



JEROME FRANK

THE MAKING OF A NEW DEALER

Daniel R. Ernst

This article is a slightly revised version of the 2022 Maurice and Muriel Fulton Lectureship in Legal History delivered by the author at the University of Chicago Law School on April 18, 2022.

— *The Editors*

AT SEVEN O’CLOCK IN THE EVENING OF February 5, 1935, the Department of Agriculture announced a reorganization of the Agricultural Adjustment Administration (or “Triple-A”), the agency created at the start of Franklin Roosevelt’s presidency to implement the New Deal’s farm policy. Officially, the move was taken “to make the administration a more efficient operating unit.” Journalists saw a purge of “left wingers.” “It was a bloodless purging,” one explained, “but ruthlessly executed,” the elimination of “the last stronghold of militant liberalism” in the New Deal.¹

The most eminent of the purged was Triple-A’s general counsel, Jerome Frank, identified by the *Washington Post* as “one of the best known New Deal legal lights.” Postmortems did not spare the principal victim. Felix

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¹ “AAA Ousts Counsel in Surprise Shift,” *New York Times*, Feb. 6, 1935, 2; Robert S. Allen, “Wallace Admits Ability of Liberals Dropped by AAA,” n.d., box 2097, entry 17, record group 16, National Archives II.

Frankfurter, who had recommended Frank for the job, blamed him not so much for his apparent belief that “law is bunk” but for his “gratuitous candor.” Not long after a montage of Frankfurter surrounded by Frank his other proteges in the New Deal appeared in the *New York Herald Tribune*, the Harvard law professor scolded Frank for failing to realize

that public life is warfare, that it is always permeated by people who are, in Holmes’ phrase, fired with a zeal to pervert, that the luxury of letting one’s mind roam through one’s tongue is a luxury that can’t be indulged in, and that there are lots of things that can be and should be done but shouldn’t be talked about.²

As an example, Frankfurter might have cited the address Frank delivered in December 1933 at the annual meeting of the Association of American Law Schools at what is now the Hilton Chicago. In “Experimental Jurisprudence and the New Deal,” Frank asserted that “[m]any judges, confronted with a difficult factual situation, consciously or unconsciously, tend to commence their thinking with what they consider a desirable decision and then work backward, to appropriate premises, devising syllogisms to justify that decision.”

To illustrate his point that the lawyers of the New Deal did the same thing, he told the story of two attorneys, each tasked with determining the legality of the same measure under a statute. The first, “Mr. Try-it,” began with his objective. “This,” he said, “is a desirable result. It is all but essential in the existing crisis. . . . The Administration is for it, and justifiably so. It is obviously in line with the general intention of Congress as shown by the legislative history. The statute is ambiguous. Let us work out an argument, if possible, so to construe the statute as to validate this important program.” The second attorney, “Mr. Absolute,” resolved to be “aloof and indifferent to the ill effects of an adverse conclusion.” He read and reread the statute and ultimately produced an opinion that was interchangeable with Mr. Try-it’s. Neither opinion revealed any concern for social consequences, but, subconsciously, they had influenced Mr. Absolute quite as much as they had Mr. Try-it.

² “Frank Is Ousted in AAA Shake-up,” *Washington Post*, Feb. 6, 1935, 1; “100 New Deal Aids Are Traced to Prof. Frankfurter’s Influence,” *New York Herald Tribune*, Oct. 27, 1935, 2; Felix Frankfurter to Jerome N. Frank, Dec. 6, 1935, Jan. 18, 1936, box 12, ser. 2, Jerome New Frank Papers, Yale University Library.

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Frank had Triple-A issue a press release summarizing his speech; six months later, after the address had somehow become controversial, he had it published in full in the *Congressional Record*.³

Frank and his legal division at Triple-A figure in a book I'm writing on elite lawyers who went to Washington at the end of Herbert Hoover's presidency and the start of Franklin Roosevelt's. Able and ambitious, they were sure of their professional ability but unfamiliar with what Frankfurter called "Washington's reefs and shoals" – the politics within federal administrative agencies, within the executive branch, and between the Executive and Congress.⁴ Even if they had had prior experience in government, it might have failed them, because they arrived in the capital during an unprecedented economic collapse and a sudden, vast expansion of the federal government that vested enormous discretionary power in administrators, many of whom were also newcomers to public office. Perhaps not surprisingly, some of the most prominent of the first lawyers foundered on those reef and shoals or, if they stayed afloat, did so only by swapping their professional identity for a political one. Thus, the title of my book is "Lost Ships," after the only keepsake one of my protagonists, Thomas Corcoran, requested after Justice Oliver Wendell Holmes died – a framed needle-point of a Greek epigram, stitched by Holmes's wife:

A shipwrecked sailor buried on this coast
Bids thee take sail
Full many a gallant ship, when we were lost
Weathered the gale.⁵

As a group, New Deal lawyers did weather the gale and learned, even from the shipwrecks, how to develop the administrative procedures and practices that have made government lawyers guardrails against illiberal, authoritarian governance.

³ Jerome Frank, "Experimental Jurisprudence and the New Deal," *Congressional Record*, June 18, 1934, 12412-14; AAA, "Excerpt from the address of Jerome N. Frank," press release, Dec. 30, 1933.

⁴ Felix Frankfurter to Thomas G. Corcoran, Mar. 21, 1933, box 638, Thomas G. Corcoran Papers, Library of Congress.

⁵ Thomas G. Corcoran, interview by John S. Monagan, Aug. 18, 1979, box 1, John S. Monagan Papers, Harvard Law School Library.

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As perhaps a few of you might already be thinking, Frank himself was one of the survivors. He became a member of the Securities and Exchange Commission in 1937 and chaired the SEC from 1939 until his appointment to the U.S. Court of Appeals for the Second Circuit in 1941. Frank's fall and subsequent rise would take more time to tell than I have today. Instead, I'm going to narrate how Frank became Mr. Try-It and went to Washington. Some of that story will be familiar to anyone who knows him as a Legal Realist or as he appears in Peter Irons's *New Deal Lawyers*, as a Legal Reformer. Some of that story suggests why Frank resists *any* categorization, his unique combination of intellect and personality that his friend William O. Douglas tried to capture when he said that Frank had "the sharpest, quickest, most incisive mind" and was also "one of the most lovable and endearing characters" he had ever known. But Frank's early life and career also bring out an easily overlooked fact, that Frank was a first-rate corporate lawyer and that he brought to the New Deal capacities required for the effective regulation of corporate America.⁶



Jerome New Frank was born in a brownstone at 330 East Sixteenth Street in New York City on September 10, 1889, the descendant of Bavarian Jews who had immigrated about forty years earlier. His father, a lawyer, moved the family to Chicago's south side in 1897, when Jerome was still in grade school. He grew up, well-to-do but not wealthy, in an enclave of German Jews, many of whom attended the stately Sinai Temple, the home of one of the nation's leading reform congregations.⁷ Precocious, with what a classmate called "a mania for arguing," Frank entered

⁶ Peter Irons, *New Deal Lawyers* (Princeton University Press, 1982), 111-99; William O. Douglas to Richard H. Rovere, Nov. 14, 1946, box 1, Richard H. Rovere Papers, Franklin D. Roosevelt Library, Hyde Park, NY (Rovere-FDRL Papers).

⁷ Tenth Census of the United States, 1880, Microfilm Publication T9, National Archives, Washington, DC, Ancestry.com; "Registers of Vessels Arriving at the Port of New York from Foreign Ports, 1789-1919," Microfilm Publication M237, National Archives I; Richard Rovere, "Frank was born in a brownstone house . . .," box 1, part 3, Richard Halworth Rovere Papers, Wisconsin Historical Society, Madison, WI (Rovere-WHS Papers); Jerome N. Frank, application form, Committee on Character and Fitness, Second Judicial Department, Jan. 23, 1930, box 7, ser. 1, Frank Papers (Frank, application form).

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the University of Chicago at age 16. He studied political economy with Robert Hoxie and the “Class Struggle in Society” with the sociologist Albion Small, but the teacher who most influenced him was Charles Merriam, then in the process of reorienting political science from the parsing of Germanic abstractions to the empirical investigation of political institutions and behavior. Frank so impressed Merriam that when the professor, a hero of Chicago’s progressives, ran for alderman and won in 1909, he hired Frank as his secretary, even though the young man had just started his studies at the university’s law school. Merriam recalled Frank as “always enthusiastic, impetuous, passionate in his hatred of wrong and injustice, keen and subtle in his intellectual processes.” But after a year of battling the likes of “Hinky Dink” Kenna and “Bathhouse” John Coughlin, and an ultimatum from his fiancée, Florence Kiper, he returned to law school in the fall of 1910.⁸

In those days, the core of the University of Chicago’s law faculty still consisted of the acolytes of the founding dean, Joseph Beale, a Harvard law professor loaned to Chicago on the understanding that it would adopt “the spirit and the methods of the Harvard Law School.” Beale’s boys faithfully employed the case method of Christopher Columbus Langdell to impart a notion of law as rules discovered through an *a priori* process of induction from the holdings of appellate cases. “Skill in the analysis of upper court opinions and the elaboration of exquisitely made legal doctrines were the very essence of the pedagogy,” Frank recalled. At least at first, he found the instruction captivating. “The untidy disciplines of economics, politics and history” of his undergraduate studies paled by comparison. “How could a theory of money or history of banking seem important when you were learning about the equity of redemption or the rule about fictitious payees?” he later wrote.⁹

⁸ *Oakland Record*, Mar. 28, 1902, quoted in Linda Wrigley, “Jerome Frank and the Reform Movement in the Agricultural Adjustment Administration, 1933-1935” (M.A. thesis, Trinity College, 1976), 2; Jerome N. Frank, “The Reminiscences of Jerome New Frank,” 3-4, 11 (1960), Oral History Archives, Columbia Center for Oral History, Columbia University Library; undergraduate transcript, Jerome New Frank, University of Chicago Library; Richard Rovere, “For twenty years, Frank came as close . . .,” box 1, part 3, Rovere-WHS Papers; Charles E. Merriam to Richard Rovere, Oct. 28, 1946, box 1, Rovere-FDRL Papers.

⁹ Joseph H. Beale, Jr., to William Rainey Harper, Apr. 2, 1902, in “Ernst Freund – Pioneer of Administrative Law,” *University of Chicago Law Review* 29 (1962): 766-767; Jerome N. Frank,

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Frank had a few courses from more heterodox legal scholars, including the legal realist Walter Wheeler Cook, the German-educated Ernst Freund, and Roscoe Pound, but the professor who most influenced him was Julian Mack. A German Jew born in San Francisco, raised in Cincinnati, and graduated with honors from the Harvard Law School, Mack had moved to Chicago in 1890 and taught as an adjunct at the law school since its founding in 1902. Frank would have known him, at least by reputation, as the organizer of a lecture series jointly sponsored by the Sinai Temple and the University of Chicago, as president of the Julius Rosenwald-funded literary society known as the Book and Play Club, and as the judge of Chicago's pioneering and nationally renowned Juvenile Court.¹⁰

Mack taught nothing like the Bealists. "There were no eight rules with fourteen exceptions," Frank recalled. Instead, Mack "told us much of how problems were flung, in the raw, at lawyers by clients or at judges by lawyers." He gave his students a taste of the "unlogical, shifting, untidy, uncertain, thoroughly human, catch-as-catch-can thing we were going to be grappling with" in the practice of law. "You never knew precisely where you were" in Mack's class, but the "fragmentarianess" of it all was immensely stimulating. Evidently Mack found Frank stimulating, too: he asked the young man to be his law clerk when Mack was named to a short-lived Article III court that heard appeals from the Interstate Commerce Commission and proved to be Mack's first stop in a federal judicial career that ended with him presiding over complex litigation in the Southern District of New York.¹¹

Frank graduated from law school in August 1912 with the highest grade point average on record. In October he started as an associate at Levinson,

"What Constitutes a Good Legal Education," Aug. 26, 1933, 15, box 166, ser. 6, Frank Papers; "First Draft of Statement of Alumni of Recommendations as to Character of New Dean," Apr. 12, 1928, box 1, Laird Bell Papers, University of Chicago Library ("First Draft").

¹⁰ Transcript, Jerome New Frank, University of Chicago Law School; University of Chicago, *Announcements: The Law School* 10 (Apr. 1910): 10-14, 11 (April 1911): 10-14; Harry Barnard, *The Forging of an American Jew: The Life and Times of Judge Julian W. Mack* (Herzl Press, 1974), 14-92.

¹¹ Barnard, *Forging*, 23, 111-127, 138-139; "Julian William Mack," in Federal Judicial Center, *Biographical Directory of Article III Federal Judges, 1789-present*, www.fjc.gov/history/judges/mack-julian-william; Frank, "Reminiscences," 13; Robert Jerome Glennon, *The Iconoclast as Reformer: Jerome Frank's Impact on American Law* (Cornell University Press, 1985), 17.

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Becker, Cleveland & Schwartz, a “mixed” firm, with both Jewish and Gentile partners and a very substantial corporate practice. His seniors recognized his legal brilliance and made him a partner four years later. Benjamin Becker credited him with the firm’s victory over a clutch of New York firms in an enormous corporate reorganization. Another Chicago lawyer marveled at his ability to master the “most difficult and complex business situations and to overcome what were seemingly insurmountable obstacles to an adjustment of litigation.” “A most intense worker,” in 1927, he received a fifth of the firm’s profits.¹²

Corporate law could not contain Frank’s restless intellect, however. Rarely did he arrive at work without a book under his arm. “His literary interests covered a wide range,” Becker recalled, including the classics, philosophy, fiction, and mystery. From 1920 to 1922, Frank presided over the Book and Play Club; most Saturdays he could be found in a downtown saloon for informal gatherings of the city’s more venturesome professionals and such literati as John Gunther, Ben Hecht, Carl Sandburg, and Sherwood Anderson. Frank and his wife Florence, a poet and playwright who, as a friend put it, “never quite ‘arrived,’” were principals in theater companies and entertained Edgar Lee Masters, Upton Sinclair, and other literary lions. Their Winnetka home, a neighbor recalled, was “a center of liberal thought and stimulating conversation on national and international affairs, literature, and culture generally.”¹³

He was, by all accounts, an extraordinary conversationalist. A junior at Levinson, Becker recalled that Frank could hold forth “on almost any subject – the latest novel or drama, the comparative methods of competing schools of psychology, or recent advances in astrophysics.” “He spouts

¹² “Summer Session at U. of C. Ends,” *Chicago Tribune*, Aug. 31, 1912, 6; Florence Kiper Frank to Richard Rovere, Feb. 19, [1947], Benjamin V. Becker, “Jerome N. Frank graduated from the University of Chicago in 1909 . . .,” 4-5, enclosed in Benjamin V. Becker to Richard H. Rovere, Dec. 27, 1946, box 1, Rovere-FDRL Papers (Becker, “Jerome N. Frank”); Frank, application form; Stephen A. Foster to Charles J. Fay, June 25, 1928, box 3, Partnership agreement, Jan. 1, 1925, box 7, ser. 1, Frank Papers.

¹³ Becker, “Jerome N. Frank”; Glennon, *Iconoclast*, 17; Frank, “Reminiscences,” 5-6; Ulysses S. Schwartz to Richard Rovere, Dec. 18, 1946, box 1, Elisabeth D. Ballard to Richard Rovere, Dec. 20, 1946, Carleton Washburne to Richard Rovere, Jan. 16, 1947, box 1, Rovere-FDRL Papers; Richard Rovere, “During the first few years of their marriage . . .,” box 1, part 3, Rovere-WHS Papers.

theories by the minute,” a journalist claimed during the New Deal. “In the space of half an hour, I have heard him develop successively a ‘cloacal’ theory of the rise and fall of nations, a ‘scent gland’ theory of love, a ‘loneliness’ theory of small-town life in America, and a ‘community songfest’ theory of [the National Recovery Administration].” He spoke too eagerly to be pompous, William Douglas explained, and swept up others in his wit and ebullience. A Winnetka neighbor thought her friends always appeared “more brilliant when they were with him.” North Shore hostesses vied to have him as a dinner guest, even though they knew he would arrive late, if at all.¹⁴

He delighted in launching conversations with outlandish observations. During their first social evening together, Ulysses S. Schwartz, a close friend, recalled that Frank denied the existence of “absolute standards” of conduct. To make his point, he placed his hat upside down on his head and declared that but for social convention he might as well wear it that way as any other. He and Florence were early proponents of birth control and the first in their social set to discuss Freud. “They were quite too startling for almost any of us,” Schwartz acknowledged, “but Jerome’s impersonal way of presenting any kind of subject took the curse off it.”¹⁵

For a corporate lawyer, he was unusually engaged in public affairs. During a strike of clothing workers in the fall of 1915, Frank and his friend Schwartz, acting on behalf of a leading Jewish charity, investigated whether clothing manufacturers counted on private philanthropy to supplement their workers’ low wages. Because he was married and a father, Frank was not likely to be drafted during World War I. Instead, he volunteered to assist the chief of the Meat Division of the War Food Administration, the masterful New York corporate lawyer Joseph Cotton, whom Frank had impressed in a railroad reorganization. Frank’s job was to create a record of the negotiations in which Cotton practically set the prices that

¹⁴ John J. Abt with Michael Myerson, *Advocate and Activist: Memoirs of an American Communist Lawyer* (University of Illinois Press, 1995), 16; John Chamberlain, “Books and Ideas,” *Fortune* 32 (July 1945): 206; *Jerome N. Frank, 1889-1957* (Association of the Bar of the City of New York and the New York County Lawyers’ Association, [1957]), 13; Elisabeth D. Ballard to Richard Rovere, Dec. 20, 1946, David Levinson to Richard Rovere, Dec. 26, 1946, box 1, Rovere-FDRL Papers.

¹⁵ Ulysses S. Schwartz to Richard Rovere, Dec. 18, 1946, box 1, Rovere-FDRL Papers; “Publicity in Limitation of Families Urged,” *Chicago Tribune*, Apr. 2, 1917, 17.

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the great meat packing companies charged a purchasing commission for the Allied forces.¹⁶

The cause that most engaged Frank was a crusade against the corrupting influence of streetcar franchises on city government. His first skirmish came before the war when he helped his friend Schwartz, newly elected an alderman, oppose the grant of a franchise on much too favorable terms. After the war, Schwartz proposed a scheme that, while leaving the operation of streetcars in private hands, would have the city acquire the lines and create a public board to oversee them. An ingenious securitization of projected revenues – Frank’s brainchild – would finance the purchase. To build support, Schwartz became chairman of the City Council’s local transportation committee and hired Frank as one of its lawyers. Then, in 1923, the good government candidate William Dever became mayor and invited Frank into his kitchen cabinet. Only Frank fully understood the securitization proposal, Schwartz confessed. “Jerome would explain one detail after another, holding the attention of all,” like a “young Hamilton in Washington’s cabinet.” Once, when “everyone’s nerves were strained to pretty near the exploding point,” Frank recited some dashed-off doggerel that broke the tension. But even a witty Hamilton could not prevail over the massed opposition of utility magnates, William Randolph Hearst’s newspapers, Socialists set on stronger measures, and party bosses intent on dealing Dever a blow. The proposal was defeated in a referendum in the spring of 1925, and Dever lost a reelection bid two years later.¹⁷

The defeat of the traction ordinance dealt Frank a blow too. The ordinance had figured in what he later termed his “ambition fantasies”; its defeat

¹⁶ Ulysses S. Schwartz to Richard Rovere, Dec. 18, 1946, box 1, Rovere-FDRL Papers; “Ellen Starr Writes to Jew Who Seems to Have Forgotten His People,” *Chicago Day Book*, Nov. 26, 1915, 30; Abt, *Advocate and Activist*, 2-3; Frank, application form; Frank, “Reminiscences,” 14-16, 52-53; George H. Nash, *The Life of Herbert Hoover: Master of Emergencies, 1917-18* (W.W. Norton, 1996), 187-95.

¹⁷ “Schwartz Urges City Control of Surface Lines,” *Chicago Tribune*, Apr. 28, 1919, 14; Ulysses S. Schwartz to Richard Rovere, Dec. 18, 1946, Francis X. Busch to Richard H. Rovere, Jan. 10, 1947, box 1, Rovere-FDRL Papers; “Schwartz Plan for Traction Declared Best,” *Chicago Tribune*, May 12, 1922, 21; “Dever Traction Plan is Scanned for Real Czar,” *Chicago Tribune*, Feb. 3, 1925, 5; Walter E. Volkmer, *The Passionate Liberal: The Political and Legal Ideals of Jerome Frank* (Martinus Nijhoff, 1970), 4-6; “Thompson Victor by 83,072,” *Chicago Tribune*, Apr. 6, 1927, 1.

left him face-to-face with the prospect that he might end his days as a corporate lawyer, a career he claimed that his father had bullied him into. The protagonist of an unfinished novel Frank wrote at this time probably voiced Frank's own rue and regret in declaring himself "a well-paid servant of this pitiful creature, the business man," a player of "an amusing if somewhat shoddy game by which he could most easily amass a competence." Frank later described himself as "restless, wanting to do everything except what I was doing." He was "constantly rebelling against being a lawyer – doing it competently but still, interiorly, objecting to it," his energy "absorbed by frictions" of various sorts.¹⁸

Not long after the defeat of the traction plan, Frank agreed to handle a matter for the firm requiring an extended stay in New York City. While there, he happened upon the psychiatrist Bernard Glueck, the principal expert in Clarence Darrow's defense of the famous "thrill killers," Nathan Leopold and Richard Loeb. After Frank disclosed his inner turmoil to the psychiatrist, Glueck proposed a year's psychoanalysis. Frank countered that he would only be in town for six months and somehow persuaded Glueck to see him twice daily, at 8:30 in the morning and 6:00 in the evening. Frank claimed psychoanalysis did him "a great deal of good," but that was not always apparent to others. A young lawyer at Levinson, Becker recalled that "Jerry had great feelings of insecurity. He would worry legal questions to death. For no apparent reason, he would write long memoranda for the files defending his decisions, covering himself for each step in any difficult case or set of negotiations."¹⁹

Other phases of Frank's life were unsettled as well. In 1927, the child psychologist who had been treating Frank's daughter for the psychosomatic paralysis of her legs moved to New York. So that her treatment might continue, that summer Frank rented a house for her and Florence in Croton-on-Hudson, an hour's commute from Manhattan. In June 1928, he sold his Winnetka house; a year later he joined his family in New York. After

¹⁸ Jerome N. Frank to Arthur C. Bachrach, Mar. 29, 1932, box 1, ser. 1, Jerome N. Frank, "Show Me an Angel," 363, box 147, ser. 6, Frank Papers; Richard Rovere, "Living close to the seat of power . . .," box 1, part 3, Rovere-WHS Papers; Frank, "Reminiscences," 11-12.

¹⁹ Frank, "Reminiscences," 11; Richard Rovere, "Frank has debunked Freud . . .," box 1, part 3, Rovere-WHS Papers; Jerome N. Frank to Bernard Glueck, Sept. 8, 1925, box 3, ser. 1, Frank Papers; *Jerome N. Frank, 1889-1957*, 19; Abt, *Advocate and Activist*, 17.

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considering several offers, on Judge Mack's advice, he decided on Chadbourne, Levy & Stanchfield, one of the few top corporate law firms in New York with both Jewish and Gentile partners. His partnership at Levinson, Becker formally ended on the last day of 1929; sometime before then he started working on Chadbourne matters. He formally joined the firm after his admission to the New York bar in early 1930.²⁰

As in Chicago, Frank looked for some public service to supplement his day job. In April 1930, through an ally in the Chicago street railway fight, he offered his services to Governor Franklin Roosevelt. When Roosevelt checked with Felix Frankfurter, the Harvard law professor passed along Mack's praise of Frank's "keen intellectual powers" but could not say whether Frank was right for "the kind of things you have in mind."²¹

Frank also pursued his longstanding literary ambitions, enriched by his recent exposure to Freudian psychology. One short story had a guilt-ridden, fire-and-brimstone preacher lose his sway over his congregation after releasing his previously sublimated sexual energy in an orgiastic revel. Similarly, Frank's partially completed novel had its lawyer-protagonist cured of anxiety over his professional life after a passionate affair. But after an editor at Houghton Mifflin found the manuscript, while not without interest, too explicit to be published in Boston, Frank turned to a nonfiction project that became his most widely read work.²²

The book's origins ran back to the unexpected death in March 1928 of James Parker Hall, dean of the University of Chicago Law School since Beale's return to Harvard. Ostensibly writing for his circle of law alumni, Frank recommended that Hall's successor commit the school to the preparation of lawyers for the "bewildering uncertainties" of law practice. The Bealists gave students the impression that law was "a definite and complete

²⁰ Jerome N. Frank to David M. Levy, Jan. 5, 1933, box 5, Jerome N. Frank to Benjamin V. Becker, Jan. 13, 1930, box 1, ser. 1, Frank Papers; Frank, application form; Frank "Reminiscences," 63-64.

²¹ Milo R. Maltbie to Franklin D. Roosevelt, Apr. 28, 1930, Franklin D. Roosevelt to Felix Frankfurter, May 19, 1930, Felix Frankfurter to Franklin D. Roosevelt, May 28, 1930, reel 60, Felix Frankfurter Papers, Library of Congress.

²² Jerome N. Frank, "The Strange Case of Obadiah Pitch" (1927), box 154, ser. 6, Ferris Greenslet to Jerome N. Frank, Mar. 7, 1928, box 3, ser. 1, Frank Papers; Frank, "Reminiscences," 7; Richard Rovere, "Not a single Pulitzer Prize had gone to a Westerner. . .," box 1, part 3, Rovere-WHS Papers.

body of doctrine” existing apart from the facts to which it was applied. This ill-prepared them for the discovery that law and facts were inextricably joined, that, say, the law of corporations was no abstraction but “very human, full of problems of manufacturing, stock market operations, labor questions, men’s cupidities and men’s dreams.” Even an honors student would go “down in the struggle” if he could not find a way to reconcile the legal abstractions he had been taught with the “concreteness of daily life.”²³

In 1928, Frank did not jump all the way to Freud; he stopped with Holmes’s maxim that the life of the law had not been logic but experience. Before long, however, he found another lesson in Holmes’s writings, that uncertainty in the law was less a problem to be solved than a condition to be accepted. In *Law and the Modern Mind*, published in October 1930 with an introduction by Judge Mack, Frank argued that the desire for certainty in law was an adult’s version of a childish need for an authoritative father figure. “The widespread notion that law either is or can be made approximately stationary and certain,” personified in “the Father-as-Infallible-Judge,” was a delusion. Mature thinkers like Holmes freed themselves of this “carry-over of the childish dread of, and respect for, paternal omnipotence.” They accepted that law continuously adapted itself to “the realities of contemporary, social, industrial and political conditions,” that it was an ongoing social process aiming to satisfy “as much as is possible of the whole body of human wants.” Only legal formulations that were socially functional should be treated as “fixed and settled” – and then only as long as they continued to work.²⁴

As much as the printed word could, *Law and the Modern Mind* captured Frank’s wit and brilliance as a conversationalist, his wide reading in philosophy, psychology, anthropology, and literature; his knack for sprightly conveying the gist of often ponderous academic writings; and his audacity, displayed in calling out eminent jurists who still indulged in “the debilitating irresponsibility” of relying on “supposed safety-conferring external authority.” His charge that Roscoe Pound was doing his best to make the law “safe for Bealism” outraged the Harvard law dean but delighted

²³ “James P. Hall, Dean of Law at U. of C., Is Dead,” *Chicago Tribune*, Mar. 14, 1928, 16; “First Draft,” 1-3, 6-7, 12.

²⁴ Jerome Frank, *Law and the Modern Mind* (1930; Coward-McCann, 1935), 6-7, 11-12, 18, 251-53.

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younger law professors, including Columbia's Karl Llewellyn, who had recently faulted Pound for squandering his vast learning on "bed-time stories for the tired bar."²⁵

Frankfurter called the book "the most refreshing and self-examining piece of writing on law that has come my way for many a year" and commenced into a lengthy correspondence with its author. Sometimes it turned prickly, as when Frankfurter instructed Frank, agitated by word that Pound had accused Frank of misquoting him, not to drag others into the fray. "At a time when we need all the intellectual resources that we can muster, and all the stimulus that comes from camaraderie among fellows in the same craft, polemics and ill will are luxuries we cannot afford." Still, Frankfurter enjoyed the exchanges. "What a pleasure it is to start any kind of discussion with you," he wrote. "I like the way you keep the ball going, and only wish that time and distance were not barriers to the game."²⁶

Frank relished the entrée to the legal academe that *Law and the Modern Mind* provided and pursued it avidly. "I'm delighted you're quarreling with me," he wrote to Harvard's Thomas Reed Powell. "I want to be educated. So shoot away, oh Socrates." He helped Llewellyn reply to Pound's 1931 article on legal realism and complained to Judge Mack when the president of the *Harvard Law Review* – Paul Freund – initially refused Llewellyn space.²⁷ Yale's legal realists were still more congenial. Irreverent iconoclasts unrestrained in their scholarship and consumption of alcohol, Thurman Arnold, William Douglas, Walton Hamilton, and Wesley Sturges recognized a kindred spirit and finagled an appointment for Frank as "Research Associate in Law" for the 1932-33 academic year. Formally, the appointment obligated Frank to attend a few faculty lunches and meet a few students; it was also understood that he would transport bootleg liquor to New Haven. Still, Frank formed lasting friendships with Arnold, whom

²⁵ Frank, *Law and the Modern Mind*, 244, 211 n.*; Karl N. Llewellyn, "A Realistic Jurisprudence – The Next Step," *Columbia Law Review* 30 (1930): 435 n. 3.

²⁶ Felix Frankfurter to Jerome N. Frank, Oct. 9, 1930, reel 34, Frankfurter Papers; Felix Frankfurter to Jerome N. Frank, Mar. 15, 1933, box 12, ser. 2, Frank Papers.

²⁷ Jerome N. Frank to Thomas Reed Powell, Nov. 24, 1930, box 6, Jerome N. Frank to Felix Frankfurter, Mar. 29, 1931, box 3, ser. 1, Frank Papers; N.E.H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (University of Chicago Press, 1997), 197-202.

he hailed as “the New Haven Montaigne,” and Douglas, with whom he coauthored articles calling for the reform of corporate reorganizations.²⁸

Throughout 1931, Frank worked on a book calling for improving the fact-finding capacity of American trial courts, organized lectures on the law at the New School for Social Research, and spoke on radio broadcasts alongside the philosopher Morris Cohen, Harold Laski, and Judge Mack.²⁹ He had considered abandoning law practice for the legal academe as early as April 1928, when he half-seriously proposed himself to Laird Bell as James Parker Hall’s successor. After the publication of *Law and the Modern Mind*, Leon Green, Northwestern’s law dean, sounded Frank out on joining his faculty. At first Frank put him off, but Green persisted and tried to raise funds for his salary. Frank’s friends at Yale did the same but had to settle for his reappointment as Research Associate.³⁰

Meanwhile, Frank’s practice remained unsatisfying. To be sure, the firm’s principal partner impressed him. Six feet six inches tall, with a deep bass voice, Thomas Chadbourne was, a journalist reported, a “giant of a man, mentally as well as physically” and held his own even among the out-sized egos of the Wall Street bar. But with 38 lawyers and retainers from 150 corporations, his firm was much larger than Levinson, Becker and top-heavy with mediocre partners brought aboard to handle long-

²⁸ Carl A. Lohmann to Jerome N. Frank, June 11, 1932, box 7, Charles E. Clark to Jerome N. Frank, Apr. 14, 1932, box 2, Jerome N. Frank to Thurman W. Arnold, Feb. 15, 1932, box 1, ser. 1, Frank Papers; Frank, “Reminiscences,” 12; Laura Kalman, *Legal Realism at Yale, 1927-1960* (University of North Carolina Press, 1986), 138-39; Jerome N. Frank, “Some Realistic Reflections on Some Aspects of Corporate Reorganizations,” *Virginia Law Review* 19 (1933): 541-70, 698-718; William O. Douglas and Jerome Frank, “Landlords’ Claims in Reorganizations,” *Yale Law Journal* 42 (1933): 1003-50.

²⁹ Jerome Frank, “What Courts Do in Fact,” *Illinois Law Review* 26 (1931): 645-66, 761-84; Jerome Frank, “Are Judges Human?” *University of Pennsylvania Law Review* 80 (1931): 17-53, 233-67; Jerome Frank, “Mr. Justice Holmes and Non-Euclidean Legal Thinking,” *Cornell Law Quarterly* 17 (1932): 568-603; Jerome N. Frank to Charles Edward Clark, Mar. 12, 1931, Charles E. Clark to Jerome N. Frank, Mar. 26, 1931, box 2, ser. 1, Frank Papers; “Charge Courts Biased in Favor of Ruling Class,” *Brooklyn Daily Eagle*, Mar. 22, 1931, 3.

³⁰ Jerome N. Frank to Laird Bell, Apr. 12, 1928, box 1, Bell Papers; Leon Green to Jerome N. Frank, May 22, 1931, box 5, Leon Green to Melvin A. Traylor, Jan. 29, 1932, box 3, ser. 1, Thurman Arnold to Jerome N. Frank, June 7, 1933, box 4, Jerome N. Frank to Charles E. Clark, Apr. 4, 1933, box 10, ser. 2, Frank Papers.

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forgotten matters.³¹ The work could be crushing. A complicated bank merger, “one of those every-night-and-Sunday jobs,” consumed him during the winter of 1931-32; in the fall of 1932 the receivership of the Interborough Rapid Transit subway again had him working days, nights, and weekends, until revelations that a Chadbourne partner had, in effect, bribed a federal judge to have the firm appointed receiver, forced Frank to drop the case. “I am so fed up with the tawdry aspects of practice that I would like nothing better than a permanent job alongside you,” an appalled Frank wrote to Thurman Arnold.³²

Frank also took his troubles to Frankfurter, who, soon thereafter, assured Frank, “I was very deeply moved by your visit – greatly touched that you should have felt like talking with me when a personal problem confronted you.” After Roosevelt’s election, Frank asked the law professor to help him find a job in Albany or Washington. “Of course the country – state or nation – needs you badly in its service,” Frankfurter replied. “Where, when or how is a matter of taking advantage of circumstances.”³³

Over the next months, Frank reminded Frankfurter of his interest and usefulness. In December 1932, he asked the law professor what he thought of Adolf Berle and Gardiner Means’s just published *The Modern Corporation and Private Property*. (Frank ventured that it identified “what may well be the vital problem of our times,” the separation of ownership from control in the large business corporation.) Frank also told Frankfurter of his proposal to create a “receivership division” in the Department of Justice to police corporate bankruptcies. (Administrative review of corporate

³¹ George Creel, “We’re Grown-Ups Now: An Interview with Thomas I. Chadbourne,” *Collier’s*, Aug. 15, 1931, 10, 11, 30; *The Autobiography of Thomas L. Chadbourne*, ed. Charles C. Goetsch and Margaret L. Shivers (Oceana Publications, 1985), 81; Frank, “Reminiscences,” 12; Memorandum for Mr. T. L. Chadbourne, Feb. 16, 1933, box 2, ser. 1, Frank Papers.

³² Jerome N. Frank to Felix Frankfurter, Dec. 28, 1931, Feb. 15, 1932, box 3, Jerome N. Frank to Thurman W. Arnold, Feb. 15, 1932, Oct. 20, 1932, box 1, ser. 1, Frank Papers; Frank, “Reminiscences,” 63; Jamison Wilcox, “The Autobiography of Thomas L. Chadbourne,” *DePaul Law Review* 35 (1986): 967-71; Joseph Borkin, *The Corrupt Judge: An Inquiry into Bribery and Other High Crimes and Misdemeanors in the Federal Courts* (Clarkson N. Potter, 1962), 23-91; “IRT Receivers’ Lawyers Quit,” *New York Daily News*, Oct. 11, 1932, 842.

³³ Felix Frankfurter to Jerome N. Frank, Oct. 19, 1932, box 1, Rovere-FDRL Papers; Jerome N. Frank to Felix Frankfurter, Nov. 30, 1932, Felix Frankfurter to Jerome N. Frank, Dec. 1, 1932, box 3, ser. 1, Frank Papers.

reorganizations would resurface in the Chandler Act of 1938, drafted while Frank was a member of the Securities and Exchange Commission and Douglas its chairman.) Impressed, Frankfurter enlisted Frank in a campaign against a bill that insufficiently protected minority interests in railroad reorganizations. “What a quick, imaginative and energetic worker you are!” Frankfurter exclaimed after receiving multiple missives on the matter from Frank.³⁴

On March 15, less than a fortnight into Roosevelt’s presidency, Frankfurter could finally hint that a job had turned up. “If you get any kind of a bid from Washington – however funny it might look on the face of things as being unrelated to your immediate legal experience,” he wrote, “don’t make a wry face at it until you have had a chance to talk with me about it. If what I am thinking should by any chance come home, I think it really would be a swell opportunity for you.” The next day Frank was closeted with investment bankers when he was called to the phone. The caller identified himself as Rexford Tugwell, the Assistant Secretary of Agriculture, who reported that Frankfurter had recommended him to be the USDA’s top lawyer and asked him to come to Washington to meet Secretary Henry A. Wallace. Florence thought her husband “slightly insane” even to consider a job that paid a fifth of his draw from the Chadbourne firm. Even so, Frank boarded a train to Washington that night.³⁵

Well, what happened next is a long story. But I hope the story I’ve told you is enough to suggest that we don’t fully account for Jerome Frank’s contribution to American legal history if we forget that he was a first-rate corporate lawyer, with, as a former partner put it, “an unusually broad experience in corporate reorganizations [and] corporate and financial

³⁴ Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Macmillan, 1932); Jerome N. Frank to Felix Frankfurter, Dec. 15, 29, 1932, box 3, ser. 1, Felix Frankfurter to Jerome N. Frank, Mar. 1, 1933, box 12, ser. 2, Frank Papers; David A. Skeel, *Debt’s Dominion: A History of Bankruptcy Law in America* (Princeton University Press, 2001), 109-23.

³⁵ Felix Frankfurter to Jerome N. Frank, Mar. 15, 1933, box 12, ser. 2, Frank Papers; Frank, “Reminiscences,” 64-65; Jerome N. Frank, interview by Joseph Alsop, Aug. 1, 1938, box 93, Joseph and Stewart Alsop Papers, Library of Congress. I date the phone call from the telegram, Lee Pressman to Jerome N. Frank, Mar. 17, 1933, box 6, ser. 1, Frank Papers. Richard Rovere, “Frank has always taken an almost superhuman view . . .,” box 1, part 3, Rovere-WHS Papers, and Russell Lord, *The Wallaces of Iowa* (Houghton Mifflin, 1947), 346, provide estimates of Frank’s income from the Chadbourne firm.

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problems.” That a sudden expansion of the administrative state into American industry and finance required the expertise of corporate lawyers is not surprising to anyone familiar with the legal history of the twentieth century’s two world wars. In the first, Herbert Hoover, as director of the War Food Administration, knew he needed Joseph Cotton, who had left Cravath, Swaine & Moore but not yet founded the firm now known as Cahill Gordon & Reindel, to stand up to the meatpackers and their formidable lawyer Silas Strawn. As Ajay Mehrotra has shown, Russell Leffingwell left Cravath and Arthur Ballantine his corporate practice in Boston for the Treasury Department. In the Second World War, John J. McCloy left Cravath to be Assistant Secretary of War and Lloyd Cutler left Cravath for Lend Lease. When James Forrestal left the investment bank Dillon, Reed to become Undersecretary of the Navy, he took Struve Hensel, his lawyer at Milbank, Tweed, with him.³⁶

The Great Depression was, of course, only an analogue of war, but the corporate lawyer’s contribution to state capacity was just as vital. Frankfurter said as much when he pitched Jerome Frank to Rex Tugwell. Frank had two sides, Frankfurter explained, “the playful, dialectic, argumentative side, which is a very much the minor part of him; and the penetrating, practical-experience talent for bringing results to pass in the world of affairs.”³⁷ If you think of Jerome Frank at all, odds are you think of that first side, which in fact contributed to his ouster from Triple-A. But you should also remember his second side, because his opponents would never have bothered to mass the forces to oust him had it not been so formidable.



³⁶ Ajay K. Mehrotra, “Lawyers, Guns and Public Monies: The U.S. Treasury, World War One, and the Administration of the Modern Fiscal States,” *Law and History Review* 28 (2010): 173-225; Lloyd Cutler, interview, May 29, 2003, 30-31, Miller Center for Public Affairs, University of Virginia; Bartholomew H. Sparrow, *From the Outside In: World War II and the American State* (Princeton University Press, 2014), 168.

³⁷ Felix Frankfurter to Rexford Tugwell, Mar. 15, 1933, reel 76, Frankfurter Papers.