

# BOOK REVIEW

BORIS I. BITTKER†

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

Legal reputations fade fast. Is Jerome N. Frank's name known to anyone under the age of fifty, except for Yale Law students serving in the Jerome N. Frank Legal Services Organization? For newcomers and oldtimers alike, Robert Jerome Glennon's biography *The Iconoclast as Reformer* is a splendid assessment of a man who brought "tremendous energy, enthusiasm, and creativity to his work as a corporate lawyer, New Dealer, federal appeals judge, and legal philosopher" and whose wife said that marriage to him "is like being tied to the tail of a comet."

As its subtitle ("Jerome Frank's Impact on American Law") suggests, Glennon's book is not an exhaustive chronological life story, but an intellectual biography, which focuses on Frank's legal career. In point of fact, however, Glennon manages to sketch the salient features of Frank's personal life and to provide, at least by assertion, a sense of his verbal exuberance. Frank was a dazzling talker, whose metier fell between conversation and monologue; when interrupted, he usually pursued any newly introduced theme as though it were a logical extension of his original line of thought. But he had no Boswell, and his oral pyrotechnics are now preserved only in rapidly fading memories. By contrast, the paper trail—starting with his first book, *Law and the Modern Mind*, and ending with his posthumously published *Not Guilty* (written with his daughter, Barbara Frank)—can be retraced in any law library.

*Law and the Modern Mind*, which went through six printings in the eighteen years following its original publication in 1930,

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† Sterling Professor of Law, Emeritus, Yale University; Former Law Clerk, 1941-42, to Judge Jerome N. Frank, United States Court of Appeals for the Second Circuit. No citations are given for the quoted phrases appearing in this Review, on the theory that they will be of little interest to most readers; but they are available on request from *The Wayne Law Review* or the author.

established Frank as the idol-smasher of *The Iconoclast as Reformer* and is a classic of American legal realism. Glennon places this movement in a larger philosophical context—a wide-ranging revolt against intellectual formalism—but he seems to credit Frank with a more formative role than Frank himself claimed in developing the theory that judges work back from conclusions to principles, rationalizing their decisions “by finding facts and selecting rules that justify the desired conclusion” in order to preserve the “basic legal myth” that law is a consistent body of principles that can be predictably applied to human controversies.

To be sure, Frank espoused a theory of unfettered judicial discretion (at least in his jurisprudential persona), but *Law and the Modern Mind* treats the idea as already validated by the writings of others, and devotes itself to the more specialized task of explaining the persistence in the modern world of “the ancient dream . . . of a comprehensive and unchanging body of law.” Frank’s conclusion: The dream reflects an infantile craving for protection against the unknown, which is manifested first in the child’s confidence in an omnipotent father (as contrasted with a “protectively tender” mother), and later in the unconscious anthropomorphizing of the Law (“the Father-as-Infallible-Judge”). *Law and the Modern Mind* couples this macro-psychic explanation of mankind’s search for unrealizable certainty in the law with a micro-psychic explanation of judicial decision-making, in which “the personality of the judge is the pivotal factor” and “uniquely individual factors often are more important causes of judgments than anything which could be described as political, economic, or moral biases.”

Frank published these speculations just after he was himself psychoanalyzed in an effort, evidently successful, to resolve his unconscious conflicts with his father, who had pushed him into a legal career from which he was then deriving little satisfaction; and the Freudian features of *Law and the Modern Mind* (buttressed by ideas drawn from Piaget, Malinowski, and other social scientists) were Frank’s most distinctive contribution to the rapidly growing legal realist movement. As Glennon demonstrates, however, Frank’s iconoclasm was almost as threatening to his fellow travellers (who feared that emphasizing the personality and day-to-day moods of the judge would expose them to the charge that they espoused “gastronomic jurisprudence”) as it was to his avowed opponents. Frank gradually distanced himself from his father-substitute theory by asserting that he had overemphasized it to stimulate thought and by pointing to an appendix to *Law and the Modern Mind*, listing fourteen of “the many possible additional explanations of

the basic legal myth," including such tersely worded factors as "the economic interpretation," "imitation," and "inertia." Not surprisingly, however, readers of *Law and the Modern Mind* paid little attention to this one-page qualification on the book's dramatic socio-psychic anthropology.

Turning from Frank's early iconoclasm to his life-long devotion to law reform, Glennon assesses the influence of legal realism on Frank's work as a New Deal lawyer. In brief, Glennon concludes that Frank and the many other legal realists who flocked to Washington in the early 1930s "used the flexibility and creativity inherent in their philosophic approach to wrestle with and subdue monumental economic and legal obstacles." (So far as economic problems were concerned, "attempt to subdue" might be more accurate; the unemployment rate, for example, was far higher in President Roosevelt's best peacetime year than in President Reagan's worst year.) Glennon makes a persuasive case for the liberating effect of legal realism on important aspects of New Deal lawyering, particularly its willingness to impose legal restrictions on business practices previously regarded as immune to federal regulation.

On the other hand, when federal judges watered down or refused to enforce the regulations and orders of New Deal agencies, they were denounced by President Roosevelt and his lawyers for exercising unwarranted judicial discretion instead of following the law as (newly) laid down, as though judicial law-making were a previously unknown phenomenon. Were these denunciations just part of the rhetorical arsenal of any well-equipped hired gun, or did the New Deal's realists really believe that *their* laws left no room for legitimate judicial discretion? Was their indignation righteous, or self-righteous? Perhaps judgmental adjectives are inappropriate; it is at least arguable that legal realism is the jurisprudence of rebellious underdogs, who must leave it behind if they join (or become) the Establishment, lest they find themselves hopelessly at war with themselves.

Glennon's pioneering work may inspire others to examine in greater detail the impact of their legal realist backgrounds on New Deal lawyers, as they moved from their outside perches as critics to their new roles as inside activists. As Glennon notes, they believed that "administrative agencies serve a public purpose by placing a coterie of neutral experts in authority"—a faith shared by Frank, which led him as judge "to construe New Deal legislation broadly, and [to defer] to the judgment and findings of fact of administrative agencies." In promoting this concept of administrative neutrality, did the New Deal legal realists (subconsciously,

and perhaps even to themselves) remystify the law that they had previously tried to demystify?

Similar questions can be asked about the New Deal legal realists who became judges. Glennon says of Frank that “[a]lthough his jurisprudential writing depicted judges as having nearly unfettered discretion, his judicial position demanded that he abide by the customary rules of play.” But how does a newly enrobed judge “abide by the customary rules of play” if, as a legal realist, he thinks that the law almost always offers a choice among conflicting rules, that legal principles serve to rationalize results reached on other grounds, and that judges have routinely perpetuated the “basic legal myth” that the law is consistent, predictable, and unaffected by judicial temperament? On ascending the bench, should the legal realist dutifully assume, or vigorously reject, the role of Father-as-Infallible-Judge?

Glennon traces Frank’s judicial career in three fascinating chapters, which are too rich to be briefly summarized. One can say, however, that it is easier—much easier—to find Frank the Reformer in Glennon’s chronicle than Frank the Iconoclast. Frank often nudged the law along in the direction he thought it should take, but Glennon shows that if this entailed disagreement with a conflicting principle or precedent, Frank always subjected it to an intensive analysis bearing all the earmarks of a genuine intellectual struggle. Moreover, Frank the reformer was always more comfortable in these forays if he could satisfy himself that he was moving with the tide. Finally, in some notable cases, he shelved his own passionate convictions, applied a conventional legal principle that he thought wrong, and appealed to the Supreme Court to initiate the change he favored but could not, he thought, properly put into force.

Thus, if Frank the Iconoclast had combed his own judicial opinions for examples to illustrate *Law and the Modern Mind*, he would have found little that explicitly supports its portrayal of judges as free agents routinely exercising unbridled discretion. Indeed, as Glennon’s account makes clear, some of Frank’s most impassioned reformist crusades involved legal principles that Frank the Iconoclast would surely have derided as empty vessels, used only to rationalize results reached on other grounds. One example is his repeated denunciation of his colleagues’ reliance, when upholding criminal convictions, on the “harmless error” doctrine, providing that appeals should be decided on “an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.” As Glennon notes, Frank “broadly supported

an ideological position that insisted on reexamining old concepts in order to produce a more just legal order”—a reformist position implying that the revised concepts are more than figleaves to rationalize results reached on other grounds. Indeed, as a judge, Frank enthusiastically embraced some vague legal abstractions and with equal passion rejected others—all on the unarticulated major premise that legal principles and concepts are *ex ante* operational forces rather than *ex post* embroidery.

To be sure, in an early exchange with Felix Frankfurter, Frank wrote that, as a practicing lawyer, he found that “one must use the particular kind of jargon . . . that, so far as one can conjecture, will be most pleasing to the particular tribunal to which the argument is addressed” and that ad hominem appeals to judges “must in most cases be artfully concealed and take on the guise of traditional judicial cant.” This suggests that Frank might have employed the same technique in his later judicial incarnation when appealing to a different (but presumably equally vulnerable) audience; but Glennon assumes (rightly, I am confident) that Frank’s judicial crusades were untinged by guile and that his rhetoric came from the heart. As a practicing lawyer, Frank may have been able to persuade others without having first persuaded himself; but I doubt that in his later years he was capable of such a suspension of personal belief. Indeed, I suspect that the reference to “artfully concealed . . . cant” was inspired as much by delight in baiting Frankfurter as by cynicism; and I would not be surprised if Frank, when in practice, succumbed to the normally irresistible impulse of practicing lawyers to believe that they are usually on the side of the angels, though I know of no testimony from his partners or associates on this point.

Glennon’s searching review of Frank’s judicial opinions shows not only that his doctrinal crusades are difficult to square with the iconoclasm of *Law and the Modern Mind*, but also that his deeply felt narrative accounts of the facts of particular cases belie the skeptical view of the fact-finding process expounded in his *Courts on Trial*, an early chapter of which is entitled “Facts Are Guesses.” It is easy to understand that as an appellate judge, given his allegiance to judicial conventions, Frank ordinarily accepted the facts as found by the trial court. The fact-skepticism espoused by *Courts On Trial*, however, suggests that he should have routinely added a disclaimer—for example: “Assuming arguendo that the facts as found by the trial judge correspond to reality, a dubious assumption, then a grave injustice has been committed.” Not surprisingly, Frank as Reformer rarely if ever

diluted the persuasive force of "the facts" by likening them to "guesses."

These observations, stimulated by Glennon's absorbing book, may suggest that it could have been entitled "The Case of the Disappearing Iconoclast." That would be too neat a label, however, because it would disregard three features of Frank's iconoclasm that, in my opinion, deserve more emphasis than they have received. First, both *Law and the Modern Mind* and *Courts on Trial* are the product of Frank's unfettered exuberance, pleasure in propounding arresting ideas, and conviction that one must overstate to get attention—temperamental proclivities that, to the delight of his companions, were unleashed when he held forth on abstract issues, but that existed side-by-side with a pragmatic and even cautious approach to concrete cases. However revolutionary his generalizations, Frank was no Lenin, nor even a Kerensky. Second, not only does Frank's brand of legal realism bear the hallmark of his personality, but legal realism itself was a product of a time and a place. Viewed *sub specie aeternitatis*, Frank and his companions may seem to invest the judge with the discretion of a legislator, social philosopher, or dictator. Seen close up, however, they were reacting against what Frank called "legal fundamentalism"—the idea that law is "a homogeneous, scientific, and all-embracing body of principle" that is discovered by judges, not made by them. Despite all the talk of "unfettered judicial discretion," most legal realists accepted as appropriate the disciplined judicial role described by Cardozo: "We [i.e. judges] must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations." This from the jurist whom Frank extolled as second only to Holmes "in making possible realistic thinking about law." One could say of Cardozo's liberated judges what Roy Campbell said in his poem *On Some South African Novelists*—"They use the snaffle and the curb all right, But where's the bloody horse?" When the legal realists spoke of "unbridled judicial discretion," perhaps they should have been asked to answer the question: "Unbridled compared with what?" Third, the legal realists grew up in a legal era that was still dominated by the common law, which they saw not only as ineluctably malleable, but as acceptable primarily if not solely *because* it was malleable. As legal theorists, they never came to grips with the "orgy of statute making" (Grant Gilmore's phrase) that has come to characterize our legal culture, since they were too busy in Washington. Orgiasts do not think, they act. Many of them were responsible, to quote Gilmore again,

for “a style of drafting which aimed at an unearthly and super-human precision” and that, one might add, was intended to leave few of the “interstices” that Cardozo saw as the principal targets of opportunity for the creative judge.

No doubt I have already intruded my own views too much into this Review, but I hope the reader will excuse a few more personal comments, addressed to Glennon’s indictment of Frank for “running for cover” during the cold war. The main foundation for this charge, which however peripheral to the main questions examined in Glennon’s book may be picked up by others, is a 1983 account by Arthur Kinoy of his last-minute effort to persuade the Court of Appeals for the Second Circuit to grant Julius and Ethel Rosenberg a stay of execution just a day after the Supreme Court, sitting in a special session, had dissolved a stay granted by Justice Douglas. According to Kinoy, Judge Swan said that he would convene a three judge panel and would “vote for the stay” if Kinoy could get one other member of the court to agree to sit on the panel and to consider granting the stay. Kinoy and two associates then called on Judge Frank, who is quoted by Kinoy as saying: “If I were as young as you are, I would be sitting where you are now and saying and arguing what you are arguing. You are right to do so. But when you are as old as I am, you will understand why I . . . why I cannot do what you ask. I cannot do it.” Although Kinoy interprets Frank’s “when you are as old as I am” remark as meaning that “to preserve our position in society, we must compromise with those in control,” Glennon says that “Frank’s performance confirms the institutional limits on his intermediate-court position,” since Kinoy’s legal theory “tracked the argument the full Supreme Court [had] found unpersuasive” on the previous day. But then Glennon goes on to ask “how can one explain Judge Swan’s apparent willingness to grant the stay?” and “why did Jerome Frank reach the opposite conclusion?”—questions that he implicitly answers by saying that Frank “turned a deaf ear to the Rosenbergs’ plea” and ran “for cover.” Let me respond to the first question. I have known many judges in the nearly fifty years since I entered law school, and I can think of none who would be less likely than Judge Swan—meticulous, reserved, cautious Thomas E. Swan—to inform counsel that he would “vote for the stay” before convening the very judicial panel that was to hear the argument, let alone before he even knew whether a panel *could* be convened. (In fact, the requisite three judges could not be assembled because Judge Clark, who was also in New Haven on that fateful day, refused to sit.) Kinoy was obviously working at fever-pitch during those last hours before

the scheduled execution; his own account applies to himself such terms as "fear and trepidation," "stunned," and "half-dazed." Enveloped in emotional turmoil, he could easily have found more encouragement in Judge Swan's words than Swan intended. Moreover, it is worth noting that in their book, *We Are Your Sons* (published eight years before Kinoy published his account of the New Haven episode), the two sons of Julius and Ethel Rosenberg make no mention of Judge Swan's alleged willingness to vote for the stay, although they based their report on discussions with Kinoy's two associates in the New Haven events and had every reason to use any such statement by Judge Swan to discredit Judge Frank, whom their father had previously castigated for "legal chicanery" and worse in sustaining his and his wife's conviction. In passing judgment on Frank, Glennon may also have relied on the report in Weinstein's *Perjury: The Hiss-Chambers Case* (cited by Glennon) that Frank "refused to provide character references" for Hiss (who had worked for Frank in early New Deal days), in response to a written request by William L. Marbury. Marbury represented Hiss in his abortive libel action against Whitaker Chambers but has written that "my role became a very subsidiary one" once Hiss was indicted—a point he confirmed to me in a recent telephone conversation. But Weinstein's report is not the whole story. Frank told me that he was interviewed in person by lawyers representing Hiss (presumably later than the Marbury correspondence); that he told them that he found it difficult to believe the charges against Hiss because he regarded Hiss as a careerist who would not have been willing to jeopardize his professional future by engaging in undercover activities for an unpopular cause; that he was willing to appear as a character witness at Hiss's trial; but that if questioned on cross-examination about a much-publicized event involving his relations with Hiss in the Agricultural Adjustment Administration (A.A.A.), he would have to say that he believed at that time and told others that he believed that Hiss had acted dishonorably. Not surprisingly, Frank was not called. His warning to Hiss's lawyers was well-founded, however, since Justice Frankfurter, who appeared as a character witness in Hiss's first trial, was asked whether Frank had complained to him about Hiss's role in the A.A.A. event. Frankfurter, unlike Frank, was able to testify that his recollection of the event was vague. Frankfurter did not appear as a character witness in Hiss's second trial.

Frank's papers in the Yale University Archives contain a transcript of Justice Frankfurter's testimony, along with a five page memorandum in Frank's handwriting, summarizing (evidently for

himself but perhaps also in preparation for a discussion with Hiss's lawyers) his relations with Hiss, which refers to facts making Hiss "to me, seem lacking in integrity" and concluding with the tantalizing unanswered question: "If asked, as a witness, what I think of his reputation/character, what should I say?"