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## HOW LIBERATED WAS JUDGE JEROME FRANK?†

Michael E. Smith\*

A MAN'S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK. Edited by *Barbara Frank Kristein*. Westport, Connecticut: Greenwood Press, 1977. (Reprint of the edition published by Macmillan, New York, in 1965). Pp. xxvii, 450. \$26.

Professor Edmond Cahn's introduction to this volume provides a handy biographical sketch of Jerome Frank.

Born in New York in 1889, he practiced law in Chicago and New York for a number of years, created a sensation in 1930 when he published the controversial *Law and the Modern Mind*, became one of the most creative figures in President Roosevelt's New Deal, held important posts in the AAA and SEC, and in 1941 became a judge of the United States Court of Appeals for the Second Circuit where he served until his death in 1957. Meanwhile, besides lecturing at Yale Law School and writing several books, the most important of which was *Courts on Trial* (1949), Judge Frank played a ubiquitous role as leader in libertarian and humanitarian causes. [P. ix]

The first judicial opinion by Frank I ever saw was in the contracts casebook I used as a first-year law student.<sup>1</sup> The case concerned nothing more lively than the enforcement of arbitration agreements, but I can still remember my surprise and delight when I encountered the extract. It had a strong intellectual appeal compounded of broad learning, wit, sharp insights, and cogency. Moreover, the extract displayed an iconoclasm calculated to please the cocky tyro. Not only was Frank sharply critical of past doctrine; he proposed that judges had been hyper-rationalistic, incoherent, venal, and extremely foolish. All of this made me an instant Jerome Frank fan.

Frank's nonjudicial writings, especially *Law and the Modern Mind* and *Courts on Trial*, will probably continue to be read widely by students of law. His judicial opinions, on the other hand, like those of nearly all judges, will become increasingly obsolete and perhaps finally vanish from notice; in the later edi-

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1. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-84 (2d Cir. 1942), reprinted in J. DAWSON & W. HARVEY, *CASES AND MATERIALS ON CONTRACTS AND CONTRACT REMEDIES* 267-68 (1959).

tions of that contracts casebook, for example, all reference to Frank's opinion on arbitration has been removed. As time passes, fewer and fewer students and lawyers with tastes similar to mine will experience the surprise and delight of encountering their first of many Frank opinions.

The reprinting of *A Man's Reach*, which includes twenty of Frank's opinions as well as extensive extracts from his non-judicial writings, is therefore very welcome. It will help to introduce the opinions, albeit in an expensive format, to future generations of readers in law. Here I want to describe for those unfamiliar with Frank as a judge the pleasures that may await them in this volume and also to point out certain characteristics of Frank's judicial work that may not be so obvious.

Most of the opinions in this book are well chosen to convey the qualities I first enjoyed in Frank's work; that is to say, most are highly discursive. The only disadvantage in this selection is that readers may be misled about Frank's ordinary output. Many of his opinions, especially later in his career, were quite traditional in content and style, and some were even terse. These are perhaps best represented in this volume by *United States ex rel. Leyra v. Denno* and *United States v. Field*.

The editor has wisely included some of Frank's opinions on subjects of popular interest. The appendix to *United States v. Roth* has Frank's famous discourse on the constitutionality of obscenity laws. His opinion affirming the convictions and death sentences of Julius and Ethel Rosenberg for espionage is here. Baseball fans can read Frank's views on an antitrust suit brought by ballplayers blacklisted for having jumped to the Mexican League after World War II. Those curious about Frank's position in *causes célèbres* will also want to see his concurring opinion in *United States v. Sacher*,<sup>2</sup> affirming the contempt penalties imposed on the defense lawyers following the trial of the top Communist leaders under the Smith Act; unfortunately the opinion is omitted from this volume.

My main difficulty with the selection of cases is the repetition of subject matter. All but four of the twenty cases concern civil or criminal procedure, and four of these are mainly about the problem of "harmless error."<sup>3</sup> Readers may benefit from this in certain ways. The repetition enables Frank's points to sink in

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2. 182 F.2d 416, 453-63 (2d Cir. 1950).

3. That is, when an appellate court thinks an error was committed at trial, it must then determine whether the error was harmful enough to necessitate a retrial. See 28 U.S.C. § 2111 (1976); FED. R. CIV. P. 61; FED. R. CRIM. P. 52.

more deeply, in accord with one of his favorite canons of persuasion (see p. xxvii). The subjects are accessible to nonexperts. They gave rise to the sharpest disagreements between Frank and his colleagues on the Second Circuit, which provides an element of dialogue to the cases. The selection also connects the opinions with the extracts from Frank's nonjudicial writing, which mostly concern fact-finding by courts. Still, readers may find the repetition somewhat tedious and yearn for a richer mixture of cases. From the many Frank opinions on other subjects that are discursive and relatively comprehensible. I have selected an even dozen, well-known within the profession, which I recommend to those wishing to explore Frank's judicial work further.<sup>4</sup>

The book has a general introduction by Professor Edmond Cahn and a preface by Justice Douglas, both close friends of Frank. These provide biographical information and personal portraits helpful to the reader's understanding of Frank's temperament. Neither says much that is useful about his judicial work; indeed, Cahn's analysis of Frank as a "paragon of trimmers" (p. xii) strikes me as misleading.<sup>5</sup> There are also brief case introductions by the editor, Frank's daughter.

Readers will find the editing of the cases generally unobstrusive. Occasionally, crucial facts are omitted from both Frank's opinions and the short introductions. Relying solely on this book, it is impossible, for example, to appraise the claim of judicial unfairness in *United States v. Rosenberg* (pp. 294-96) or the argu-

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4. *Triangle Publications, Inc. v. Rohrlich*, 167 F.2d 969, 974-82 (2d Cir. 1948) (dissenting opinion) (desirability of trade-name protection); *Repouille v. United States*, 165 F.2d 152, 154-55 (2d Cir. 1947) (dissenting opinion) ("good moral character" for naturalization); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) (summary judgment); *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757, 760-70 (2d Cir. 1946) (concurring opinion) (releases of liability by injured workmen); *Standard Brands, Inc. v. Smidler*, 151 F.2d 34, 37-43 (2d Cir. 1945) (desirability of trade-name protection); *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694 (2d Cir. 1943) (consumer rights in the administrative process); *Hoffman v. Palmer*, 129 F.2d 976 (2d Cir. 1942) (hearsay evidence); *Picard v. United States Aircraft Corp.*, 128 F.2d 632, 638-45 (2d Cir. 1942) (concurring opinion) (desirability of the patent system); *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208 (2d Cir. 1942) (judicial attitudes toward administrative agencies); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942) (judicial attitudes toward arbitration); *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949, 954-69 (2d Cir. 1942) (dissenting opinion) (freedom of contract); *Hume v. Moore-McCormack Lines, Inc.*, 121 F.2d 336 (2d Cir. 1941) (releases of liability by injured workmen).

5. In this context, trimmers in part are those who "[set] themselves in extreme opposition to the majority of their time and [seek] to counterpoise the majority's exaggerations and distortions" (p. xi). Compare Cahn's analysis with my comments below, text at notes 18-21 *infra*, about Frank's stance in Communist-related cases and his penchant for overargument.

ment that the judge's charge in *United States v. Antonelli Fireworks Co.* cured the prosecutor's misconduct (p. 326). The omission of cited cases, and sometimes of entire passages of case analysis, most notably in *Antonelli Fireworks*, makes it more difficult to evaluate Frank's handling of precedent. The entire first section of Frank's dissent in *Aero Spark Plug Co. v. B.G. Corp.* has also been excluded, depriving the reader of some particularly sharp insights into Frank's judicial approach. Finally, the omission of most footnotes diminishes the impression that the opinions give of Frank's extraordinarily wide interests and reading. Yet these are relatively small obstacles to the reader's enjoyment and stimulation.<sup>6</sup>

As I mentioned at the start, one potential source of enjoyment in Frank's judicial work is its intellectual character. First, in dealing with legal questions Frank was apt to resort to an interesting variety of nonlegal materials. The famous appendix to *United States v. Roth* displays this trait vividly. There, in discussing the constitutionality of obscenity laws, Frank drew heavily on historical and sociological data concerning such matters as the literary tastes of the framers, Victorian sexual mores, the effect of pornography on adults and children, and pornography in classical literature. He also quoted the speculations of Milton, J.S. Mill, Macaulay, Goethe, Carl Becker, Franklin Roosevelt, Spinoza, and Jimmy Walker, and even resorted to his private correspondence with a psychologist.

The opinions in this volume are also full of clever asides, legal and nonlegal. Some are merely witty, others are trenchant; for me they are the best things in the opinions. Here is a sample. Responding to the "apparent paradox" that the first amendment, in the name of the democratic process, may invalidate the fruits of that process: "The paradox is unreal: *The Amendment ensures that public opinion . . . shall not commit suicide through legislation which chokes off today the free expression of minority views which may become the majority public opinion of tomorrow*" (p. 135) (emphasis in original). Speaking of the power of juries to decide according to their own views of the law: "[M]ost writers on jurisprudence . . . would do well to modify their ideas by recognizing what might be called 'juriesprudence'" (p. 262). Acknowledging psychological arguments against special jury ver-

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6. Connoisseurs of the opinions of notable judges may wish to compare *THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND* (H. Shanks ed. 1968), now regrettably out of print. The selection and editing of the opinions are excellent, and so are the extensive commentaries.

dicts: "Seperation [sic] of a decision into 'law' and 'fact' components . . . [may] be 'too logical,' in the sense that it excludes that 'intuition of experience which outruns analysis and sums up many unnamed and tangled impressions, impressions which may lie beneath consciousness without losing their worth'" (p. 269). "[T]o the question whether the difference between a difference of kind and difference of degree is itself a difference of degree, the sage answer has been given that it is a difference of degree, but a 'violent' one" (p. 314). "[T]he judge's cautionary instruction may do more harm than good: It may emphasize the jury's awareness of the censured remark—as in the story by Mark Twain of the boy told to stand in the corner and not think of a white elephant" (p. 333). Denouncing the "one-word-one-meaning" fallacy: "Similar reasoning would compel the conclusion that a clotheshorse is an animal of the equine species, and make it impossible to speak of drinking a toast" (p. 425).

Most notable of all, many of the opinions printed here contain long, cogent essays on a variety of legal topics; often these are only remotely related to the cases. One of the most widely known is Frank's compelling discourse on special jury verdicts in *Skidmore v. Baltimore & Ohio Railroad*. There he pointed out, among other things, the declining status of juries in other democratic countries; the scope that general verdicts gave to jury lawlessness and prejudice; the grave difficulties in reviewing general verdicts; the assistance to accurate fact-finding given by special verdict forms; the inability of juries to grasp legal instructions, and the consequent folly of overturning verdicts because of faulty instructions; and the opportunity afforded by special verdicts for dispensing with most instructions. Admittedly, Frank did not consider the objections to some of these contentions, nor did he discuss any of the practical problems in using special verdicts; yet he did carefully canvass opposing considerations based on the psychology of making decisions. I think readers will find the discourse most impressive.

Although I have emphasized the idiosyncratic aspects of Frank's opinions, since they evidence most clearly his intellectual powers, Frank could also perform traditional legal exercises effectively. Here are some examples from the book. His capacity for sensitive observation and presentation of factual detail is shown in two confession cases (pp. 342-43, 369-70) and in his analysis of the testimony of an eavesdropping policeman (pp. 360-61). Legally trained readers will enjoy Frank's deft handling of precedent in distinguishing an old Supreme Court ruling that organized

baseball is not subject to the Sherman Act (pp. 313-14) and in demolishing an opponent's authorities in *United States v. Field* (pp. 397-401). A judge's capacity for sharp analysis is well-tested by lurking choice of law questions, a test Frank passed with high honors in *United States v. Forness* (p. 430). Finally, his opinions concerning harmless error, especially *United States v. Rubenstein* and *United States v. Antonelli Fireworks Co.*, demonstrate Frank's ability to construct a persuasive doctrinal argument. Somewhat spruced up, it ran as follows: Appellate courts have no opportunity to observe the demeanor of witnesses as a guide to their credibility. Therefore, in the ordinary case they are in a poor position to assess the strength of the evidence on either side. That means, in turn, that they can hardly gauge accurately the likelihood that the verdict would have been the same even if errors at trial had not been committed. We have a constitutional policy of allowing juries to decide uncertain questions of fact, especially in criminal cases. Moreover, since they see the witnesses they are better placed than appellate courts to find the facts accurately. Therefore, in any case of significant doubt about the harmfulness of an error, the matter should be sent back for retrial. This argument, although not conclusive, is at least very powerful.

Readers may also delight in Frank's iconoclasm, his propensity to thumb his nose at traditional legal ways. The main target of this iconoclasm was the commitment of lawyers and judges to general rules and binding precedents. At his mildest, Frank contended that the commitment was greatly exaggerated. In *Aero Spark Plug Co. v. B.G. Corp.*, for example, he argued at length that judges were too preoccupied with the precedential implications of their own decisions; they ought to concern themselves mainly with a just disposition of the cases before them. Correspondingly, judges should be much more willing to disregard undesirable precedents laid down by others (pp. 444 ff.).<sup>7</sup> Frank acted on the latter view in a number of cases in this volume, including *Gardella v. Chandler*, *United States v. St. Pierre*, and *United States v. Forness*.

More drastic was Frank's belief that rules and precedents could not possibly be of much real significance because of their inherent indeterminacy. For this view readers must refer mainly to the extract from *Law and the Modern Mind*, published ten

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7. See also *United States v. Forness* (pp. 429-30).

years before he became a judge, but it is echoed in at least one case here in which Frank wrote,

The conventions of judicial opinion-writing—the uncolloquial vocabulary, the use of phrases carrying with them an air of finality, the parade of precedents, the display of seemingly rigorous logic bedecked with “therefores” and “must-be-trues”—give an impression of certainty (which often hypnotizes the opinion-writer) concealing the uncertainties inherent in the judging process. On close examination, our legal concepts often resemble the necks of the flamingos in *Alice in Wonderland* which failed to remain sufficiently rigid to be used effectively as mallets by the croquet players. [Pp. 323-24]

Frank also believed that rules and precedents were of minor importance because they were overridden by other aspects of the legal process.<sup>8</sup> Like other legal realists, he avowed that “[a] legal system is not what it says, but what it does” (p. 336), and for him the largest determinant of what it does was procedural (p. 367). Moreover, in his view our fact-finding procedures were badly flawed; beyond unavoidable sources of error, such as the fallibility of witnesses, he felt that we deliberately impeded accurate fact-finding. Thus Frank repeatedly denounced: total reliance on the parties to adduce the facts, especially when one party was too poor to do the job properly (pp. 440-41); rules of evidence whereby relevant information was excluded (p. 393); decision by juries, “casually selected groups of twelve persons, most of them untrained in the difficult art of fact-finding” (p. 338); myths about the impartiality of judges (p. 411); and other generally accepted features of our trial process. This so-called fact-skepticism is by far the most common form of Frank’s iconoclasm to find expression in his opinions.

Frank’s iconoclastic appeal extends also to his opinion-writing style. In part this is a product of the intellectual characteristics already mentioned—the extensive use of nonlegal materials, the witticisms and trenchant asides, the lengthy essays. Even more refreshing for readers impatient with the decorum of judicial discourse will be Frank’s propensity to needle his adversaries, including judicial colleagues. In *United States v. Antonelli Fireworks Co.*, for example, he accused the majority of suppressing crucial facts (pp. 325, 327), of preferring “the pocketbook of

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8. I recognize Frank’s express denial that he thought legal rules of “little importance” (p. 196), and I argue later, text following note 10 *infra*, that in practice he seemed to take rules seriously, but I still think that my statement accurately describes the general tendency of his polemics.

an insurance company" to the liberty of an innocent criminal defendant (p. 334), and of merely pretending to deplore prosecutorial misconduct, "recalling the bitter tear shed by the Walrus as he ate the oysters" (p. 335). Frank did not spare any of his colleagues from such strictures, not even Judge Learned Hand, although it is likely that over the years his adversary, Judge Charles Clark, received Frank's hardest blows.

To certain readers Frank's opinions will have yet another ground of appeal, linked to the last, and that is their liberal activism. Nearly everyone who writes about Frank comments on his strong sympathy for the poor and powerless, and this is borne out by the cases reproduced here. He denounced cowardly censorship only of the "relatively inconspicuous" (p. 129), monopolistic conspiracies of employers against working people (p. 312), callous exploitation of Indians (pp. 431-34), and use of invalid patents to bully small competitors (p. 448). His strongest sympathies, however, were for criminal defendants. In case after case readers will find him abhorring the possibility that innocent people may be convicted—by false confessions wrongly extorted (pp. 364-65, 371-73), by prosecutorial misconduct (pp. 336-37), by improper comments of judge to jury (pp. 421-22), by the confusions of a mass trial (p. 408), and the like. With almost equal fervor he deplored the mistreatment of criminal suspects, for example, by oppressive interrogation (pp. 364-65, 371-73), invasion of privacy (pp. 357-58), or unwarranted subjection to trial (pp. 363-64). Frank's viewpoint in criminal cases is especially notable because it was shared only to a limited extent by Judge Learned Hand and hardly at all by the other judges on the Second Circuit, not even Judge Clark, a strong liberal in almost every other respect.

Frank could express these liberal commitments most effectively. One example from *United States v. Rubenstein*, concerning the erroneous conviction of the innocent, should suffice.

In a case like this, all our complicated judicial apparatus yields but a human judgment, not at all sure to be correct, affecting the life of another human being. If we are at all imaginative, we will comprehend what that judgment will mean to him, and what a horror it will be if we wrongly decide against him. To be sure, one can say that it does not pay to take too seriously the possibility that one man, more or less, may be unjustly imprisoned, considering the fact that [in World War II] millions have died and that the Atomic Age . . . may end any minute in the destruction of all this planet's inhabitants. Yet (perhaps because I am growing old or because, despite my years, I have not fully matured) it seems to me that, if America's part in the war was meaningful and if man-

kind's development has any significance against the background of eternity, then the dignity of each individual man is not an empty phrase. If it is not, then we judges, part of a human arrangement called government, should proceed with great caution when we determine whether a man is to be forcibly deprived of his liberty. [P. 324]

There is also substantial reason for readers to conclude that Frank was a judicial activist, which is to say that in deciding cases he put his social commitments ahead of legalistic considerations. This is strongly suggested by his overt avowals. He repeatedly suggested that the main task of judges was to do justice in particular cases (*e.g.*, pp. 444-46). Moreover, he was prepared to translate this liberal platitude into specific doctrine. For example, in *Gardella v. Chandler* he stated that, because the reserve clause was so repulsive, judges ought to do their best to distinguish the Supreme Court ruling that organized baseball was outside the Sherman Act (p. 312). And in *United States v. Forness* he expressly declined to apply established landlord-tenant law in large part by characterizing the dispute as one between poor Indians and exploitative whites (p. 429).

The decisive test of activism, however, is results. Judged by the cases in this book, Frank passed the test easily. In all but three, his "bottom line" (whether affirmed or reversed) was in accord with his liberal social preferences. Two of the remaining three cases involved communism, a matter to which I will return, and the third opinion, *United States v. Roth*, was a dissent from the criminal conviction in all but name. Moreover, it is my impression that the cases in this book are representative of Frank's output as a whole. Compared to the other members of the Second Circuit, most of whom were moderate to liberal, Frank voted far more frequently in favor of criminal defendants and accused infringers of monopolies, and as a champion of personal injury plaintiffs only Judge Clark was his equal.

Frank adhered to his social commitments even when they conflicted with his views on fact-finding. In *Skidmore v. Baltimore & Ohio Railroad*, he upheld a personal injury plaintiff at the expense of a request for a special verdict; in *Keller v. Brooklyn Bus Corp.*, he did so by insisting on a technically perfect jury instruction. In at least two other cases here, he invoked rules that excluded relevant evidence in order to reverse criminal convictions.<sup>9</sup>

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9. *United States v. Rubenstein* (pp. 318-24); *United States v. On Lee* (pp. 352-61); *United States v. St. Pierre* (pp. 383-94).

Thus far I have addressed potential readers who may be inclined to admire Frank's traits as a judge and opinion-writer. Others are apt to react differently. As in the past, some may find his parade of learning vain, his asides silly, his extended discourses tedious, his attacks on others nasty. Frank's realism and liberalism may strike some as exaggerated or shallow; his activism may seem inappropriate in a judge. I do not recommend this book to thoroughgoing traditionalists.

And yet, upon closer examination both iconoclastic liberals and traditionalists may find Frank to be other than he seems. By the realist criterion that he, himself, avowed—"[a] legal system is not what it says, but what it does" (p. 336)—he was a fairly conventional judge.

Consider first Frank's avowed skepticism of legal rules and precedents; throughout this volume readers will nevertheless see him treating them seriously. He based his entire concurrence in *United States v. Roth* on his own restatement of the law of free speech (pp. 113-14). He attacked general verdicts in part because they made it easy for juries to ignore rules of law (pp. 261-62). He proposed carefully crafted doctrines for such subjects as harmless error (p. 328) and the waiver of fifth amendment rights (p. 384). He sought to root deeply in precedent his views on these matters and others such as prosecutorial misconduct, electronic eavesdropping, and inaccurate jury instructions (*e.g.*, pp. 331-32, 397-403, 414-15). In one case he attacked a majority view largely, he said, because it "may have wide precedential consequences" (p. 397).

Indeed, at times Frank put exaggerated reliance on rules and precedents. A common fallacy of the formalists, whom realists such as Frank attacked, was to move from authoritative general propositions to a resolution of specific questions with hardly any steps in between. Frank, himself, did this repeatedly. He applied Supreme Court denunciations of trial practices such as prosecutorial misconduct or erroneous jury instructions without any comparison of the facts of the cases (pp. 326, 414-15). To Congress he mechanically attributed policies he favored or opposed (pp. 317, 430-31). Most striking was his seeming deference to the fifth amendment privilege and the sixth and seventh amendment guarantees of jury trial. Frank claimed to oppose trial by jury, especially in civil cases, as subversive of accurate fact-finding, and at least at the start of his judicial career he also questioned the use of privileges to exclude relevant evidence. Yet repeatedly he asserted that these policy considerations were totally overrid-

den by the very words of the Constitution, and thus he purported to solve such refined problems as formulation of the harmless error test and the precise point at which a witness waives his fifth amendment privilege (e.g., pp. 323, 391-93). Incidentally, it might be thought that Frank's treatment of these cases, though wooden, was highly principled. In each instance, however, the outcome Frank urged was to uphold a criminal defendant or a personal injury plaintiff.

Readers may suppose that these excursions into traditional, even formalist, methods of opinion-writing were merely attempts to win assent from the less iconoclastic. If so, they were inconsistent with Frank's usual tactlessness, exemplified by his sharp attacks on conventional judges and lawyers. They were also at war with his avowed devotion to honest dealing between the government and its citizens (p. 405). I think at least equally likely is Professor Karl Llewellyn's suggestion that professionally Frank had two authentic personalities; in jurisprudential polemics he was a provocative radical, but as a man of affairs he was an orthodox (and able) practitioner.<sup>10</sup> I would add to this observation my comments below concerning Frank's penchant for overargument, which would have led him to exaggerate both his theoretical rule-skepticism and his practical reliance on rules and precedents. It is also relevant that Frank's most extreme rule-skepticism dated from a decade before he became a judge. In the interim the social situation had changed and Frank had taken on a variety of practical responsibilities; by the end of that decade he was more interested in other causes.

Frank's liberalism, too, was not as thoroughgoing as it may seem. As I mentioned before, two of the three cases in this book in which Frank voted against his usual social preferences involved communism—the prosecution of the Rosenbergs for espionage and the contempt conviction of Dashiell Hammett and two others, sureties for four Communist leaders who jumped bail. And in Frank's most renowned case not in this book, *United States v. Sacher*,<sup>11</sup> he voted, over the dissent of Judge Clark, to uphold the contempt convictions of the defense lawyers at the Smith Act trial of the top Communist party officers. None of the cases in the book in which Frank followed his usual social proclivities concerned Communists. On purely quantitative grounds readers may have reason to conclude that Frank was considerably less

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10. K. LLEWELLYN, *THE COMMON LAW TRADITION* 220 n.214, 511 (1960).

11. 182 F.2d 416, 453-63 (2d Cir. 1950).

liberal than usual in criminal cases involving communism.<sup>12</sup>

This conclusion, however, has to be tested by doctrinal analysis. Of the Communist-related cases on which Frank sat, probably the most significant for civil liberties was *United States v. Rosenberg*. Not only were there arguable claims that the trial had been unfair, but it ended in the unprecedented imposition by a civil court of the death penalty for espionage. Moreover, the case attracted widespread public attention and was appealed amidst a rising storm of anticommunism. The decision could not help but have a significant impact on the public understanding of the rule of law and the role of the courts in protecting that regime.

The customary appraisal of Frank's conduct in the *Rosenberg* case is that it fit his liberal activism. He alone of the appellate judges voted to reverse the conviction of Morton Sobell, the lesser defendant, and he did so for characteristic reasons. As for the Rosenbergs, it is said that he honestly, and reasonably, believed that they had received a fair trial. Still, in his majority opinion he conscientiously discussed each of their numerous claims at length. The death penalty he abhorred, so his admirers claim, and he would have reversed it if there had been any legal ground to do so, but he was foreclosed by ironclad Supreme Court precedents. He did what he could for the liberal cause, nevertheless, by including in his opinion a powerful appeal to the Supreme Court to reconsider the precedents that bound him (pp. xv, 290).

There is much to be said for this view, but there are grounds to object to it as well. Regarding the fairness of the trial, two of the Rosenbergs' claims were calculated to appeal strongly to Frank's concern about conviction of the innocent. They argued, with reason, that the trial judge had intervened in the questioning of witnesses so as to favor the prosecution; unfortunately, the examples Frank reproduced in a footnote to his opinion have been omitted from this book. The Rosenbergs also asserted, again with reason, that the repeated references during the trial to their radical political beliefs and membership in the Communist party, even if arguably relevant, unduly prejudiced their right to an impartial trial (pp. 294-97). Both claims, however, ran counter to Frank's views on the fact-finding process. He felt that judges were considerably better fact-finders than jurors, and thus he was not averse to their intervening at trial (pp. 238-39). He also had

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12. See also the discussion of two other Frank opinions in M. SCHICK, *LEARNED HAND'S COURT* 299-301 (1970).

a strong predilection in favor of admitting all relevant evidence for appraisal by the fact-finder (p. 393). Yet as I have pointed out before, in other cases his concern for fair treatment of criminal defendants overrode these views.<sup>13</sup>

What seems clearly anomalous is Frank's repeated reliance on the trial judge's admonitions to the jury as a prophylactic for whatever dangers of unfairness lurked in these and other claims. At every other place in this volume in which Frank referred to judicial admonitions, he ridiculed them as useless and even harmful (pp. 333, 347, 350). To be sure, he acknowledged his usual view at one point in the *Rosenberg* opinion, but his only response was that the Rosenbergs had "made no effort to procure a trial by a judge alone" (p. 297). It is impossible to reconcile this harsh remark with Frank's repeated invocation in other contexts of the constitutional right to a jury trial.<sup>14</sup>

Turning to the death penalty, the crux of the Rosenbergs' position, even supposing they were guilty as charged, was that by far the most important of the secrets they stole were passed to a wartime ally, hardly a hanging crime. In legal terms this translated into a contention that the sentence was either an abuse of the trial judge's discretion or unconstitutional. In researching these claims, Frank discovered a third argument, unfortunately omitted from the opinion as reproduced in this volume, that under the circumstances the death penalty was not authorized by *statute*. The death penalty could only be given for espionage during wartime; otherwise the maximum sentence was twenty years in prison. In terms of policy, the statutory argument was that Congress, in hiking the maximum punishment so drastically for wartime espionage, must have been thinking of passing secrets to enemies, not allies. Admittedly, there were tenable objections to this argument. The rest of the statute had already been held to apply to spying for friends as well as enemies, and the absence of an explicit distinction in the death penalty provision might point in the same direction. As a matter of policy, too, Congress might have felt that even disclosures to allies had to be deterred drastically in wartime because of the danger of security leaks. My only

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13. See also *United States v. Giallo*, 206 F.2d 207, 211-13 (2d Cir. 1953) (dissenting opinion).

14. Frank also repeatedly relied on the competence and conscientiousness of defense counsel and on statements by them at trial that the defendants had been treated fairly (pp. 294-95, 298, 304). These references display an insensitivity, extraordinary in Frank, to the manifold difficulties—logistic and tactical—confronting defense counsel in this case. See L. NIZER, *THE IMPLOSION CONSPIRACY* (1973).

point here is that the statutory argument against the death penalty was very strong, an assessment shared by three astute faculty colleagues to whom I have put the problem. Yet Frank's entire response to the argument was, "[T]he legislative history contains nothing to support such an interpretation."<sup>15</sup> I conclude that although Frank may have opposed the death penalty in general, and may even have objected to it in this particular case, he did not search zealously for grounds on which he might overturn it as he did other criminal convictions that aroused his sense of injustice.<sup>16</sup>

If I am right that Frank behaved differently in the *Rosenberg* case, and perhaps in his other cases involving communism, readers may wonder why. His long-time colleague and adversary, Judge Clark, wrote privately of Frank's "troublesome lack of forthrightness in the political or so-called 'Communist' cases";<sup>17</sup> by this I take him to have meant a lack of courage. The biographer of *Learned Hand's Court*, Marvin Schick, speculated that Frank had acquired a strong anti-Communist bias from his personal experience with aides in the New Deal.<sup>18</sup> As an ardent admirer of Judge Learned Hand, Frank may have absorbed some of his mentor's judicial modesty in the face of a political storm as strong as McCarthyism. These are mere conjectures, however; we will not approach certainty without information of a more private character than has yet been published.

In any event, Frank was sensitive to suggestions that he had let down the liberal side in the "big" cases of the early 1950s. Readers will find his feelings fully expressed in the speech entitled, "On Holding Abe Lincoln's Hat," but they also surfaced in at least one case here. Reviewing a felony murder conviction in 1955 he wrote,

Recently many outstanding Americans have been much concerned—and justifiably—with inroads on the constitutional privileges of persons questioned about subversive activities. But concern with such problems, usually those of fairly prominent persons, should not blind one to the less dramatic, less publicized plight of humble, inconspicuous men . . . when unconstitutionally victimized by officialdom. It will not do to say—as some do—that deep

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15. *United States v. Rosenberg*, 195 F.2d 583, 603 n.21 (2d Cir. 1952).

16. Frank did not rely on the fact that the Rosenbergs had failed to raise the statutory point. To have done so would have been inconsistent with his approach in other cases (e.g., p. 319).

17. Letter from Judge Clark to Edmond Cahn (Feb. 25, 1958), reprinted in M. SCHICK, *supra* note 12, at 299.

18. M. SCHICK, *supra* note 12, at 301-03.

concern with such problems of the humble is the mark of an "old-fashioned liberal." For repeated and unredressed attacks on the constitutional liberties of the humble will tend to destroy the foundations supporting the constitutional liberties of everyone. The test of the moral quality of a civilization is its treatment of the weak and powerless. [P. 374]

Some potential readers of this volume may be consoled by the proposition that Frank was not as iconoclastic, or as liberal, as he appears. Another trait that close examination of this book reveals will hardly appeal to anyone. Frank had an unfortunate penchant for gross overargument, manifested in a variety of ways. He frequently resorted to exaggeration. He made glaringly fallacious and even absurd contentions. He often failed to grant serious difficulties in his own position. In some cases Frank's entire line of argument was hung from such devices.

At the risk of tedium, I will try to provide enough clear-cut examples at least to establish that I am not being unfair to Frank. One fertile source is *United States v. Roth*, otherwise an admirable opinion:

(1) Frank claimed "it seems doubtful" that the first amendment was meant by the framers to leave room for an obscenity statute. His entire evidence is that Franklin, "father of the Post Office," wrote two ribald works; that Jefferson extolled Franklin and wrote approvingly of one of those works; that Madison also admired Franklin and himself told Rabelaisian anecdotes; and that Madison, with Jefferson's encouragement, introduced what became the first amendment (pp. 117-18).

(2) Frank argued that if the obscenity statute was valid on its face, it must logically be applied to press accounts of sexual crimes (pp. 128-29). He declined even to consider the possibility of doctrinal developments that would fairly distinguish such material from hard-core pornography.<sup>19</sup>

(3) To his credit, Frank raised the difficult and important question, often ignored, whether "artistic" speech was protected by the first amendment. His affirmative response, however, rested solely on an ambiguous sentence from the 1774 address of the Continental Congress to the inhabitants of Quebec, plus assorted warnings about the impact of censorship on innovative art (pp. 136-37).

(4) Frank claimed that the obscenity statute was void for vagueness because even judges could not agree on its meaning.

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19. Compare, for example, *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966).

His sole ground for saying so was that a part of the definition of obscenity—whose lust had to be aroused—had once changed (pp. 138-39).

Another fertile source of examples of Frank's propensity for overargument is the harmless error cases, particularly *United States v. Rubenstein* and *United States v. Antonelli Fireworks Co.*:

(1) In only one of the four cases did the majority find error at trial; in the others it had no occasion to apply a harmless error test. Therefore, Frank was attacking the majority for failing to justify something it had not done. This is most evident in *Rubenstein*, in which Frank accused Judge Learned Hand of virtual double-talk as to the ground of his decision (p. 320).

(2) Frank repeatedly claimed that the majority's test of harmless error was whether it personally believed the defendant to be guilty (*e.g.*, pp. 320, 328-29). Yet the express position of the majority in genuine harmless error cases was much more complex, involving both the weight of the evidence against the defendant and the seriousness of the error; the resulting test was considerably stricter than Frank suggested.<sup>20</sup> Nor did Frank come near showing that what the majority did was different from what it said, and at least in the case of Judge Learned Hand, an intensely honest and self-aware judge, the proposition would have been inherently implausible.

(3) Coupled with the last point was Frank's contention in *Antonelli Fireworks* that unless the court treated all errors as harmful or adopted his slightly less drastic test—was the evidence "so 'strong' that no sensible jury, had there been no error, would conceivably have acquitted, as for instance where the defendant in his testimony in effect admits his guilt"—the court was "[n]ecessarily" deciding merely according to its own view of the defendant's guilt (p. 328). This simplistic analysis omitted a large middle ground, one piece of which had been staked out by the majority.

(4) Especially in *Antonelli Fireworks* Frank insisted that the Supreme Court had adopted his test of harmless error. The evidence he adduced at most showed only that the Court had rejected the extreme alternative of deciding merely according to its own view of guilt or innocence (pp. 331-32).

Finally, here are a half-dozen examples, by no means exhaus-

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20. See cases reproduced or noted in *THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND* 253-63 (H. Shanks ed. 1968).

tive, from other cases:

(1) Baseball's reserve clause forbids players to play on any professional team other than the one with which they first contracted, except when the right to hire them was transferred to another team. In *Gardella v. Chandler*, Frank foolishly described this arrangement as "shockingly repugnant to moral principles that, at least since the War Between the States, have been basic in America . . . virtual slavery" (p. 312).

(2) In *United States v. Leviton*, defense counsel objected to the introduction of part of a codefendant's confession but did not make it clear whether he wanted it excluded altogether or merely sought a cautionary instruction. The trial judge understood the latter, sustained the objection, and promised to give an appropriate instruction. Defense counsel never claimed until the appeal that he had been misunderstood.<sup>21</sup> Yet without acknowledging the slightest uncertainty, Frank asserted that counsel had asked for exclusion of the passage altogether (p. 347).

(3) In *United States v. On Lee*, an informer entered the shop of a drug suspect and had an incriminating conversation with him. Instead of merely reporting what was said to a policeman afterward, the informer broadcast the conversation to the policeman by means of a hidden radio. In dissent, Frank equated these facts to George Orwell's description in *1984* of the telescreen compulsorily installed in every house. He absurdly concluded, "My colleagues' decision, by legitimizing the use of such a future horror, invites it" (pp. 359-60).

(4) In *United States v. St. Pierre*, Frank relied very heavily on a state court decision concerning the privilege against self-incrimination (p. 387). The majority, through Judge Learned Hand, had made it clear that the decision was unique and contradicted by those of numerous other courts, yet Frank never alluded to this fact in his dissent.

(5) In the same case, Frank made the tenable suggestion that relatively specific constitutional clauses ought to be given a more rigorous interpretation. On this ground he argued, plausibly enough, for strict enforcement of the privilege against self-incrimination. Yet as a former New Dealer he could not resist characterizing the equally specific obligation-of-contracts clause as a relatively vague provision that should be applied leniently (pp. 392-93).

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21. *United States v. Leviton*, 193 F.2d 848, 864 n.10 (2d Cir. 1951) (dissenting opinion).

(6) In *Keller v. Brooklyn Bus Corp.*, the trial judge first gave a blurred but arguably inaccurate instruction on the burden of proof for contributory negligence and later adopted a clear and accurate statement of the same matter. On appeal the majority mentioned that the correct statement came at the end of the trial judge's charge. Frank astutely responded, "But what justification is there for believing that the last words in a speech are invariably the ones most heeded by the audience?" (p. 417). Yet in *Antonelli Fireworks*, with the shoe on the other foot, he accused the prosecutor of "bearing in mind an ancient observation, 'If you want to excite prejudice you must do so at the close, so that the jurors may more easily remember what you said'" (p. 326).

I do not, myself, mean to exaggerate. I have already mentioned that this volume repeatedly exhibits Frank's mastery of traditional legal skills. The reader can also find demonstrations of balance and candor. For example, Frank qualified in major ways the extreme views on obscenity of his ally, Judge Curtis Bok (p. 138); he recited important psychological objections to the special verdict (p. 269); his discussion of judicial bias in *In re J.P. Linahan, Inc.*, was remarkably sensitive; he expressly conceded at least a limited value to general rules of law and stare decisis (pp. 444, 446). Indeed, some of the opinions in this volume were argued solidly pretty much from start to finish. Of the individual opinions I especially recommend *United States ex rel. Leyra v. Denno* and *United States v. Field*.

It is also true that many of Frank's excesses would probably pass unnoticed by the ordinary reader, and at least to this extent they were not harmful. Yet there were some who noted them and were greatly offended. The most significant was a colleague, Judge Clark, who privately complained about Frank's "tendency to ascribe fairly unconscionable positions to his colleagues against their openly stated views, preparatory to the demolition of the straw men thus created."<sup>22</sup>

The simplest explanation of Frank's penchant for overargument is excessive zeal for his social goals—fair play for criminal defendants and the like. Yet the two friends who wrote the introduction and preface to this volume portray Frank, not as an extremist, but as a person who kept his commitments in perspective. This is also the way Frank viewed himself. He wrote,

I have no respect for the humorless self-righteous sort of person who has a firm conviction that always he alone, of the entire regi-

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22. Quoted in M. SCHICK, *supra* note 12, at 276.

ment, is in step. Accordingly, when all my colleagues (whom I consider among the ablest of judges) repeatedly arrive at a certain conclusion, my sense of humor usually downs my doubts and nudges me into acquiescence. [P. 325]

Another of his friends' characterizations of Frank may bring us closer to the explanation. Both stress his love of advocacy, reflected in his penchant for "using every available proof and argument" (p. x), his "knack of reducing complicated records to simple terms" (p. xix). I sense that this love of advocacy was generally joined much more closely to ebullient playfulness and a desire to shine than to hostility toward adversaries. In any event, I suggest that when Frank sat down to draft an opinion on a controversial subject, he was seized with an impulse to overwhelm the opposition, and driven by this impulse he lost his self-restraint.

More will be known about such matters when private sources of information are made public. Marvin Schick, who had access to some of these sources, recounts an important incident that tends to support my view. In *United States v. Sacher*,<sup>23</sup> the contempt proceeding against defense counsel arising out of the Smith Act prosecution of the top Communist leaders, Frank wrote a concurring opinion, upholding the convictions, that displayed his usual excesses. Yet as Schick reveals, Frank's first inclination was to overturn the convictions; he apparently had to be talked around by Judge Augustus Hand. Moreover, the first published version of his concurring opinion was relatively mild; he used the occasion of a petition for rehearing to stiffen it considerably.<sup>24</sup> My impression is that the excesses of the final version were a product, not of Frank's deep-seated commitment to the outcome, but of psychic steam generated by the process of espousing his viewpoint. The fact that his perennial adversary, Judge Clark, was on the other side added to the pleasure of combat.

Yet readers should not judge Frank's balance and candor wholly by these writings. The introduction and preface to the volume testify that in person he was affectionate, lovable, and sympathetic, never rancorous, able to laugh at himself, accept criticism, and admit his own errors. Justice Frankfurter made this point explicitly. "To have known Jerome Frank only through his writings was not to have known him. On paper he appeared prickly and pugilistic; in personal relations he was warm-hearted

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23. 182 F.2d 416, 453-63 (2d Cir. 1950) (concurring opinion).

24. M. SCHICK, *supra* note 12, at 291-96.

and generous.”<sup>25</sup>

Professor Llewellyn, a long-time colleague and partial adversary of Frank, wrote of him after his death, “[A]lmost great.”<sup>26</sup> I find that a just judgment, and ample reason for readers to consult this book.

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25. OF LAW AND LIFE AND OTHER THINGS THAT MATTER 100 (P. Kurland ed. 1969).

26. K. LLEWELLYN, *supra* note 10, at 220 n.214.