad judgment because Cardozo's writing was pellucid and certainly better understood by students and lawyers than the cryptics of Holmes or the jargon of the psychologists whom the Judge quoted so freely. After an hour and a half of rather volatile and occasionally heated argument, I was asked how soon I could report for work.

Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk,* 24 U. CHI. L. REV. 661, 662 (1957) (footnote omitted; ellipsis in original).

4. In a moving essay published to mark Frank's death, Justice Douglas recalled their first meeting:

> My first memory of Judge Frank goes back to the fall of 1934, when I went to Washington, D.C., to head up a new bureau or division in the recently created Securities and Exchange Commission. I was anxious to assemble a good staff, and the man I wanted to head it was Abe Fortas, who worked for Jerome Frank, then general counsel to the Agricultural Adjustment Administration.
>
> I asked for an appointment with Mr. Frank, and when I saw him in his office, he was most antagonistic. He figuratively tore me limb from limb. I realized as he talked that he had no animus toward me, but only a zealous protective attitude toward his staff. They were friends in whom he had a great emotional investment. So, I exploited that weakness by asking him, "Why do you stand in the way of your junior's professional advancement?" His attitude completely changed. He melted and at once became gentle and soft-spoken. And before I left, he was eager to help me find the best staff possible.
>
> Soon, I became a member of that small group toward whom Jerry Frank had a fatherly, protective attitude.

Douglas, *supra* note 2, at 1.

mately 30 pages long. The first is an overview of Frank's life; the second concentrates on Frank as author and legal realist; the third examines Frank's participation in Roosevelt's New Deal; and the final three chapters focus on Frank's work as a federal appellate court judge.

Chapter Four ("On Barking Up Trees") is the most interesting and successful of the final three chapters. It addresses Frank's efforts, while respecting the subordinate role of the Court of Appeals, to "urg[e], persuad[e], coax . . . and cajol[e] the [Supreme] Court to move in desired directions" (p. 106). Frank pursued these efforts, in part, by writing candid opinions discussing the failings and inconsistencies of governing precedent. The most colorful example is drawn from *In re Luma Camera Service,*[5] in which Frank, while applying Second Circuit precedent, implored the Supreme Court to reverse:

> Although we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and thus affirm orders which first direct Maggio "to do an impossibility, and then punish him for refusal to perform it." Our own precedents keep us from abandoning that pretense which, in this case, may well lead to inhumane treatment of Maggio . . . .
>
> To eliminate the unfortunate results of the unreasonable fiction we have adopted, it will be necessary for the Supreme Court to grant certiorari and then to wipe out our more recent precedents.[6]

The Supreme Court heard Frank's plea and vacated the judgment.[7]

Frank also sought to exert influence in letters addressed directly to his friends on the Court, usually to speak of general concerns, but occasionally to request action in specific cases. Glennon's discussion of such efforts provides some of the book's most interesting reading.

Chapter Five ("Legal Realism on the Bench") follows with a disappointing examination of "legal realism's" effect on Frank's judicial behavior. Glennon explores realism's influence by chronicling a series of cases on a variety of subjects to demonstrate Frank's proclivity for "doing justice" (p. 132). Yet sometimes Frank did not "do justice" — as when, according to Glennon, Frank turned a blind eye to the injustices of the Cold War.[8] But if these cases suggest a tension between justice and Frank's judicial restraint, the reason for Frank's restraint is not established. The reader is left with a catalogue of case holdings

5. 157 F.2d 951 (2d Cir. 1946), *vacated and remanded sub nom.* Maggio v. Zeitz, 333 U.S. 56 (1948).

6. 157 F.2d at 955, *quoted at* p. 108.

7. Maggio v. Zeitz, 333 U.S. 56 (1948).

8. Glennon notes in particular United States v. Sacher, 182 F.2d 416 (2d Cir. 1950), *aff'd.*, 343 U.S. 1 (1952); and United States v. Rosenberg, 195 F.2d 583 (2d Cir.), *cert. denied,* 344 U.S. 838 (1952), in which Frank affirmed rulings below that, Glennon says, were improperly influenced by Cold War animus against the defendants.

and the not very interesting conclusion that sometimes Frank did justice and sometimes he did not.

On the whole, Chapter Five's discussion rarely signals legal realism at play. Given realism's interest in the language of judicial opinions, it may have been more profitable to study the terms of Frank's opinions rather than their holdings. A law clerk for Judge Frank testified that the judge "was firmly wedded . . . to the view that a judge in his decisions is under obligation to lay bare the fullness of his thought as far as he can himself understand it — the complex of his biases, his predispositions, his intellectual premises, his social views, his economic predilections."[9] If Frank was true to this view, it would have been fun to have seen an example. Then we, perhaps, could see the "modern mind" of Judge Jerome Frank.

Chapter Six ("The Influence of a Circuit Judge in Influencing Constitutional Law") picks up from Chapter Four, but is less successful. It sets out to examine Judge Frank's success at influencing the work of the Supreme Court, and his impact on the course of American law generally. As Glennon notes, however, such an inquiry is plagued by problems of analysis and quantification. His study is a case in point. Glennon first tries to measure Frank's influence by examining such things as the frequency with which Judge Frank was affirmed by the Court or mentioned in its opinions.[10] The figures are interesting, but fall closer to trivia than to proof.

Glennon concludes the chapter with an evaluative study of approximately a dozen Frank opinions that, he says, shaped the course of American law by "contribut[ing] to a climate of [judicial] opinion" (p. 179). Among these are Frank's famous concurrence in *United States v. Roth,*[11] his dissents in *Chrestensen v. Valentine*[12] and *United States v. Grunewald,*[13] and his opinion in *Associated Industries v. Ickes.*[14] More broadly, Glennon notes the similarities between Frank's views and the judicial views prevailing in the 1960s, particularly with regard to judicial protection of civil liberties. But similarities are all that

9. Davis, *Jerome Frank — Portrait of a Personality,* 24 U. CHI. L. REV. 627, 628 (1957).

10. The most interesting data are lifted from a study published in Marvin Schick's *Learned Hand's Court,* and suggest that Frank's participation in a case increased its chance of Supreme Court review, and that, upon review, the Court supported Frank more often than his brethren. More careful analysis of the figures and additional data would have been valuable, but are not provided.

11. 237 F.2d 796, 801 (2d Cir. 1956), *affd.,* 354 U.S. 476 (1957). Thurman Arnold, writing at Frank's death, wrote in reference to *Roth:* "Although a majority of the Supreme Court did not follow Judge Frank, his opinion was at least provocative enough to induce the Supreme Court to grant certiorari on an issue which the lower court had considered to be settled. There are few opinions like it — indeed, there are no opinions like it, in American case law. Arnold, *Judge Jerome Frank,* 24 U. CHI. L. REV. 633, 641 (1957).

12. 122 F.2d 511, 517 (2d Cir. 1941), *revd.,* 316 U.S. 52 (1942).

13. 233 F.2d 556, 571 (2d Cir. 1956), *revd. and remanded,* 353 U.S. 391 (1957).

14. 134 F.2d 694 (2d Cir.), *vacated and remanded,* 320 U.S. 707 (1943) (per curiam).

Glennon can show. Unable to demonstrate a causal relationship between Frank's opinions and the course of American law, the simple conclusion that Frank was ahead of his time is not enough to carry the chapter. The chapter's fault is its focus. Having admitted the difficulties of his task, Glennon should have redirected his inquiry. If his interest was in evaluating Frank's major opinions, he should have been content to acknowledge and do just that.

Chapters Four through Six are often interesting, but they fail to develop a coherent vision of Judge Frank's life on the bench. By organizing the chapters topically and isolating the issues in each, Glennon attempts to structure the book so that each chapter stands on its own. Unfortunately, the separateness of each chapter requires an undesirable degree of redundancy from one chapter to the next and makes *The Iconoclast as Reformer* read like a collection of essays, written separately and combined without editing.

Taken separately, as it seems the author would have us do, the "essays" meet with uneven success. All are plagued by superficial analysis. Chapter Two, for instance, is devoted principally to an unilluminating discussion of Frank's *Law and the Modern Mind,* and its reception in legal literary circles. But Chapter Three, discussing Frank's participation in the New Deal, and Chapter Four, discussing his attempts to influence the Supreme Court, both of which rely more heavily on historical account, are much more successful, and are very interesting indeed. The writing throughout is competent, but does not share the wit or felicity of expression that characterized Frank's own works.

By attempting to gauge the influence of a secondary figure in American law, Professor Glennon undertakes an interesting, but very difficult subject. Traditional biography may have been a safer and more successful venture.

Glennon writes that, initially, he set out to write a traditional biography, "but eventually decided that [he] would find it more interesting, as would readers, to focus on [Frank's] significance and on key questions posed by his career" (p. 10). Among those key questions, Glennon lists the impact of Frank's legal realism, how a legal realist can take legal doctrine seriously as a judge, how Frank could remain silent to the injustices of the Cold War, and to what extent Frank influenced the Supreme Court. Unfortunately, the book does not provide persuasive answers to these questions. To the extent that *The Iconoclast as Reformer* tries to provide them, Glennon should have prefaced his book with the same warning with which Jerome Frank opened one of his own: "What follows consists of a series of guesses most of which are based on highly doubtful evidence — so doubtful

that the reader is warned to take little of this book very seriously."[15]

— *Matthew W. Frank*

15. J. FRANK, FATE AND FREEDOM 23-24 (1945). Glennon quotes this passage without citation (p. 10), and implies that Frank meant to caution his own readers. In fact, Judge Frank suggested that this warning was appropriate for works of history, not for his own.

For a generally more favorable review of *The Iconoclast as Reformer,* see Tushnet, Book Review, 3 LAW & HIST. REV. 449 (1985).