

1971

Book Reviews

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

(1971) "Book Reviews," *South Carolina Law Review*. Vol. 23 : Iss. 5 , Article 9.

Available at: <https://scholarcommons.sc.edu/sclr/vol23/iss5/9>

This Book Review is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.

BOOK REVIEW

JEROME FRANK: JURIST AND PHILOSOPHER By J. Mitchell Rosenberg. New York: Philosophical Library. 1970. Pp. XVIII, 264. \$8.75. *Reviewed by Larry J. Ritchie**

The sociological school of legal philosophy originated around the turn of the century. Dean Roscoe Pound of Harvard Law School was the major proponent of sociological jurisprudence. Law was considered in relation to social problems with philosophic support being found in the pragmatism of William James. The contention quite basically was that one cannot know whether a thing is useful or good until we find out whether or not it works. If indeed, it does work, then it is good and useful. The task of the courts was one of social engineering: to use those things that are functional to settle legal disputes in the interests of society.

Realism was an offshot of sociological jurisprudence and is perhaps the major working philosophy of American jurists today. Continuing to rely on pragmatism, the realists incorporated the social sciences into their philosophy with major emphasis being placed on behaviorism and psychoanalysis. The majority of the realists seemed to advocate behaviorism, the basic tenet of which is the stimulus-response bond. Human behavior is nothing but a response to the stimuli that have affected the individual during his life. Man's behavior is the product of these stimuli. Thus, if one is to predict how an individual will act in a given situation, he should study the stimuli that have affected or are affecting the individual at the time. Transferred to a philosophy of law, judges do not decide cases by a logical process of building on antecedent legal rules and norms. Rather, judges are the victims of their environmental stimuli which produce a decision in a case. After a judge has arrived at a desirable decision, he must then search the law for legal rules which support his decision and carefully select the appropriate facts by which to make his decision seem logical.

The other social science of importance to the realists was psy-

* Assistant Professor of Law, University of South Carolina.

choanalysis which explains human behavior as the result of the unconscious mind. Rather than man's environmental stimuli controlling his actions, his unconscious or subconscious mind is the determinative factor. When applied to the judicial process, as with behaviorism, legal rules and a logical process have little to do with deciding cases. One must understand the workings of the unconscious mind of the individual jurist before he can predict a possible decision. The man responsible for the introduction of psychoanalysis into the jurisprudence of realism was Jerome Frank.

Frank attacked the rigidity of law as being the result of a "basic legal myth" that the law is, should be, and can be made stationary and certain. This human yearning for certainty is a result of the unconscious mind as follows: The unborn child in mother's womb has all his needs met and is completely secure and protected. After birth, however, he must face the harsh reality of life. That feeling of certainty and omnipotence engendered by mother's womb is lost. A replacement is sought and the child turns to the omniscient and omnipotent father who lays down the rules and sits in judgment. However, as the child grows out of infancy, he realizes that his father is indeed fallible. Reality strikes again. For a second time, the child seeks a replacement. Now, the transference of his yearning for certainty is to the Law which is fixed, predictable and capable of solving all difficulties, thus satisfying the emotional needs of the child. So, the law is a subconscious substitute for the father, who in turn was a subconscious substitute for the mother's womb.¹

Mr. Rosenberg, Ph.D., explains Frank's psychoanalytical interpretation of the law in the first chapter of the book. Chapter one, "Legal Realism and Jerome Frank", gives us a glimpse of the four major schools of jurisprudence and proceeds to a superficial treatment of legal realism. Mr. Rosenberg then provides an interesting account of fact-skepticism and the role it plays in the judging process. The rule-skeptics of the realist school were more concerned with the appellate courts, assuming that behind the "paper rules" of appellate decisions could be found some real rules which might establish some predictability in judicial behavior. The fact-skeptics, Frank being among their numbers, were most concerned with the subjective evaluation by the

1. J. ROSENBERG, *JEROME FRANK: JURIST AND PHILOSOPHER*, 15-16 (1970).

trial judge of oral testimony and evidence presented at trial with the many opportunities for a misinterpretation of the facts, especially considering the prejudices of the fact finder. Nevertheless, Frank felt that a professional fact finder, adequately trained and subjected to an examination before ascending the bench, would be a more accurate finder of fact than twelve untrained members of the community—neophytes to the judicial process bringing with them their many and varied biases. Thus, Frank's proposals for reform included an apprentice system and examination for prospective judges, abolishing the jury system in civil cases, the appointment of a public prosecutor for civil actions, the establishment of clinical legal education as opposed to "book-law schools", and, most importantly, that all prospective judges undergo psychoanalysis.

Mr. Rosenberg's introduction to his book begins with the statement, "No systematic analysis of Judge Jerome Frank's judicial opinions has heretofore been undertaken. This study is the first such attempt."² After whetting the appetite of the reader with the first chapter placing Frank within the school of legal realism, Mr. Rosenberg begins his survey of Frank's opinions. Unfortunately, that is all that follows, a survey rather than a systematic analysis of the decisions rendered by the Freudian realist. Mr. Rosenberg's introductory statement is correct, and sadly this study remains only an "attempt".

Chapter two of the book is entitled "Stare Decisis" and in a plodding fashion Mr. Rosenberg does an adequate job of explaining the opposing views on this judicial tenet and the jurisprudential clash between the values of predictability and stability on one side and flexibility and progress on the other. Mr. Rosenberg notes the apparent conflict between Frank's earlier philosophical writings about the detrimental effect of the doctrine of stare decisis (often assumed to be a call for "free judicial decision") and his later treatment of the doctrine as an appellate judge (when faced with an undesirable result in a case forced by legal precedents, he would concur in civil cases suggesting that a change should be made and dissent in criminal cases), and a weak explanation is offered.

"Civil Liberties" is the title of chapter three, in which Rosenberg hand-plows old ground as he gees and haws through Frank's opinions

2. *Id.* at xi.

on coerced confessions, entrapment, eavesdropping, self-incrimination, trial by jury, poverty and equal justice, and aliens; leaving to chapter four a discussion of Frank's three opinions on freedom of speech and of the press, one dealing with the distribution of commercial handbills and the other two with obscenity. Indeed, the reader becomes slightly interested again when Rosenberg records Frank's clarion call for an empirical study of the anti-social effects of literature prior to censoring it as obscene. Demonstrating the ineptitude of judges to make such a determination, Frank pointed out that "Judges know best the views of lawyers, who are known to tell at their gatherings such tales as appear in Roth's book. [*Magic Tales of the Czechs*]. Have they become depraved as a result?"³

The final chapter, "Justice Is as Justice Does", is a summary of the first four chapters and a collection of the sparse conclusions of Mr. Rosenberg. Examples of his recorded conclusions are that to Frank the aim of law was the administration of justice rather than the maintenance of order and that Frank should be classified as "liberal".

As for the form of the book, its 274 pages are divided into 162 pages of text followed by 112 pages of bibliography, footnotes, and addenda. Leafing back and forth from text to footnotes is extremely inconvenient. The frequent printing errors in the text are aesthetically irritating. Most offensive, however, is the noticeable reiteration throughout the book, not only of ideas, but of phrases such as "critical to the lifeblood of a democracy" and words such as "leitmotif", "hyperhole", "gestalt", and "antinomy". The only thing that can be said for this repetition is that it tends to offset the feeling of the reader that Mr. Rosenberg writes with *Thesaurus* in hand.

Throughout the book, Rosenberg is concerned with Frank, the realist, who seeks justice rather than order; a judge who in the judging process "begins with the decision he deems desirable and, working backwards, will select such facts and apply such rules as will make his decision appear logical".⁴ Why then has Rosenberg not discussed Jerome Frank, the man, and the social, political, or personal reasons for the decisions he reached? The book would have been much more inter-

3. *Id.*, at 143.

4. *Id.* at 22.

1971]

BOOK REVIEW

843

esting and informative if he had. But, alas, that is the real problem! This is not a book. It is a doctoral dissertation. I will not find fault with Mr. Rosenberg, Ph.D., for submitting his thesis to an academic committee, but I do criticize him for allowing it to be published in book form.

.