# PROVOCATION

## FRANK'S WAY

*Robert Post*[*]

I know that Dean Martha Minow would like me to begin with a provocation, but I can't help beginning instead with an acknowledgment. Throughout my career as a legal academic, I have always had two guiding lights, two pole stars whose integrity and depth I have trusted to steer me in the right direction. One is Owen Fiss, and the other is Frank Michelman.

No one would ever confuse these two scholars. Owen's style is divisive and pugnacious. His MO is to enter a controversy, the way that Clint Eastwood might enter a saloon, clarify the dispute, and adopt a position. Whether you agree or disagree, you are guaranteed to come away with a better sense of the stakes in question.

Frank's style, by contrast, is anything but swaggering. Frank is empathetic, polite, generous (almost to a fault), indirect, and tentative. His archetypical article worries a question. And when I say worries, I mean the way that a terrier might worry a rat — by turning it over every which way, by attacking it from every possible angle, and by tasting its every implication. In the end Frank may (or as likely may not) reach some provisional conclusions. But in the process the reader will certainly have reaped rich rewards, for he will have experienced how a deep scholarly mind, exercising perfect scholarly integrity, illuminates depths hitherto unseen and unimagined. He will have been inspired by the gift of insight. Frank's writings offer wisdom in the service of a passionate fidelity to the intractable complexity of legal issues.

The topic for today's panel is Law and Philosophy. This is an appropriate subject because Frank has long been one of the very most sophisticated scholars working at the border between law and philosophy. Frank does not write jurisprudence in the manner, say, of Professor Jules Coleman or Professor Scott Shapiro. Instead he explores the implications within law of moral and political philosophy. Throughout his career he has engaged in a high-level conversation with the likes of John Rawls and Jürgen Habermas (whose recent ideas about the

* Dean and Sol & Lillian Goldman Professor of Law, Yale Law School. This "provocation" is a revised version of a paper that was presented at the Symposium in Honor of Professor Frank Michelman, hosted by Harvard Law School on February 10–11, 2012.

co-origination of democracy and law may owe a great deal to Frank's interventions).

I myself am not qualified to survey Frank's influence in the world of philosophy. Because of Frank's style, because he is more apt to raise questions than to push answers, my guess is that there is no cognizable Michelman "position" within philosophy, as there might be, for example, positions associated with figures like Ronald Dworkin or Jeremy Waldron. But this is a subject on which I must defer to my co-provocateur, Professor Tim Scanlon.

In this provocation, I shall focus on the ways that Frank inimitably brings philosophy to law. And on this subject I shall in fact be provocative. I shall not discuss Frank's seminal contributions that deployed the work of John Rawls to reimagine the relationship between justice and constitutional law. Instead I shall focus our attention on issues that have preoccupied Frank during the past ten or fifteen years.

No one can read Frank's recent work without instantly experiencing, with some tenderness, the love they express for the titanic work of John Rawls. If we examine Frank's writings during the last decade or so, it is impossible to avoid the perception that he has worried a set of deeply important questions that are framed almost entirely by reference to Rawlsian categories. These questions concern how the coercive power of the state may be justified to those who disagree with its exercise.

The basic problem is this: We need law in order to obtain what Frank, following Rawls, calls the "good of the political," which refers to the goods of social solidarity and cooperation. Without law, there is simply no hope of achieving the coordination necessary for such goods. Yet Frank keenly appreciates what, following Rawls, he calls the "burdens of judgment," which refer to the ways in which our differing experiences cause us in perfect good faith to see the world differently from each other. Because of the burdens of judgment, we cannot all agree on which laws deserve praise and which laws deserve condemnation.

Frank, again following Rawls, believes that in a just society laws must be justifiable to each and every individual who must be subject to them. Frank writes that "'Political' liberals . . . — I use John Rawls' name for us — shy away from coercion, of ourselves or of others. We want to feel that we always, when called upon, can give others 'public' reasons sufficient to justify the actual processes and practices of legal coercion in which we connive. Very roughly, public

reasons are reasons that the giver sincerely believes ought to count as such for any right-minded (a/k/a 'reasonable') political associate."[1]

The problem is that the burdens of judgment prevent us from fulfilling this basic precept of liberal legality. For how can the laws be justifiable to all when there is persistent, obdurate disagreement about political goods?

Frank adopts from Rawls a basic stratagem for solving this seemingly inescapable conundrum. He calls this a proceduralist solution, because it postulates that all individuals can agree to a procedure for making laws, even if they cannot agree on which laws should be made. If they agree to this procedure, then they have in some relevant sense agreed to the laws which the procedure produces, and hence laws will be, pro tanto, justified.

Although this is a "procedural" solution because it directs our attention to matters that are oblique to the substantive question of the justification of particular laws, it is also a "substantive" solution, because it requires us to agree on the desirability of a high-order system for making laws. Sometimes Frank calls this higher order system a "regime," and sometimes he calls it a "Constitution." In making this move, Frank frequently cites to this passage from Rawls:

> [O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy.[2]

This is exactly the point at which Frank's profession as *constitutional* scholar intersects with his passion for *philosophical* investigation. Frank presses the Constitution to answer the fundamentally philosophical demand of justifying to each and every citizen the application of ordinary laws that they might otherwise find merely coercive and oppressive.

One large difficulty is that this way of framing the problem situates the Constitution on the verge of a potentially infinite regression. If the burdens of judgment produce disagreement about the justifiability of ordinary laws, they might equally produce disagreement about the justifiability of the "principles and ideals" enshrined in the Constitution. And if there is persistent such disagreement, the whole proceduralist strategy fails. We are left holding the bag of unjustifiably coercive laws.

---

[1] Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345, 352 (2003).

[2] Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review*, 72 FORDHAM L. REV. 1407, 1409–10 (2004) (quoting JOHN RAWLS, POLITICAL LIBERALISM 217 (1996)).

We seem to be at the edge of a cliff here, but it is this precipice that Frank Michelman has spent a long, long time staring down. He has at different moments proposed a number of distinct solutions for bridging this gulf, ranging from a kind of epistemic trust in the specialized judgment of courts (in his book on Brennan), to a kind of Michelmanian constitutional patriotism that entails the brute historical contingency of an overlapping consensus produced by our common commitments to the shared constitutional enterprise of the nation.

Before I myself venture into this landscape of what Frank has called "damaged goods," let me first pause and stress what is perhaps too obvious to mention. Frank has posed an extreme dilemma under the pressure of a basically philosophical inquiry. Lawyers typically and willingly cede to political philosophers such abstract and contextless questions as whether law can be justified to each and every citizen. Legal scholars characteristically deal with more concrete and practical problems, like how to construct the rights and obligations of particular kinds of property, or how to regulate the freedom of speech. We do not aspire to imagine that what we propose will be acceptable to everyone, or that it must be justified to everyone. We try very hard to ascertain what will be good enough to be adopted by a judge, or accepted by a legislator, or endorsed by an administrator. From my perspective as a legal scholar, the urge to convince *everyone* — even the lesser included urge only to convince everyone who is merely *reasonable* — is a hubris and perfectionism specific to the philosophical enterprise.

And yet Frank, adopting the philosopher's vocation, has dedicated to this hope an immense amount of thought and deliberation, which he has applied to the very real and historically contingent content of our actual Constitution. Of course, being a superb lawyer, Frank knows that our Constitution does not consist simply of its text, but that it also encompasses what we do every day in the name of that text. And so Frank has a lot of explaining to do. He must bring the entire enterprise of judicial review to the bar of philosophical judgment.

Frank's single-minded dedication to this task has produced a depth and profundity of scholarship that is utterly singular in our profession. It has led Frank to author work that will last far beyond the merely topical and bounded horizon that characterizes the great proportion of legal academic writing. Frank pens for the ages, and this is because he poses problems that are timeless and eternal. If I had to identify the precise achievement that so distinguishes Frank's incomparable legal contributions, it is not bringing the texts of Rawls or Habermas into legal discussion. It is instead the importation into legal scholarship of the rigor of a disciplined *philosophical* sensibility, a sensibility that improves and elevates every legal issue it touches.

Of course there are reasons why we lawyers tend to avoid philosophers' questions in our work. One important reason is that philoso-

phers' questions tend to be posed so strictly as to paralyze all possible real life solutions. And in dealing with the law — and especially with subjects like constitutional law — one is faced first and foremost with real, practical problems of governance. It takes an inhuman discipline and detachment to approach these problems in a way that simultaneously embraces a legal apprehension of their practical implications and a philosophical understanding of their timeless truths.

Frank's ascetic fidelity to this tension has endowed him with what I can only describe as a kind of secular sacral quality, somewhat like Mahatma Gandhi. In the world of law, Frank inhabits a singular space. He seems unruffled by the mere contingencies of history, in which he is perfectly fluent, because he is so purely and devoutly committed to the play and flow of reason. Frank is the only constitutional theorist I know whom I would be tempted to describe as "innocent," in the sense of being untouched by the compromises that at one time or another soil every lawyer. A perfect example is his speech to the Israeli Knesset last December, when with the perfect courage of a Daniel, he parsed the constitutional difficulties involved in the commitment to the particularist goal of being a democratic *Jewish* state, rather than simply a *democratic* state.[3]

There is an underlying tension in Frank's characteristic stance, and it arises because the pragmatic horizon of the philosopher differs from that of the lawyer. The extent of this tension, and the concomitantly resulting strain in Frank's writings, is particularly vivid in an article that Frank wrote in 2000 for *Ratio Juris — Human Rights and the Limits of Constitutional Theory.*[4] For this article, Frank was asked to answer the question "Do human rights need democratic legitimation?"

To Frank's way of thinking human rights are like constitutional rights; they are constitutive of the entire constitutional order or system. A constitutional system can be rendered "respect-worthy" enough to legitimate the laws necessary for the goods of social cooperation only if it contains the right kind of human rights. We know that a system is respect worthy if it comports with right reason, and we know right reason does not yield to mere popular opinion. Frank is very firm on this point. As he put it in his book on Brennan, "[i]t is absolutely not possible to appoint democracy to decide what democracy is. . . . [L]ogic . . . bars democracy from . . . deciding the contents of

---

[3] *See generally* Frank I. Michelman, Keynote Address at the Conference on the 20th Anniversary of Israel's Human Rights Revolution (Dec. 19 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1976580.

[4] Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, RATIO JURIS 63 (2000).

the most basic of a dedicatedly democratic country's laws, its law of lawmaking."[5]

This is Frank speaking in his philosophical voice. As he says in *Human Rights and the Limits of Constitutional Theory*, it is simply "not a plausible view" that human rights need democratic legitimation, because popular opinion neither adds nor subtracts from the correctness of the constitutional principles that are necessary to legitimate law.[6] Frank writes:

> The category of human rights, then, by the very notion of it — call this Platonism if you will — has a democracy-independent, abstract and general content. . . . No strictly procedural fact of democratic debate or decision can settle the question of the rightness of [the content of human rights]. What settles the rightness question can only be intellectual competence — a competent accounting of the abstract and general content of human rights and of the apt concretization of this content for the country in question in its historical condition.[7]

This is quite a sharp and definitive assertion about the need to submit law to the priority of philosophical reason — a kind of Platonism if you will. The rightness of the content of human rights is to be determined by the competence of those who know how to think. It has nothing to do with the content of popular opinion.

Yet, as a law professor, Frank also knows our laws are not made by philosophers. It is vain to imagine that only the "competent" will determine the contents of our human rights. Speaking under the pressure of his legal vocation, therefore Frank seeks to transform the question into an inquiry about the *conditions* under which it could be morally right to give support to an established political regime that includes a set of human-rights interpretations.

Frank writes that "[r]ather than construing the question as asking 'Does the *rightness* — the truth or validity — of anyone's answer to the question of what are human rights depend on what any democratic procedure says about it?' we could construe it as asking 'Are there grounds for contending that acts and processes of maintaining and supporting a given political regime can be morally justified only on the condition that the regime's prevailing human-rights interpretations are effectively tested by democratic-discursive critical examination?'"[8]

If the question is whether the contents of human rights comports with "*true justice*,"[9] democracy can have nothing to do with it. But if instead the question is whether the presence of certain human rights

---

[5] FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 34 (1999).
[6] Frank I. Michelman, *supra* note 4, at 66.
[7] *Id.* at 67.
[8] *Id.* at 69.
[9] *Id.* at 70.

within a constitutional system can justify "support of an established political regime,"[10] then it might just be the case that

> a possible characteristic of the regime, in virtue of which everyone subject to it could abide by it out of respect for it, is that the regime's human-rights interpretations are in some way made continuously accountable to truly democratic critical re-examination, re-examination that is fully receptive to everyone's perceptions of situation and interest and, relatedly, everyone's opinion about true justice. If that is a true proposition, and if it further turns out that accountability to democratic critical examination is the *only* practically possible respect-worthiness-conferring virtue that a regime of human rights interpretation might have in conditions of reasonable interpretive pluralism, we would then have explained how recourse to a democratic procedure can possibly confer normative legitimacy on a human rights regime.[11]

The turn in Frank's argument is highly revealing. Frank begins with the idea that the content of a system's human rights determines the respect worthiness of the system and hence the justifiability of its laws. The appropriate content of human rights — the "true justice" of their platonic content — can be known only through the exercise of "intellectual competence," which is to say through a form of reason that is immune to popular opinion.[12] Yet in the middle of his article Frank pivots to the quite different idea that a regime can (also?) potentially be rendered respect-worthy by reference to "everyone's *opinion* about true justice."[13] So of course the question arises as to why, if the content of human rights necessary to justify a regime can be known only through competent *reason*, mere popular *opinion* can serve nevertheless to render a system respect worthy.

The tension between these two positions exposes precisely the strain between legal and philosophical perspectives. The significance of Frank's pivot is best illuminated through the lens of Hannah Arendt, who has thought longer and harder about the relationship between truth and politics than just about anybody else. Arendt famously theorizes:

> Political thinking is representative. I form an opinion by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent; that is, I represent them. . . . The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusions, my opinion.[14]

---

[10] *Id.*
[11] *Id.* at 73.
[12] *Id.* at 67.
[13] *Id.* at 73.
[14] Hannah Arendt, *Truth and Politics*, *in* BETWEEN PAST AND FUTURE 241 (1978).

Political thinking thus rests on opinion, and it is in this respect sharply incompatible with philosophical reason.

> [H]istorically the conflict between truth and politics arouse out of two diametrically opposed ways of life — the life of the philosopher . . . and the way of life of the citizen. To the citizens' ever-changing opinions about human affairs, which themselves were in a state of constant flux, the philosopher opposed the truth about those things which in their nature were everlasting and from which, therefore, principles could be derived to stabilize human affairs. Hence the opposite to truth was mere opinion, which was equated with illusion, and it was this degrading of opinion that gave the conflict its political poignancy; for opinion, and not truth, belongs among the indispensable prerequisites of all power. "All governments rest on opinion," James Madison said, and not even the most autocratic ruler or tyrant could ever rise to power, let alone keep it, without the support of those who are like-minded.[15]

Consider Frank's fierce declaration that it is simply "implausible" to imagine that democracy has anything to do with the determination of the human rights necessary to justify the legitimacy of a regime. The opinions of the hoi poloi are irrelevant to this question. The question can only be answered by exercise of competent reason. And the implication of this conclusion seems to be that the content of the constiutiton by which the masses are to be governed must be determined by those who possess philosophical reason, which is to say by philosophers. Only philosophers can discern the content of true justice.

It is precisely this implication that leads Arendt to assert that, "[s]een from the viewpoint of politics, truth has a despotic character,"[16] and that "[t]ruth carries within itself an element of coercion."[17] Truth is singular and compels agreement; it is monologic. Politics, by contrast, requires plurality and disagreement; it requires dialogue. From these contrasts, Arendt reaches the paradoxical conclusion that "every claim in the sphere of human affairs to an absolute truth, whose validity needs no support from the side of opinion, strikes at the very roots of all politics and all governments."[18]

---

[15] *Id.* at 232–33.

[16] *Id.* at 241.

[17] *Id.* at 239.

[18] *Id.* at 233. As Arendt further notes:

> The story of the conflict between truth and politics is an old and complicated one . . . . Throughout history, the truth-seekers and truthtellers and been aware of the risks of their business; as long as they did not interfere with the course of the world, they were covered with ridicule, but he who forced his fellow-citizens to take him seriously by trying to set them free from falsehood and illusion was in danger of his life: "If they could lay hands on [such a] man . . . they would kill him," Plato says in the last sentence of the cave allegory.

*Id.* at 229.

Arendt's analysis illuminates the pivot in Frank's argument in *Human Rights and the Limits of Constitutional Theory*. Frank first approaches the question of human rights and democratic legitimation entirely within the framework of philosophical reason. He asks how we can know the contents of human rights necessary to justify a regime. He inquires into the truth of the matter. Democracy is irrelevant to this question. But he then flips the question to ask how a regime can be legitimate. Because Frank knows perfectly well that philosophical truth is itself incapable of compelling political agreement, it cannot ground legitimacy in the life of any actual regime. Plato's efforts in Syracuse did not end well.

Frank knows that agreement — that is to say opinion — is indispensable to political governance, and therefore to law. He is thus drawn to conclude that legitimacy itself can be based upon opinion, and not solely upon the exercise of philosophical reason.[19] Although Frank begins with the thought that the respect-worthiness of a regime depends upon the truth of the contents of its human rights, he is inevitably led to the distinct conclusion that a regime cannot be respect-worthy unless it is responsive to the freely formed opinion of its people.

Why might this be so? Arendt suggests that Frank has shifted from the question of philosophical truth to the question of political legitimacy. Frank has crossed the border from philosophy into law. Law, after all, is less about truth than it is about issues like governance, authority, and legitimacy. These issues, Arendt reminds us, always refer to the opinions of the governed. These opinions are not to be confused with the truth of the matter. Law, as distinct from philosophy, is a creature of opinion and the political sphere.

It is easy these days to dismiss Arendt's work, because we are apt to hear references to "opinion" as referring merely to the empirical popular opinion that political scientists purport to measure with their endless polls. But this is not what Arendt has in mind. Arendt's invocation of political opinion refers to the faculty of judgment, which is often captured by the idea of "reasonableness." Frank himself often modifies his analysis by quite precisely defining the audience of persons to whom the state must be justified — it must be justified only to "reasonable" persons.

---

[19] I suggest that it is for this reason that Frank concludes his speech to the Israeli Knesset by affirming that:

> It is impossible to see how a package of constitutional essentials could meet a standard of upholding and confirming the social bases of self-respect for all citizens, if it does not allow everyone full freedom to press for acceptance of their own conscientiously held views using all the individual and associational means that a liberal democracy normally allows.

In the law we have a great deal of experience conceptualizing "the reasonable person." The reasonable person is, like law itself, a creature of what Arendt means by "opinion." The reasonable person does not know what is "reasonable" by taking a poll, in the manner of a political scientist. Neither does the reasonable person act like a philosopher and exercise independent reason to determine what is right. Instead the reasonable person makes a judgment about what to do, and in making this judgment the reasonable person is expected to take account of what reasonable people actually think. [20]

Law actually employs "reasonableness" as a performative concept. As law decrees the "reasonableness" of behavior, so through legal regulation law *creates* the community in which such behavior is, as a normative matter, regarded as right. Legal judgments of reasonableness are active and normative; they seek to establish the very political community in which they can be vindicated. They are bets on the future. They are founded in opinion but they aspire toward truth. If they succeed in becoming true, it is because they have created the social solidarity in which they correspond to actual warranted beliefs.

"Reasonableness" in the law is the result of a dialectical and temporally extended process. We might think of this process as an effort to transcend *both* the descriptive public opinion of political science *and* the synchronic truth of philosophy. How this process works is a complex question, which ought perhaps to be taken up on another day. For now it is sufficient to observe that reasonableness in law precisely mediates the tension between truth and legitimacy that so informs Frank's work. It is toward reasonableness in law that Frank moves in the conclusion of *Human Rights and the Limits of Constitutional Theory*.

Frank's writing has for decades served as the starting point for the rest of us who seek to understand the mysterious and complex phenomenon of constitutional legitimacy. Frank's tectonic efforts to yoke philosophy and law make constructively visible the tension that lies between the goods of social union and the goods of truth. More than anyone else living, Frank has illuminated how deeply important, and yet how unnatural, is the ambition of setting reason and politics in dialogue, one with the other. He has attempted what seems beyond human capacity, and in so doing has earned our deepest admiration and affection.

---

[20] For a discussion, see generally Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort,* 77 CALIF. L. REV. 957 (1989).