THE LEGAL THINKING OF JEROME FRANK:
A STUDY IN CONTEMPORARY AMERICAN
LEGAL REALISM

DISSertation

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JULIUS PAUL, B.A.
The Ohio State University
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Approved by:

[Signature]
Adviser
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THE LEGAL THINKING OF JEROME FRANK:
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INTRODUCTION

Social science can thus in the long run best attain its goal when those who cultivate it care more for the scientific game itself and for the meticulous adherence to its rules of evidence than for any of the uses to which their discoveries can be put....1

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We may now venture a rough definition of law from the point of view of the average man: For any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law, but only a guess as to what a court will decide.2

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...In spite of all the irrefutable logic of the


realists, men insist upon believing that there are fundamental principles of law which exist apart from any particular case, or any particular activity; that these principles must be sought with a reverent attitude; that they are being improved constantly; and that our sacrifices of efficiency and humanitarianism in their honor are leading us to a better government. The truth of such a philosophy cannot be demonstrated or proved. It exists only because we seem unable to find comfort without it. 3

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I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death. 4

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This is the study of one man's ideas about the law. It will be a systematic and critical assessment of the ideas of a modern American legal thinker, Judge Jerome Frank, who has been a leading exponent of the so-called school of American "legal realism."

Since this is a philosopher's quest, there will be many pitfalls along the way. To begin with, we immediately run into trouble when we use the term "philosophy." We might roughly think in terms of two categories, those who consciously and systematically write on philosophical


4 Learned Hand, "The Deficiencies of Trials to Reach the Heart of the Matter" in 3 Lectures on Legal Topics 89 (1926), p. 105. Frank regards Judge Hand as "our wisest judge" and continually refers to this particular passage.
matters, or who write philosophically about matters that fall into the realm of philosophy. Then there are those writers who are neither conscious nor systematic in their philosophical quests, but who nonetheless write about ideas with a strong philosophical bent, and who enjoy the game regardless of what they are labeled. Jerome Frank falls into the latter category.

I chose to write on Judge Frank for a number of reasons. Since he is a man of eclectic interests, the challenge of systematic organization of his ideas was ever-present. Most of all, he is still relatively young (65) in terms of a fixed philosophy of law, having been a federal judge for only thirteen years. He has changed and expanded some aspects of his original writings, if not always successfully, certainly with sincerity of purpose. 

Frank devoted an entire appendix to his third book, *If Man Were Angels* (App. V, pp. 276-315) to answering the critics of his first book, *Law and the Modern Mind*. Of course, much of this material reinforced and rationalized the ideas that he had expressed in his earlier work.

Perhaps the significant element in my choice of Jerome Frank was the fact that he has been a provocateur in recent American legal thought. Irrespective of how well-accepted his ideas have been, they have certainly created a maze of
critical discussion in legal periodicals and among students of jurisprudence. How much really valuable work has emerged from these numerous hornet's nests is hard to say, but there is little doubt that Jerome Frank has been a key figure in the arguments concerning the validity and efficacy of American "legal realism." Part of this dissertation will deal with some of the cardinal criticisms of Frank's work, as well as his rejoinders to his critics.

Therefore, the main purpose of this paper will be to examine systematically Jerome Frank's philosophy of law and its role in modern society. A mere systematic arrangement of a man's ideas is useful, but not sufficient in itself, so that my second purpose in writing on Jerome Frank will be to attempt a critical evaluation of his ideas and their place in recent American legal thinking.

What is meant by the term, "the modern mind," and especially the modern legal mind? What significant ideas have helped to mold American legal thought in the twentieth century? These, and many similar questions, will plague us throughout this paper, but this is to be expected. Ideas do not exist in a vacuum, any more than institutions do. A man's ideas, as I view the problem before us, ought to be studied in a context of either intellectual or institutional history, or both. The "modern mind," whatever it is, is the result of the accumulated knowledge of many minds, of many fields of endeavor, and of much intellectual
6 "A civilization is, however, something more than a complex of institutions; it always embodies a system of ideas, an ideology. Whether such ideologies have clearly come into the consciousness of the members of a community, whether they are only dimly and vaguely apprehended, whether they remain quite completely within the field of the sub-conscious, they constitute the counterpart, the reflex, the reciprocal, of the system of institutions. Institutions and ideologies are the warp and woof of the fabric of history. A study of either by itself is incomplete and misleading...." Walter J. Shepard, "Democracy in Transition" 29 Am.Pol.Sci.Rev. 1 (1935), pp. 1-2.

Hence, I always want to keep Jerome Frank in the angle of vision of modern society and modern thought, because these are the things that have influenced his thinking, and which his ideas, to a certain extent, have helped to shape. Legal philosophy, or for that matter, any philosophy, operates in a symbiotic relationship to the outside environment and to the thought outside of its own purview.

Since I am only a young and recent student of jurisprudence, I feel humble in tackling a man of Judge Frank's wide experience in the law. I must admit that I was attracted to his thinking not via the route of jurisprudence, but through his treatise on history and the scientific method, Fate and Freedom, published in 1945. Here, I thought, was a man with fresh ideas. Erratic at times, impulsive and excitable, Frank was above all a man who
liked to delve into questions of value, of means and ends, and into those areas of philosophy that attracted his special attention, metaphysics and the scientific method.

Jerome Frank has been a trail-blazer in the area of the relations between law and the social sciences. Especially in his early espousal of psychological theory, he has been a man who refused to be tied to the parochial "every man to his own" frame of reference. If this has not always culminated in accurate and systematic research on his part, it has at least resulted in the desire on the part of others to venture forth into unknown areas outside of jurisprudence.

Although many writers in the field of American jurisprudence have agreed with some of Frank's ideas, he has few followers and practically no proteges. But many men have followed him in his quest for a more thorough understanding of the relationships between law and the other areas of man's knowledge of himself. In this sense, I feel that he is a figure of considerable importance and one who deserves the serious attention of any student interested in the legal development of our day.
A Short Note On Methodology

The reader ought to be forewarned about the danger of value-judgments, both Jerome Frank's and my own. In writing a dissertation of this kind, no really empirical test of a man's ideas can be made. The only yardstick that I will use for measuring the influence, as against the validity or the accuracy, of Frank's ideas is the quantity and the quality of legal criticism of his work.  

7 For example, I found 34 book reviews of *Law and the Modern Mind*, 28 of them in law journals. In the case of *Courts on Trial*, I found 37 book reviews, 28 of them in law journals. Of the 56 reviews of these two books published in various law journals, a large number were written by prominent figures in American law. In my opinion, this in no way indicates the quality of Frank's writing, but it does show the wide interest in his work. Very few other books in the field of American jurisprudence attracted so many reviewers.

This leads me to the value-judgments of Frank's appraisers, and we compound possible error with even more possible error. This sounds somewhat defeatist, which it is not meant to be, but the danger in any philosophical quest of this kind is to ignore the almost innate pitfalls of philosophical inquiry, especially in the social sciences. The problem of selecting source-materials (what materials and whose materials) inevitably raises the question of how and
why these materials were used. Objectivity in social science research, according to this view, is a matter of degree, and depends upon the methodology used and the ability of the individual researcher to understand and evaluate the materials he uses. 8

8 I discussed this problem in more detail in a paper, "Concerning Value-Judgments in Political Science," which I delivered at the first conference of the International Society for General Semantics at the University of Chicago, June 22, 1951.

I am not one who believes that a mere acknowledgment of value-judgments is sufficient in itself. Even the learned Max Weber knew that self-awareness is not enough. At the outset, let it be said that I will make judgments about Frank's work, but these will be properly labeled as such, so that the reader can distinguish between what Frank said and what I think about what he said.

I have read all of Jerome Frank's published writings on law and politics, and as much criticism of his work as I could find. These will serve as my primary source-materials. However, my understanding of his work and the objectivity of my critique (in short, my value-judgments) can always be questioned.

In evaluating Frank's writings on the law, I have tried to use many different views of his work. The picture, in
realities, is not always a clear one, for there are strong arguments both for and against most of Frank's ideas. My purpose in this paper is that of assessing his work in terms of the critical insights of prominent men in the field of American jurisprudence, and not merely the knowledge of the field that I could bring to bear on Frank's work.

Immersion in a man's work is both necessary and dangerous. Sometimes it becomes almost impossible to extricate one's self from the ideas that are being examined. To deal philosophically with any body of thought requires some inspiration; yet, this need not degenerate into either preaching or salesmanship. I do not intend either in this paper. I hope that the reader can both enjoy and learn from this exegesis of a man's ideas.
The first section of this dissertation will deal with the major changes in American legal thinking since the turn of the century. This will serve as a preface to my discussion of the school of American "legal realism," of which Jerome Frank is a major figure. I will also attempt to show the many different variations of thought within this school, and distinguish Frank from the men who have seriously differed with his conception of legal realism.

Next, I will turn to the main body of Jerome Frank's legal thought. Most of his writing on law breaks down into five main categories which I will use: the fetish of the legal myth of rule certainty (what Frank calls the "basic legal myth"), where Frank is strongly influenced by the findings of modern child psychology; the so-called upper-court myth, where he criticizes the failure to study the actions of trial courts, or what he calls "court-house government"; the role of the judge in the judicial process (are judges human? do they act on the basis of mere intuition or "hunch"?), where Frank discusses the complex nature of judicial fact-finding, the role of the judicial "hunch," and related matters; the work of the jury, where Frank expresses grave doubts about the utility of the jury
system and suggests a number of improvements; and modern legal education, where Frank severely criticizes the Langdell-Harvard Law School case method of teaching law and suggests many ways for improving the education of lawyers so that they can better serve as well-equipped members of modern society.

Following my exposition of Frank's main ideas and his proposals for reforming the judicial system in America, I will discuss the major criticisms of Frank's work and that of other legal realists. In the appendices at the end of the dissertation, I will include a list of some of the cases that Judge Frank has decided since 1941, and a glossary of words and phrases used in this paper.

If the reader is interested in Jerome Frank's biography, let him now turn to the short biography (appendix I) at the back of this paper, which summarizes his life as a lawyer, government counsel, administrator, writer, teacher, and now federal judge.
SECTION ONE

THE PLACE OF LEGAL REALISM IN RECENT AMERICAN LEGAL THOUGHT: PROLEGOMENON TO THE LEGAL PHILOSOPHY OF JEROME FRANK

*****
The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.1

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At any rate, legal trends of the day raise problems which reach far below the experience of our recent past and turn up for inspection some of the deepest principles of the Anglo-American legal system.2

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I use the phrase "the law" in the sense of sequences of external facts and their concrete legal consequences through the concrete operation of governmental machinery.3

***

But in a general way it may be said of the sociological jurists as compared with the nineteenth century schools that they are concerned not so much with the content of a body of laws as with its working. They think of it not as necessarily made or necessarily found but as a social institution which may be improved by conscious effort, whether its content is made or found or both. They urge as the basis of its authority the social ends which law serves. They do not think of either custom or statute as necessarily the type of a law but regard the form of legal precepts as but means to ends which are of more importance. Chiefly they are positivists or neorealists but their pragmatist method, as has often been pointed out, is consistent with more than one


metaphysical doctrine.  

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...Law defines a relation not always between fixed points, but often, indeed oftenest, between points of varying position. The acts and situations to be regulated have a motion of their own. There is change whether we will it or not.

***

If we were to study the history of western thought since 1850, perhaps the four most important writers of the past century in terms of their impact on modern American jurisprudence would be Marx, Darwin, Freud, and Dewey. Economic determinism, evolution and historicism, positivism, pragmatism and instrumentalism, and psychoanalysis have all had an influential part in shaping the main currents of the modern legal mind.

The past century has been an era of almost miraculous changes, not only in terms of political evolution, but also in terms of the rapid rise of modern technology, the growth of cities with all of the manifold problems of urban life,
the growth of centralization of governmental power in the democracies as well as in the neo-dictatorships and totalitarian systems, the rise of modern mass communications, and lastly, the birth of the atomic age.  

6 Cf. : "If legal history is read aright, these changes will impose a heavy burden upon the legal order. For the law which always lags behind the social process will have to be brought into some working proximity with these facts." Aumann, op. cit., p. 278.

But if this past century was a century of great change, it was also an "age of anxiety," to borrow the phrase of poet W. H. Auden, an age of modern science that disdained things "metaphysical," an age which took pride in the material accomplishments of its empirical methods.  

7 Karl N. Llewellyn, writing on the period from 1870 to 1900, says: "And what philosophy may hope for acceptance and utilization, in such a situation? Positivism. Let us forget "right reason"; let us forget the bastard something known as morality; let us acknowledge merely the obvious fact, in law, that law as is, is law. Justice may be an ideal; in actuality it is an accident. A logical system exists to preserve the law as is, and any other thinking is a somewhat absurd idealistic tendency, divorced from facts of life." "On Philosophy in American Law" 82 U. of Pa. L. Rev. 205 (1934), p. 208.
And law, which has always been considered a conserving force in society, could not remain unaffected by these changes in the mode of man's living and in the shape of his thinking. Law was bent in many directions, and felt the impact of many influences, sometimes in harmony, and sometimes contradictory. Law as idea and law as institution has helped to shape, and in turn was shaped by, this past century of scientific and intellectual discovery. The purpose of this chapter will be to sketch some of these key ideas in relation to the various schools of jurisprudence that grew up around them.
Holmes' Legal Positivism: The Forerunner of Legal Realism

The impact of Darwin, and Comte after him, was felt heavily in jurisprudence. Law as a fixed mechanical guide, as a given set of rules that a judge could easily discover in the accepted treatises and codes, was shattered by the positivistic and scientific impact of the late nineteenth century. The only certainties spared were the immediate certainties of sense, that is, of experience. All generalizations were characterized as merely tentative or probable. The search for universal truths was condemned as chimerical. Strangely enough, the positivists, resisting the Hegelians all along the line, were forced to defend the outworn doctrine of the possibility of certain knowledge arising from experience. The application of positivism to jurisprudence was immediate. Whereas legal facts or specific legal instances could be known with certainty, legal generalizations must always be tentative. With Hegelians battling the certainties of fact on the one hand and the Positivists the certainties of 'law' on the other, it is no wonder that the nineteenth century became, par excellence, the century of 'uncertainties.' Our guiding thread still leads us through the maze. Legal autonomy is attacked separately from two sides. The next philosophical stage witnesses an attack on both sides together." Thomas A. Cowan, "Legal Pragmatism and Beyond," ch. VII, pp. 130-142 in Interpretations of Modern Legal Philosophies; Essays in Honor of Roscoe Pound, ed. by Paul Sayre. N.Y.: Oxford Univ. Press, 1947, p. 137. Cowan's last sentence refers to legal pragmatism.

late Justice Oliver Wendell Holmes was the man who laid the groundwork for the various schools of "legal realism" that
followed him into the early part of the twentieth century.

In rejecting the mechanistic approach, Holmes took the philosophy of positivism, which excluded everything but the knowable, and applied it to the law. By centering his attention on experience (as against mechanical legal rules, logic, or natural law), Holmes forged the link between positivism and pragmatism, and thus gave rise to the functional study of actual legal events.\(^9\)

\(^9\) "...The ultimate aim of positivism is to separate the ought from the is for the sake of the is, while the aim of the natural law philosopher is to serve the ought while refusing to draw a sharp distinction between the ought and the is...." Harold G. Reuschlein, *Jurisprudence — Its American Prophets; A Survey of Taught Jurisprudence.* Indianapolis: Bobbs-Merrill, 1951, p. 439.

In the mind of Jerome Frank, Justice Holmes was the "completely adult jurist," a man whose monumental influence was the intellectual foundation for a full fifty years of jurisprudential controversy.\(^10\)

\(^10\) "He did not content himself with substituting an accurate description of legal rights and duties for a false description. He pointed to the fundamental vice in most prior legal thinking. He made it clear that traditional jurisprudence is founded upon the erroneous notion—sometimes expressed but often implicit—that there are self-evident truths about the judicial process which must not be and cannot be questioned, from which self-evident truths a legal system
can be worked out logically as the ancient geometers had worked out their systems from self-evident geometrical axioms. Holmes saw that law is not pure mathematics; that the so-called self-evident truths of the traditional jurisprudence are not self-evident; and that many of the axioms of legal thinking do not appear on the surface but are concealed and must be dug out for inspection." Frank, "Mr. Justice Holmes and Non-Euclidean Legal Thinking" 17 Cornell L.Q. 568 (1932), p. 571.

Those writers who felt that legal rules are neither self-evident nor absolute took Holmes to their bosom, and the battle over the meaning of much of what Holmes wrote was begun in earnest. More than any other statement by Holmes

ll "The revolt against mechanistic doctrines in law, like that against mechanistic doctrines in the other social sciences, was a revolt from forms to function, from concepts to activities, from statics to dynamics, from individual ends to social ends, from the satisfaction of intellectual ideals to the satisfaction of human wants. It sought to rescue law from the tyranny of the past and give it to the present, to rescue it from the dead and give it to the living. It asserted that law was made for man and required it to conform to the needs and wants -- and even the vagaries -- of men. It challenged at once the arrogance and the irresponsibility of jurists who regarded themselves as above the battle and yet, like gods of Greek mythology, descended from time to time to enter the fray. The challenge was, in fact, an old one, but not until the turn of the century did it achieve some degree of respectability...." Henry Steele Commager, The American Mind: An Interpretation of American Thought and Character Since the 1880's. New Haven: Yale Univ. Press, 1950, p. 375.

the following quotation has been the hallmark of modern American legal thinking, especially the school of "legal
realism waits:

The actual life of the law has not been logic; it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.12


The assault on logic and especially on syllogistic reasoning was carried forth with vigor by John Dewey and his school, whose pragmatist bent was felt throughout modern American education and philosophy. As in the case of Holmes, Dewey felt that logic had only limited utility, and that the core of an idea was how it worked in actual practice, not its logical consistency or inconsistency.13

13 Referring to his own arguments against logic, Dewey, in an article which created widespread interest, wrote: "They indicate either that logic must be abandoned or that it must be a logic relative to consequences rather than to antecedents, a logic of prediction of probabilities rather than one of deduction of certainties." "Logical Method and Law" 10 Cornell L.Q. 17 (1924), p. 26. Needless to say, Dewey as philosopher was much admired by some of the legal realists.

But when Holmes chose "experience" over "logic," what
did he really mean? Was this meant to be the death-knell for logical inquiry in the law? Did this mean that legal ideas and jurisprudence in general were not themselves part of the history of law? Or was Holmes merely giving experience the prior claim to attention over logic, which had held sway during the long pre-twentieth century era of analytical jurisprudence? These and many other questions have plagued the "legal realists" for decades and still remain burning questions.

Nevertheless, Holmes' significant contribution to American jurisprudence was his positivistic approach to the study of legal phenomena, an approach which laid firm foundations for the functional, sociological, and realistic schools of legal thought that followed Holmes' assault on mechanistic jurisprudence.14

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Once the myth of mechanical legal rules was broken, and Justice Holmes' positivistic approach to law had gained popularity, other areas of the law became vulnerable to broader analysis. Law as an institutional means for social control, as a device that men created for their own social good, came into view.15

15 "...The attitudes of the sociological jurist is essentially functional. With the debates of Austin, Gray, and Carter as to whether law is found or made, the sociological jurist has little patience. He rather looks upon the law as a social institution which may be consciously bettered by deliberate effort whether through a process of making law or finding it. The sociological jurist affirms the efficacy of effort. He finds the sanction of law not in the force of Austin or the custom of Carter but in the social ends which law is designed to serve. From this it follows that the sociological jurist has no essential preference for any one type of legal precept (e.g. statute or custom) except as one particular type of precept may more effectively serve as a means to secure the desirable end in a particular situation. Lastly, the sociological jurist is a pragmatist, unless perhaps he be a rigid positivist or a neo-realist. To be either positivist or neo-realist is often not inconsistent with a sympathetic adherence to a set of helpful idealistic principles which, most likely than not, were cradled in the metaphysical school of philosophy." Reuschlein, op. cit., pp. 129-30.

Roscoe Pound, as law teacher and as publicist, did more than any other man in America to carry legal analysis into the interstices of sociology itself. Pound's impact on
American legal education, as well as on contemporary jurisprudence, has been enormous. As an innovator, Pound had first to free himself from the bonds that the mechanistic and rationalistic approaches of the analytical and historical schools of jurisprudence of the nineteenth century had placed on juristic thought. Having been trained as a botanist in his early years (he held a Ph.D. in botany from the University of Nebraska and taught that subject there) before he went to the Harvard Law School, Pound had an unusual background for the task he set before himself. Some writers on American law feel that Pound's botanical training is responsible for his taxonomic bent in jurisprudence. This, I would think, was an asset in his intellectual training, not a weakness. Nevertheless, Pound had a thorough grounding in the scientific method of the natural sciences, unlike most of his later detractors, who regard themselves as "scientists."

But to some legal realists, especially Jerome Frank, Pound was a right-wing traitor who distorted Holmes' legal teachings. Whereas, some legal realists could dispense

"Pound was the right wing of the Holmes' movement. It was in the highest degree unfortunate that the first vastly influential teacher to take over Holmes' insight should have warped it. It might almost be said that the Holmes' point of view would have been less retarded today in its consequences had Pound opposed it. For his mode of partially adopting it was to confuse and mislead those whom he influenced." Frank, "Are Judges Human?" 80 U. of Pa. L. Rev. 17, 233 (1931), p. 18.

with values as such, with ought-ness (which they replaced
with the is-ness of legal activity), Pound felt that men's ideas about law are still an integral part of jurisprudence and cannot be ignored merely because some men have exaggerated the use of metaphysics in the past.\(^6\)

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18 "This question of ought turning ultimately on the theory of values is the most difficult one in jurisprudence. Those who long for an exact science analogous to mathematics, physics, or astronomy are inclined to seek exactness by excluding this problem from jurisprudence altogether. But such a jurisprudence has only an illusion of reality; the significant question is the one excluded." Pound, \textit{op. cit.}, p. 485. See ch. IV, "The Problem of Values," in Pound's \textit{Social Control Through Law}. New Haven: Yale Univ. Press, 1942, pp. 103-34.

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The study of law required an entirely new viewpoint of man's needs and desires and of the new social institutions that were being created in an era of rapid social change. If law was to be pragmatic, ends as well as means had to be kept in view. To be exclusively empirical was to ignore aspects of law that were nonetheless present. The law was no longer a simple rational object of study, but was a complex system of interrelationships.\(^7\)

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19 "For the simple picture of the legal order painted by the historical school, with its one ideal to which it attributed and by which it solved everything, must give way before the results of psychology and psychological sociology. We must give up the quest for the one solving idea. The actual legal order is not a simple rational thing. It is a
complex, more or less, irrational thing into which we struggle to put reason and in which, as fast as we have put some part of it in the order of reason, new irrationalities arise in the process of meeting new needs by trial and error.... If the argument up to this point has been sound, we require an interpretation of legal history that will take account of the men who act in finding and adapting legal materials, of the materials with which they act, of the circumstances under which they act, and of the purposes for which they act...."

Pound, Interpretations of Legal History. Cambridge: Harvard Univ. Press, 1946, pp. 21, 141. It is my feeling that Dean Pound's early training as a botanist gave him an invaluable sense of organic unity and interrelationships, and of the complexity as well as the unifying elements of nature and of human knowledge. Had his botanical training come after his law study, there is no telling what his future might have been. However, it can be positively asserted that regardless of this training, Frank still regards Pound as a wolf in sheep's clothing.

What Pound sought was not a denial of the positivistic trend, but rather a channeling of the movement into what he called social engineering. Law as an instrument of social control at all levels of governmental behavior was the core of Pound's philosophy of law. The study of the law in action was an important, but not the exclusive, part of Pound's sociological jurisprudence. 20

20 "Sociological jurisprudence may be said to be an attempt to reconcile the legitimate demands of liberty and authority, individualism and solidarism, change and stability." Moses J. Aronson, "Tendencies in American Jurisprudence" 4 U. of Toronto L.J. 90 (1941), p. 99. Cf. Max Radin: "The law is not right reason, nor the means of a good life, nor the framework of society, nor the foundation of the world, nor the harmony of the spheres. It is a technique of administering a complicated social mechanism, so complicated that it reaches at some point almost any sphere of human conduct, but often only barely reaches it. The technique can dis-
Some writers have labelled Pound's philosophy of law as "functional" jurisprudence. Others call it "pragmatic" or "experimental" in its approach. But regardless of the label, the major tenet of Pound's school of jurisprudence is that the sanction of law is not found in the command of a sovereign, or in a mechanical set of legal rules or principles, or even in the traditional customs or mores of the community, but is found in the social ends which law, as an instrument of the community, must serve.

In order to understand and describe what the law is, we must understand what the law does. But always implicit in the balancing of social interests, and in the preservation of the community's stability, is the problem of values. Pound has never denied this, any more than William James denied the reality of religious experience. The problem of values, from the point of view of the sociological jurist, is not the search for a final set of eternal truths, but is rather the choice of values that can best serve the social interests of a community in a particular situation. Dig deep into the Poundian thesis and the pragmatic test will always pop up. It is implicit in almost all of the so-called functionalist writings on the law.21
"Sociological jurists looking at law functionally have been more interested in what law does and how it does it than in what it is and so have looked primarily at the legal order." Pound, "Jurisprudence," 8 Ency. of the Soc. Sci. 477 (1935), p. 478. For a critical discussion of Pound's views, see Eugene V. Walter, The Idea of Justice in Sociological Jurisprudence. Unpublished Doctoral dissertation, University of Minnesota, 1953. Dr. Walter regards the neorealist "group" as a part of the sociological school.

21 Institutional and Anthropological Approaches to Law

Whereas Pound's emphasis was on the law itself, and its functioning in relation to the total social organism (society), other writers took the pragmatic, functional approach another step further in their institutional and anthropological approaches to the study of law. The entire basis of legal "reality" was broadened to include the study of all of the influences that helped to shape the legal order, especially in an era of dynamic and rapid social change.22

Douglas, Shanks, Berle, Means, Arnold, Hamilton and others studied law institutionally in terms of the *economic order*. Karl Llewellyn chose to study a primitive society, the Cheyenne Indians of the American Southwest, in order to see how legal sanctions differ in various cultures.


Others merely swept legal study into the whole panorama of the social sciences.
Still others carried the anthropological and comparative approaches to law into the field of comparative international law. Sometimes the comparison was on the level of ideas; at other times, the level of institutions. Noteworthy examples have been the studies in comparative international law at the Harvard Law School, and the studies on Soviet law and jurisprudence by Professor Harold J. Berman at the Harvard Russian Research Center and Professor John M. Hazard at Columbia University's Russian Institute. 26

26 Professor Hazard, both in his writing on Soviet law and jurisprudence, and on the teaching podium, has tried to be the dispassionate observer of Soviet legal behavior. In my opinion, these efforts have not always been successful because Soviet law in theory is sometimes quite different (at times radically different) from Soviet law in action.

The recent founding of the American Journal of Comparative Law, edited by Professor Hessel E. Yntema, is another
example of this approach. Yet, despite their topical differences, all of these approaches to the study of law are held together by a common desire to study the law in action, whatever the tools of analysis might happen to be. Some writers have used economic analysis as the core of their studies, others sociological tools (e.g., Jerome Hall and the Gluecks), and still others, the anthropological study of legal institutions and social mores. At the root of these various approaches to the study of law, one can almost always find the pragmatic tradition laid down by Holmes, Dewey, Pound, and their followers. 

27 Cf.: "Effectively, the law is what it does....It exists, so to speak, in the interstices of the social structure and regulates, more or less, all the exchanges between the elements of that structure. The law is not a body of abstract rules under which cases are formally subsumed. It is more truly a tissue of interacting elements of human behavior, beginning with the formulation of a rule by a legislature, continuing in the decision of a court and the consequent action of an official, and having its final incidence in the modified behavior of those for whom or against whom the law is enforced....For a knowledge of the actual interrelationships of human beings, of their actual behavior, and of the effects of their behavior, is necessary to that conscious and methodical choice of ends and means which the scientific study of law requires." George H. Sabine, "The Pragmatic Approach to Politics" 24 Am.Pol.Sci.Rev. 865 (1930), pp. 878-9.

With the advent of Freudian psychology and Watsonian behaviorism, another school of jurisprudence came into being, viz., behavioristic jurisprudence, which was short-
lived and perhaps only a transitional stage in the subsequent development of the psychological side of American legal realism. Behavioristic jurisprudence was much too mechanical for the emancipated "functionalist" writers of modern vintage. Although it could add some light to the behavioral study of judicial action, it was far too monistic in its approach to legal science. In actual practice,

28 E.g., G.H.T. Malan, "The Behavioristic Basis of the Science of Law" 8 A.B.A.J. 737 (1922) and 9 id. 43 (1923).

however, the behaviorists were not any less dogmatic in their assertions than some of the addicts to Freudian psychoanalysis, whom I will discuss next.
**Legal Realism and the Psychological Approach to Law**

George W. Paton, reviewing the literature of modern jurisprudence, has attempted a classification of writers advocating a functional approach to law. Paton places Roscoe Pound's sociological jurisprudence in the "right wing" of this modern trend in American law, and the legal realists in the "left wing" of the functional school;²⁹


Jerome Frank is then the left wing of the left wing.

Since most of the legal realists would trace their origins to the philosophical skepticism of Holmes, the real problem is not that of finding the origin of their ideas as much as it is the variation in interpretation of what American legal realism is supposed to represent. Karl Llewellyn has vigorously denied the existence of a single school of legal realism.³⁰ And Roscoe Pound has always reminded his

³⁰ "Some Realism About Realism---Responding to Dean Pound" *Harv. L. Rev.* 1222 (1931), pp. 1255-6. Llewellyn has always been skeptical of the psychoanalytical approach to the study of legal behavior.
fellow brethren of the need for toleration of many schools of legal thinking.31

31 "But in the house of jurisprudence there are many mansions. There is more than enough room for all of us and more than enough work." "The Call For a Realist Jurisprudence" 44 Harv.L.Rev. 697 (1931), p. 711.

The binding force of all of the legal realists was their action-approach to law, and their continual reiteration of the assertion that law is not a body of rules, but a set of facts that can be observed in the official actions of courts or other public officials.32

32 Generally speaking, the realist school has included such men as Frank, Hamilton, Llewellyn, Powell, Cook, Oliphant, Moore, Radin, Hale, Yntema, Hutcheson, Patterson, Arnold, Robinson, Bingham, Lasswell, Lerner, Laski, Boudin, Garlan, Green, Douglas, Felix Cohen, Nelles, Rodell, and McDougal. Harold G. Reuschlein differs from this somewhat. He classifies Cook and Oliphant as exponents of "The Scientific Method" and treats Hamilton separately, although he admits that he is a realist. Patterson is with Cardozo, Cairns, Morris Cohen, Fuller, Hall, and Cahn in a chapter entitled "Integrative Jurisprudence." Moore is classified as an "institutionalist" and is treated alone. Judge Hutcheson of "hunch" fame is discussed in "The Reign of Law." Table of contents, Jurisprudence--Its American Prophets. Needless to say, these categories are not fixed and if the general requirements of the legal realist school are stated, most of the above-mentioned men could be included.

Having rejected the rationalistic approach of the old
analytical school, the legal realists set out to make jurisprudence an empirical study of actual events. Perhaps the basic difference between Pound's "functional" jurisprudence and the left-wing legal realists was the degree of emphasis on empiricism and the content of the materials being studied.33

33 "The new realists have been doing good work at this point. But such critical activity, important as it is, is not the whole of jurisprudence, nor can we build a science of law which shall faithfully describe the actualities of the legal order and organize our knowledge of these actualities, merely on the basis of such criticism. There is as much actuality in the old picture as in the new. Each selects a set of aspects for emphasis. Neither portrays the whole as it is....Faithful portrayal of what courts and law makers and jurists do is not the whole task of a science of law." Pound, "The Call For a Realist Jurisprudence," 44 Harv. L.Rev. 697 (1931), pp. 699-700.

Most legal realists could accept Sabine's definition of legal behavior,34 but few would go as far as did Frank, Lasswell, Robinson, and West in their defense of psychoanalysis. As early as 1918, one writer, Theodore Schroeder, was setting a fast pace for the psychological legal realists, a good decade ahead of Frank and Lasswell.35

34 Supra, n. 27, p. 30.
"By the deductive application of the general psychoanalytic principles we come to the conclusion that every judicial opinion necessarily is the justification of the personal impulses of the judge, in relation to the situation before him, and that the character of these impulses is determined by the judge's life-long series of previous experiences, with their resultant integration in emotional tones." Theodore Schroeder, "The Psychologic Study of Judicial Opinions" 6 Calif.L.Rev. 89 (1918), p. 93. Note the use of the word, "necessarily," which is the danger that most of the extremists of this school faced later on, succumbing in one fashion or another to the blatant assertion that the exposure of the unconscious drives of the individual judge will tell us everything we had failed to learn from jurisprudence before the birth of Sigmund Freud.

For Harold Lasswell, the free-phantasy method was the elixir of the new jurisprudence, a jurisprudence, one might add, that would not only free us from the logical fetters of the past, but also from all of the prejudices and misconceptions of the pre-psychoanalytical era of the law. Although psychological jurisprudence had much to contribute to the new trends in legal thinking, it was perhaps regrettable that a nihilistic stream of influence tended to mar the really important insights that this school contributed to a fuller understanding of the judicial process. 36

36 This is a typical example of Lasswell's approach: "Free phantasy is not a momentary relaxation of selective criticism, but a prolonged emancipation from logical fetters.... It would be possible to fill many volumes with illustrations of the hitherto unseen meanings which have been discovered by men and women who learned to use the free-phantasy technique. They have often been able to find how and why their
emotions tended to be aroused favorably or unfavorably toward individuals of their own sex or the opposite sex who exhibited certain traits, and to understand why they tended to choose certain secretaries, to sponsor certain protégés, and to be impressed by certain witnesses and attorneys. They have been able to inspect the phraseology of law, politics, and culture, and to extricate themselves from many of the logically irrelevant meanings which they tended to read into it."

"Self-Analysis and Judicial Thinking" 40 Intl. J. of Ethics 354 (1930), pp. 358, 361. Lasswell goes on to say that both logic and the free-phantasy method are necessary for the training of judges, administrators, and theorists. In his book, Power and Personality (N.Y.: W.W. Norton, 1948), Lasswell was bold enough to recommend the psychoanalysis of all future political candidates and leaders. Neither major party has, as yet, seriously considered this suggestion.

Most of the legal realists could accept the contributions of Holmes and Pound without sacrificing their sense of balance for a novel approach to the study of law. The

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37 Even a political scientist like the late Charles Grove Haines could understand the need for behavioral study of the law without addiction to either free-phantasy or hypnosis: "While in theory, then, we have often been led to believe that constitutional law has been developed solely through the application of the rules of formal logic in accordance with well established principles, in reality we have found it has been to a considerable extent the result of human forces in which the personality of the judges, their education, associations, and individual views are of prime importance." "General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges" 17 Ill. L.Rev. 96 (1922), pp. 113-14. Cf. Max Rheinstein, n. 14, p. 114-15, infra.

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38 Lasswell's
effort terrible came in 1930, with the publication of Jerome Frank's first book, Law and the Modern Mind.
This book still remains a landmark in modern American jurisprudence, especially in its attempt at applying the tenets of psychoanalysis and child psychology to the behavior of judges and juries. Having broken through the "unconscious," Frank felt that the myth of legal rule certainty, which he called a fetish because it had become a kind of father-substitute, could be exposed and eliminated, with the end-result being self-awareness. Judges would no longer need to deceive themselves or the public. And once this "truth" was known and proclaimed throughout the land, glory be to jurisprudence and the legal profession for this new freedom and self-knowledge! The "unconscious" became the "inarticulate major premise" of psychological legal realism. (Cf. Holmes, "The Path of the Law" 10 Harv.L.Rev. 457 (1897), p. 461, repr. in his Collected Legal Papers 167, 187). Following Frank's Law and the Modern Mind, Lasswell published Psychopathology and Politics (Chicago: Univ. of Chicago Press, 1931); Thurman W. Arnold, his two books, The Symbols of Government (1935) and The Folklore of Capitalism (New Haven: Yale Univ. Press, 1937); and Edward S. Robinson followed with his Law and the Lawyers (N.Y.: Macmillan, 1935). All of these men, together with Myres S. McDougal and Walton R. Hamilton, were at one time or another associated with the Yale Law School, which helped to father and nurture the psychological study of law and legal behavior.

...articles had presaged what the psychological extremists had in store, but Frank's book was the storm-raiser if ever there was one. Even as confirmed a legal realist as Karl Llewellyn could not swallow whole-hog the tenets of psychoanalysis, the fetish, the father-image, and the hallowed free-phantasy technique.39
the same mind which cuts through rule and legal concept to bare decision accept as domatic Must-Be's such stereotyped psychoanalytic concepts as womb-yearning, father-omnipotence, father-substitution, law as the father-substitute --- accept them as applying not to some persons, but to almost all. The basic fallacy of whole-hog psychoanalytic theory is the assumption that what may well be possibly or even probably often true is always or almost always true." Book Review, "Legal Illusion," in the symposium on Law and the Modern Mind, 31 Col.L.Rev. 82 (1931), pp. 85-6.

Other writers, e.g., Pound, Morris Cohen, Fuller and Gurvitch, were equally appalled at the failure of the psychological realists to prove their assertions and to keep a sense of balance once they emerged from their sacred couch. Pound was gracious enough to accept the good works of the psychological realists in spite of their careless use of psychological dogma, but Cohen was not nearly so kindly in his criticism of Frank.\[40\] Pound, who has borne the brunt

\[40\] "...His complacent assumption that psychoanalytic concepts like father-substitute are "the best instruments now available for the study of human nature" begs more than he or any one else has as yet proved. Psychoanalysis has doubtless led to some therapeutic results. But so have Christian Science and other faith-cures, and a logician must contend that therapeutic efficiency does not prove the truth of all the different faiths that produce it. Psychoanalysis will become scientific only when, like biology, it becomes really critical of its own evidence, instead of resenting --- as all sectarian faiths do --- the demand for such evidence.... It may perhaps be unfair to judge Mr. Frank's book by a standard of logical rigour not generally applied to books written for the general public. But as Mr. Frank is engaged in a serious and important task, it must be in the interest of the public be pointed out that the myth of a completely certain legal system, apart from the work of judges --- a myth that has its roots in legal experience from time
immemorial --- cannot be overthrown by an admitted fiction from the mushroom science of psychoanalysis...." From his essay, "Jerome Frank," in Law and the Social Order. N.Y.: Harcourt, Brace and Co., 1933, pp. 360-1.

of much of Frank's invective, replied in kind. 41

41 "...The new realists have their own preconceptions of what is significant, and hence of what juristically must be. Most of them merely substitute a psychological must for an ethical or political or historical must....Nor is the psychological neo-realism of the moment wholly emancipated from a priori dogmatism with which it reproaches older types of juristic thought." "The Call For a Realist Jurisprudence" 44 Harv. L.Rev. 697 (1931), pp. 700, 706. See supra, n. 33, p. 34.

For Georges Gurvitch, the serious deficiency in the psychological approach to law is methodological; 42 whereas

42 "...Some turn toward a sociology of law based exclusively on reality judgments and free from dependence on jurisprudence of which the sole task is reduced to applying the results of reality judgments without any consideration for ends and values (Llewellyn, Arnold). Others would eliminate jurisprudence in general, to replace it not by sociology, but by a naturalistic psychology which describes the minds of lawyers (Robinson) or even by psychoanalysis of lawyers (Frank)....Here it suffices to note that no kind of individual psychology can generally lead to a contact with the problem of law as phenomenon essentially constituted by collective experience and linked to the social whole...." Sociology of Law, N.Y.: Philosophical Library and Alliance Book Corp., 1942, pp. 175-6, 172.
Lon L. Fuller, who is considered one of the leading non-realists, finds at least a dubious value in philosophical exorcism.  

43 With his usual cutting philosophical tang, Professor Fuller writes: "The realist movement has done an immense service to American legal science in inculcating in it a healthy fear of such very real demons as Reified Abstractions, Omnibus Concepts, and Metaphors Masquerading as Facts." "American Legal Realism" 82 U. of Pa. L. Rev. 429 (1934), p. 443. See his The Law in Quest of Itself. Chicago: The Foundation Press, 1940.

Even the late Felix S. Cohen, who was classified as a legal realist, was a staunch critic of Frank and the psychological realists. His book, Ethical Systems and Legal Ideals, 44 shows what he meant by the role of values in respect to the legal order, for he was always critical of those who felt that empirical analysis automatically eliminated values from the realm of objective reality. 45


45 "It is one of the serious dangers of the functional approach that those who invoke it for the purpose of descrip-
tion may without further thought utilise it as a criterion of value. It is important for the jurist to remember that when he has described the human significance of a rule he has not thereby justified its existence." F.S. Cohen, "The Problems of a Functional Jurisprudence" 1 Mod. L.Rev. 5 (1937), pp. 24-5. Also, see his excellent article, "Transcendental Nonsense and the Functional Approach," 35 Col. L.Rev. 809 (1935), repr. in 2 Etc.; A Rev. of Gen. Semantics 82 (winter 1944-45).

The failure to understand the importance of values, the exaggerated use of psychological techniques, and at times, a misuse, or even a distortion of the scientific method and its aims have been the major criticisms of the left-wing legal realists. Describing the Is of experience

46 "Realism is still in the early stages of that infantile disease of adjustment to the scientific virus which all the disciplines, physical as well as social, have experienced and outgrown....Without denying the urgent need and invaluable utility of objective information, there are still many sceptics, however, outside the fold who persist in their failure to see how even the most accurate knowledge of the manner in which the law in all its ramifications actually functions could by itself alone supply the norms or standards which must guide the law as a progressive institution of social control." Aronson, op. cit., pp. 102-3, 106. Cf. Max Radin, "Legal Realism" 31 Col. L.Rev. 824 (1931).

does not prescribe the Ought, and furthermore, the careless use of these two terms (is and ought) as though they were synonymous elements in a science of the legal order, has been a cardinal sin of those writers who regard themselves, in and out of the law, as "empiricists."
Benjamin Cardozo, Morris Cohen, and Max Rheinstein have all made the very important point that when the myth of absolute legal rules has been broken, something adequate must take its place, and scientific method alone is not the substitute.47

47 Rheinstein, writing about the myth of legal rules, says: "To us, who have eaten from the tree of knowledge, that happy state of innocence is no longer possible.... In the age of psychoanalysis, judicial self-deception simply became impossible. It has been destroyed, and with it there has been destroyed one of the most effective guarantees of judicial law observance. That destruction was inevitable and cannot be reversed. But there remains the task of establishing, or re-establishing, other safeguards, lest the door be opened to a despotism of judges which would be no less dangerous than any other despotisms." Ch. XXIX, "Who Watches the Watchmen?" in Interpretations of Modern Legal Philosophies, p. 602. For Cohen and Cardozo, a legal system in flux demands some signposts; if not fixed points, at least directional signals.

Jerome Frank, on many occasions, both in his speeches and in his writings, has tried to deny his addiction to the psychological approach to law. One particular speech that he delivered before the Association of American Law Schools' annual meeting in Chicago on December 30, 1933, still remains the best short statement of Frank's philosophy of legal realism. The following excerpts should serve as a preface to the more extensive treatment of Frank's ideas which will follow in the next section of this paper.
Parenthetically, let me say that realistic jurisprudence was an unfortunate label, since the word "realism" has too many conflicting meanings. In the light of its congeniality with experimental economics, I suggest that realistic jurisprudence be renamed "experimental jurisprudence" and that those who lean in that direction be called "experimental." The attitude of the experimentalists among the lawyers and economists cannot be adequately compressed into a few words. But briefly it can be described thus: These men are critical students of institutions who are committed not to mere detached study but are devoted to action on the basis of their tentative judgments....


Having only barely begun the statement of his argument, Frank, in my opinion, has already made two serious mistakes: (1) he has given up the term "realistic jurisprudence" for purposes of clarification, but this has led him into further confusion in the use of terminology, for in his later writings, Frank employs such terms as "legal actualism," "legal observationism," "pragmatic jurisprudence," "experimental jurisprudence," and "possibilism." (2) As I understand the scientific method, a detached empirical bent does not imply commitment to any particular set of values (except
49 "To subordinate the pursuit of truth to practical consider­
erations is to leave us helpless against bigoted partisans
and fanatical propagandists who are more eager to make their
policies prevail than to inquire whether or not they are

asserts that the "experimentalists" are men of action, which
raises a number of questions regarding the role of modern
science and the problem of social reform. 50

50 See my article, "The Sociology of Japanese Relocation"
7 Etc., A Rev. of Gen. Semantics 222-7 (1950), where I dis­
cussed some recent attempts to arrive at scientifically-
sound research in the social sciences.

In the next passage, Frank elaborates on the skepticism
of the "experimentalists":

...They are constantly skeptical of their own formu­
lations, but not to the point of paralyzed inaction. Es­
pecially do they repudiate fixed beliefs as to the ex­
ternal validity of any particular means for the accom­
plishment of desired ends. They are ready at all times
to acknowledge their own mistakes. They admit that all
their tentative proposals are, and in the nature of
things must be, based upon partial and unavoidable ig­
norance, for they are keenly alive to the shifting nat­
ure of many of the so-called "facts" upon which all
human action is based. They are not -- as some of their
detractors would have it -- delighted with human falli-
bility, but accept that fallibility as one of the imp-
portant factors which must be faced honestly and cour-
ageously. They are devoted to increasing the use of
reason, but unabashed to confess how small a part reason
has heretofore played in human affairs; they hope, in-
deed, that by recognition of the immense stretches of
unreason, its proportions can be reduced. Their skep-
ticism as to the best means of accomplishing desired
ends is not a dilettante iconoclasm; it is more hardy
and athletic. To them, skepticism is indeed a means,
not an end in itself; its terminus, they think, is not
the mere pleasure of doubting but the consequences
achievable only through effective and constructive
doubting.51


This is indeed a program of action, but it is still
questionable to this writer whether the social gospel of the
New Deal is paramount, or whether the skeptical method is
merely a useful device for fulfilling the desired ends of
the welfare state.52 Perhaps Frank is implying that ought-

52 Cf., on the problem of the scientific method and its
practical applications, Morris R. Cohen wrote: "...This is
not to deny that compassion for human suffering and the de-
sire to mitigate some of its horrors may actuate the social
scientists. But the social reformer, like the physician,
the engineer, and the scientific agriculturist, can improve
the human lot only to the extent that he utilizes the labour
of those who pursue science for its own sake regardless of
The experimentalists, be they economists or lawyers, share also these attitudes: They tend to look upon human activities with the eyes of anthropologists. Most of the experimentalists, too, are characterized in these troubled days, by their primary regard for the immediate. They begin with the present, make that their constant point of reference, work backward from and forward to it. I do not mean for a moment that they neglect the past; among them are profound and earnest students of history. The point is that what they seek is a better future. But they believe that, insofar as intelligence can play a part in shaping the future, it must deal informedly with present possibilities. They regard the future not as unlimited in its possibilities but as conditioned by that residue of the past we call the "present." Yet they do not consider that conditioning as an unalterable determination of what is to come. That is to say, they are not rigid determinists, but possibilists. A considerable, yet limited, variety of future events are made possible by past and present events; within the limits of those possibilities, both chance and intelligence will play their parts. Within those limits, the experimentalists seek to increase the role of intelligence.53

53 Frank, op. cit., pp. 12±12-13. (Underlining mine). Note the use of the term "anthropologists." Frank's pretensions about the functions of the "experimentalists" now turned "possibilists" is somewhat heady. Wouldn't it have been enough to say that the "experimentalist" lawyers that Frank described were but conscientious, hard-working New Deal lawyers trying to earn an honest buck?

How can a detached empirical attitude be created by the "experimentalists" if their primary interest is the "immediate"? Is science the objective study of reality (within the limits set by human knowledge and fallibility), or is it what Frank calls the search for "a better future"? Without
answering these questions, Frank then turns to a discussion of the experimentalist approach to the study of the judicial process:

...It has frequently expressed its doubt as to the efficacy of legal thinking which purports to begin with so-called "legal principles." It inclines to the belief -- and here, for lack of time I am talking sketchily -- that many 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. They see that many judges phrase the two vague variables -- the so-called "facts" of the case and the so-called "rules of law" -- so as to produce opinions aesthetically and logically satisfactory in support of judgments and decrees in accord with what they think just and right. 54


Most of the questions that Frank has begged in this article will be dealt with in subsequent chapters. It is the hope of this writer that some of Holmes' "cynical acid" will help the reader to wash away some of the trivia that is ever-present in much of the realist and anti-realist literature. 55

55 "You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law." O.W. Holmes,
Collected Legal Papers, p. 174. Some of the fervent anti-realists would feel that "trivia" is very weak language, if cynical acid is needed. For their purposes, legal realism, at its worst, is missmal.

Facts and values are both an integral part of the legal order, and in an era of rapid social, political, and legal change which this past century has witnessed, no student of jurisprudence can afford to act as though the area of values did not exist.

The functional school of modern jurisprudence has done much to liberate jurisprudence from the miasma of the past century, but theories that have themselves become dogmatic entrenchments for one idea or another merely impede progress, for monism is not the road to liberation from the sterile ideas of the past. To move forward, jurisprudence must utilize the findings of many schools of legal thinking. Some kind of integration, short of eclecticism, is perhaps the tentative answer. 56


I said earlier that this is a philosopher's quest. If this is the case, then it is appropriate that everyone's
absolutes be exposed for examination,\textsuperscript{57} for this search

\textsuperscript{57} This is not for the purpose of throwing brickbats at each other, but is for the avowed purpose of "clearing the air" of invective so that rational, intelligent discussion can take place. Cf. George Santayana: "For those who believe, the substance of things hoped for becomes the evidence of things not seen." As quoted in Sidney Hook, \textit{The Hero in History}. N.Y.: The John Day Co., 1943, p. 21. Also, see Robert Dean Patton, \textit{Natural Law and the Theory of Free Enterprise}. Unpublished Doctoral dissertation, The Ohio State University, 1938, pp. 6-10, 304-20, where Professor Patton cogently discusses the differences in scientific methodology between the natural and the social sciences.

into modern legal philosophy has many rocky roads to cover, and self-deception of any kind is no help.\textsuperscript{58}

\textsuperscript{58} This reminds me of a statement by poet-critic Yvor Winters at the University of Chicago circa 1946: "I believe in my absolutes only relatively, but you gentlemen (his critics) believe in your relatives absolutely." Needless to say, the borderline is not always clearly marked.
SECTION TWO

JEROME FRANK'S PHILOSOPHY OF LAW

CHAPTER ONE

LEGAL RULES AND THE MYTH OF LEGAL CERTAINTY

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...The truth of the matter is that the popular notion of the possibilities of legal exactness is based upon a misconception. The law always has been, is now, and will ever continue to be, largely vague and variable. And how could this well be otherwise? The law deals with human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it — more confused than ever, in our kaleidoscopic age.

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...The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial, and political conditions; although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. Much of the uncertainty of law is not an unfortunate accident; it is of immense social value.

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...Only a limited degree of legal certainty can be attained. The current demand for exactness and predictability in law is incapable of satisfaction because a greater degree of legal finality is sought than is procurable, desirable or necessary. If it be true that greater legal certainty is sought than is practically required or attainable, then the demand for excessive legal stability does not arise from practical needs. It must have its roots not in reality but in a yearning for something unreal. Which is to say that the widespread notion that law either is or can be made approximately stationary and certain is irrational and

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1 Jerome Frank, *Law and the Modern Mind*, pp. 5-6.
2 Ibid., pp. 6-7.
should be classed as an illusion or a myth.3

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...It is a curious twentieth-century phenomenon that so many intellectuals should be so actively engaged in the task of persuading other intellectuals by reason that men are essentially irrational....4

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It might be said that American jurisprudence has never quite recovered from the shock of the publication of Jerome Frank's first book, Law and the Modern Mind, in 1930 and its five subsequent reprints. For this book, more than any other in modern American legal literature, thoroughly saturated the philosophical horizons of the law with a psychological approach that was hard to accept in one big gulp.

Every major idea that Frank has presented in his other books and numerous articles has been a reflection, a correction, or an extension of this first book. And most of the criticism of Frank's writing, though intended for specific books or articles, can be levelled at Law and the Modern Mind. For those realists who had wanted to dabble with the psychological approach to the law, but could never quite bring themselves to the brink of Freudian psychology, this


book was a minor masterpiece. For others, it was a lesson in the exaggerated addiction to a single idea, a distorted and unscientific hodge-podge of new (or what looked like new) ideas, or even just a mere exercise in intellectual eclecticism. But regardless of its effects on the reader, Frank's first book marked him as an important pioneer in American legal thought, a figure to be watched, whether admired or deplored.\(^5\)

\(^5\) See the criticisms of M. Cohen, Gurvitch, Fuller, and Aronson, \textit{supra}, pp. 38-42.

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From the very beginning of his book, Frank was the crusading legal realist, moving first to describe and then to explode what he called the basic legal myth, the myth of legal rule certainty. At the outset, Frank was set on making a frontal assault on this myth:

Here we arrive at a curious problem: Why do men crave an undesirable and indeed unrealizable permanence and fixity in law? Why in a modern world does the ancient dream persist of a comprehensive and unchanging body of law? Why do the generality of lawyers insist that law should and can be clearly knowable and precisely predictable although, by doing so, they justify a popular belief in an absurd standard of legal exactness? Why do lawyers, indeed, themselves recognise such an absurd standard, which makes their admirable and socially valuable achievement—keeping the law supple and flexible—seem bungling and harmful?...\(^6\)
Do lawyers deliberately and consciously deceive the public in this fashion? Is this the reason why some people in our society regard the lawyer as a crafty individual bent on hunting down potential cases in which he can fleece the public? No, says Frank. The reason lies in the basic legal myth:

Why these pretenses, why this professional hypocrisy? The answer is an arresting one: There is no hypocrisy. The lawyers' pretenses are not consciously deceptive. The lawyers, themselves, like the layman, fail to recognize fully the essentially plastic and mutable character of law. Although it is the chiefest function of lawyers to make the rules viable and pliable, a large part of the profession believes, and therefore encourages the laity to believe, that those rules either are or can be made essentially immutable.

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7 Op. cit., p. 9. Note the use of the word "consciously." What is meant by this terminology? Later on, in his discussion, this type of psychological language and explanation almost becomes the raison d'être of Frank's philosophy of law.

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In an age of rapid social transformation, the lawyer is a useful figure, but why does he persist in his desire, for Frank a contradictory one, to find a fixed set of legal rules? This paradox is the dilemma that Frank now begins to
Now the true art of the lawyer is the art of legal modification, an art highly useful to the layman. For the layman's interests, although he does not realize it, would be poorly served by an immobile system of law. Especially is this so in the twentieth century. The emphasis of our era is on change. The present trend in law is, accordingly, away from static security -- the preservation of old established rights -- and towards dynamic security -- the preservation of men engaged in new enterprises. Which means that the layman's ordinary practical needs would be seriously thwarted by an inelastic legal arrangement. A body of undeviating legal principles he would find unbearably procrustean. Yet paradoxically he and his lawyers, when they express their notions of a desirable legal system, usually state that they want the law to be everlastingly settled.


The answer to this dilemma is relatively simple, if we can accept Frank's major thesis, viz., our childish ways of thinking as evidenced in the craving (or what the psychoanalysts would call "wish-fulfillment") for a fixed, stable and immutable set of mechanical legal rules. From the works of child psychologists, especially Jean Piaget, Frank fashioned an elaborate description of this process of childish illusion and its counterpart in man's desire for legal certainty. But although this explanation sounds simple, and may be unique so far as modern American jurisprudence is concerned, the logic of his argument left much to be desired.
But let us first examine the elements of this psychological explanation in Frank's own words.

We are on the trail of a stubborn illusion. Where better, then, to look for clues than in the direction of childhood? For in children's problems, and in children's modes of meeting their problems, are to be found the sources of most of the confirmed illusions of later years.9

9 Op. cit., p. 13. Most writers on law would not accept the last statement as proved truth without more evidence and less reliance on psychological dogma.

But why should we look to childhood? Why not examine our pre-natal existence? In my opinion, most of Frank's assertions about the childhood basis of adult illusion are not easily defended. Only if you accept the basic tenets of Freudian psychology can such assertions be even superficially acceptable. Why does Frank emphasize childhood?10 Why not

10 Cf.: "The psychological function of law for the child is well analyzed by Jerome Frank....Frank deviates from the above analysis in that he concludes that the law is a substitute for the father, whereas it is maintained here that law becomes not a symbolic person but the prohibitions of a symbolic person. As the child progresses through school grades, he becomes acquainted with the Constitution and its framers. Here, the part of the founding fathers is clear -- they made the law. In their position as defenders of the Constitution, the Supreme Court justices have received analogous roles, roles made more complete by their age qualifications and their specific sphere of the highest law of the land." Sebastian de Grazia, The Political Community; A
carefully examine our social institutions? Or our social mores? Or even our national literature? For Jerome Frank, the answer is again quite simple: because modern psychologists like Jean Piaget have shown us that this is where...
ment, which in turn served as proof of childish behavior-patterns, which, so far as modern jurisprudence is concerned, is not the point at issue. In short, the argument is circular.

...And so, in the childish appraisal of the parents, the mother tends to become the embodiment of all that is protectively tender while the father personifies all that is certain, secure, infallible, and embodies exact law-making, law-pronouncing and law-enforcing. The child, in his struggle for existence, makes vital use of his belief in an omniscient and omnipotent father, a father who lays down infallible and precise rules of conduct.12

12 Frank, op. cit., p. 15.

The child's use of his father is pre-eminent in Frank's theory of legal illusion, for sooner or later the child will have to shake off the bonds of father-authority, and then the search for a father-substitute begins.

...But the demand for fatherly authority does not die. To be sure, as the child grows into manhood, this demand grows less and less vocal, more and more unconscious. The father-substitutes become less definite in form, more vague and impersonal. But the relation to the father has become a paradigm, a prototype of later relations. Concealed and submerged, there persists a longing to reproduce the father-child pattern, to escape uncertainty and confusion through the rediscovery of a father.13
And, it follows from this argument that the father-substitute the child later adopts is the Law.

...To the child the father is the Infallible Judge, the Maker of definite rules of conduct. He knows precisely what is right and what is wrong and, as head of the family, sits in judgment and punishes misdeeds. The Law -- a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeeds -- inevitably becomes a partial substitute for the Father-as-Infallible-Judge. That is, the desire persists in grown men to recapture, through a rediscovery of a father, a childish, completely controllable universe, and that desire seeks satisfaction in a partial, unconscious, anthropomorphizing of Law, in ascribing to the Law some of the characteristics of the child's Father-Judge. That childish longing is an important element in the explanation of the absurdly unrealistic notion that law is, or can be made, entirely certain and definitely predictable.

The Law can easily be made to play an important part in the attempted rediscovery of the father. For, functionally, the law apparently resembles the Father-as-Judge.

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14 *Op. cit.*, pp. 18, 19. Frank does not regard this explanation of the legal myth of rule certainty as anything other than a partial explanation. "This book, then, from now on, reads as if unconscious "father-substitution" were the explanation of the oddities it discusses. But, we repeat, we are consciously using a partial explanation. It is employed to further the chief aim of this book: the development of that "realistic" movement in law which seeks to overcome an astonishingly prevalent blindness to legal realities." *Ibid.* , p. 21, note. Of course, what Frank regards as legal "realities" are for other writers in the field of American legal philosophy, sheer nonsense. For Morris Cohen, or even Karl Llewellyn, this psychological explanation, humble as it may sound, borders on quackery.
Jerome Frank believes that the consequences of such an illusion have their effects on many additional areas of the law, e.g., the area of judicial law-making. Here again, the basis of the myth that judges do not make law is the childish illusion that certainty can be achieved.

If, therefore, one has a powerful need to believe in the possibility of anything like exact legal predictability, he will find judicial law-making intolerable and seek to deny its existence. Hence the myth that the judges have no power to change existing law or to make law: it is a direct outgrowth of a subjective need for believing in a stable, approximately unalterable legal world — in effect, a child’s world.15


To a legal realist who regards actual specific past decisions and guesses as to actual specific future decisions as the law, the illusion that judges cannot and do not make law is outlandish, and is, of course, vigorously denied. Thus, the judges, as well as the lawyers, deceive the lay public about the nature of the judicial process. Again the question of "why?" is raised, and Frank promptly comes forth with his usual answer: childish thought-ways and the legal certainty myth.

...The no judge-made law doctrine, it seems, is not, fundamentally, a response to practical needs. It
appears rather to be due to a hunger and a craving for a non-existent and unattainable legal finality -- which, in turn, may be ascribed to a concealed but potent striving to recapture in the law the child's conception of the fatherly attributes....Why, then, do the judges deceive the public? Because they are themselves deceived. The doctrine of no judge-made law is not, generally speaking, a "lie" --- for a lie is an affirmation of a fact contrary to the truth, made with knowledge of its falsity and with the intention of deceiving others. Nor is it a "fiction" --- a false affirmation made with knowledge of its falsity but with no intention of deceiving others. It is rather a myth -- a false affirmation made without complete knowledge of its falsity. We are confronting a kind of deception which involves self-deception. The self-deception, of course, varies in degree; many judges and lawyers are half-aware that the denial of the existence of judicial legislation is what Gray called "a form of words to hide the truth." And yet most of the profession insists that the judiciary cannot properly change the law, and more or less believe that myth. When judges and lawyers announce that judges can never validly make law, they are not engaged in fooling the public; they have successfully fooled themselves.16


With the lawyer, the judge, and the lay public all deceived, this leaves only the wise student of legal realities (e.g., Frank) able to break through the "sound barrier" of legal illusion and muddled thinking. "Frank's war is a war of liberation."17 With the psychologist on his right, and

17 "...The law must be liberated from the enslaving forces engendered by faith in the "Basic Myth" because harmful consequences stem from the illusion or dogma of legal certainty...." Harold G. Reuschlein, Jurisprudence -- Its American
the court room on his left, the left-wing legal realist is then able to see clearly what the law "actually" does. But without Frank's "partial explanation" of childish thinking, no analysis of this kind could be made.

The genealogy of legal myth-making may be traced as follows: Childish dread of uncertainty and unwillingness to face legal realities produces a basic legal myth that law is completely settled and defined. Thence springs the subsidiary myth that judges never make law. That myth, in turn, is the progenitor of a large brood of troublesome semi-myths....

18 Frank, op. cit., p. 41.

The end-result of such myth-making is what Frank calls "rule fetishism." Whenever an object is unduly worshipped, it becomes a fetish, and in the case of legal philosophy, the worship of mechanical legal rules has led to an illusory sense of reality and a complete inability to cope with what the law really is. This kind of thinking, according to Frank's labels at the more sophisticated level of legal philosophy, is termed "absolutism," "realism," "platonism," "legal fundamentalism," or, to use the most loaded term, "scholasticism."
...To say of a man's thinking that it is scholastic or platonist, is to say that it is tinged with childish emotions.19


In extending his explanation one step further, Frank says that the ability to deceive ourselves about the nature of legal reality is tied to our use of legal logic20 and

20 Frank's attack on legal logic created a furor among students of legal philosophy, among them Mortimer J. Adler, who, like Morris Cohen and Lon Fuller, regards Frank as an extreme nominalist. Adler wrote: "If Frank and others of his persuasion had stopped to analyze the logical problem of certainty and probability in the law instead of completely eschewing formal logic as a diseased thing because it is associated in their minds with the middle ages and scholasticism, there would be greater clarification and less confusion of the issues between realistic jurisprudence and its opponents." "Legal Certainty," in the symposium on Law and the Modern Mind, 31 Col.L.Rev. 82 (1931), p. 102. Frank criticized Adler and Morris Cohen for their criticism of Holmes' logic and especially for what he called "their lack of actual legal experience....When these philosophers become practicing lawyers they will understand what Holmes meant." Frank, "Are Judges Human?" 80 U. of Pa. L. Rev. 17, 233 (1931), n. 73, p. 48. Adler also felt that Frank had failed to distinguish what Adler called "Law as official action" from "Law in discourse." In his later works, especially Courts on Trial and the new preface to the 1949 edition of Law and the Modern Mind, Frank recanted his attack on what he called "scholasticism" and devoted some enthusiastic portions of his last book to a discussion of natural law and the value of Thomistic thought. However, Adler would still
find the body of Frank's writing antithetical to his own legal philosophy, even though the Notre Dame Lawyer has temporarily taken Frank to its bosom. One might also add the comment that instead of engaging in squabbles of this kind, Professor Adler is now engaged in more lucrative ventures.

legal language. Word deception is the indispensable tool of the rule-fetichists.

...Verbalism and word-magic; fatuous insistence on illusory certainty, continuity and uniformity; wishful intellection which ignores, or tries to obliterate from cognizance, unpleasant circumstances --- these are the marks of childish thought and often affect legal thinking.21

21 Frank, op. cit., p. 82.

At this point, it should be said that Frank is clearly not denying the existence of legal rules, or for that matter their effect on contemporary legal thinking and action; what he is saying is that the legal rules that we employ are not all there is to "law" (as he conceives it) and the judicial process.

...Whoever studies that process unhampere by subjective commitments which deflect accurate observation must note that, while rules enter into the making of law, they are not the whole of it. That process of judging (which is law) is not to be confined within the compass of mere rules. The rules play only a subordinate role.22
Op. cit., p. 274. Frank defines "law" in this fashion: "From the point of view of the practical work of the lawyer, law may fairly be said to be past decisions (as to past events which have been judged) and predictions as to future decisions. From the point of view of the judge, the law may fairly be said to be the judging process or the power to pass judgment." Ibid., note, p. 274.

Rules can help us to predict future decisions. They can also serve as guides to future action, but beyond that, their efficacy is seriously doubted by Frank, who writes:

...A rule tells something about law, but is not law. For, to repeat, law is what happened or what will happen in concrete cases. Past decisions are experimental guides to prognostications of future decisions. And legal rules are mental devices for assembling, in convenient form, information about past cases to aid in making such prognostications. Or they may be defined as generalized statements of how courts will decide questions, of the considerations which will weigh with courts in the decision of cases to which the rules are applicable. 23

As a lawyer, and later a federal judge, Jerome Frank has had little patience for those who worship legal rules. He has gone so far as to say that...

...There are excellent grounds for the contention that "direct specific rules of law" provoke more litigation than they prevent.... 24
Another name for "legal absolutism" is what Frank calls "Bealism" after the late Harvard professor of law, Joseph H. Beale. As Christopher Columbus Langdell later received Frank's expletives because he laid the "wrong" foundations for modern American legal education, Joseph Beale was the focal-point for Frank's attack on legal fundamentalism and rule-fetichism.

"The Law," then, is extra-experiential. It is "the breath of God, the harmony of the world," as Hooker put it; it is "invested with a halo," a "brooding omnipresence in the sky," to use Holmes' derisive phrase. Such, in effect, are the views expressed by Beale. We may, for convenience, refer to this attitude as legal Absolutism or "Bealism."
26 Frank, Law and the Modern Mind, pp. 54-5. Frank added a note saying that "Beale, it is fair to say, is not a consistent Bealst. But in his more didactic and philosophic writings he expresses so pronounced an absolutist point of view that the term Bealism is justifiable as a label." Ibid., p. 55.

Beale was accused of possessing most of the previous "sins" of the non- and anti-realists, viz., wishful thinking, Wousining or Word-Magic, "verbomania," and finally, "scholasticism."

We can see now why there is so much talk about the certainty of law. That talk is not descriptive of facts; it is made up of magical phrases. Law being so largely lacking in the certainty which is desired, resort is had to those twangings of the vocal cords which will yield compensatory satisfaction.

27 Ibid., p. 63. Morris Cohen, Mortimer Adler, Lon Fuller and other writers feel that Frank could be accused of the same amount of "twanging." The only trouble is that Frank's verbalizations come under the category of "legal realism" and are therefore "true," whereas the "scholastics" merely play with words. If ever there was a word-magician, it is Jerome Frank. And if one is searching for logomachy, anything that Frank has written, especially Law and the Modern Mind, will serve as a fine field of battle (of words). This is not the place for systematic criticism of Frank's ideas, but let it be said at this point that Frank is guilty of most of the sins of his attackers.

Indeed, the word-magic that so deludes the legal fundamentalists has a "narcotic" affect upon its listeners.
It is not, then, the clouding of the critical faculties through the power of words that betrays us lawyers; it is rather that, confronted by the law, men tend to be baffled by feelings stimulated by the father-substitute which law represents, and therefore use narcotizing and paralyzing words to pursue what are relatively childish aims.28


The answer that Frank gives to Bealism and its disciples is as simple and direct as was his solution to the basic legal myth:

...The law of any case is what the judge decides.29

29 Ibid., p. 126.
Along with Roscoe Pound and Joseph Beale, Frank has centered a large share of his criticism on Professor John Dickinson for his addiction to "rule-fetichism."\textsuperscript{30}

\begin{quote}
30 "...Dickinson represents the older tradition in its most sophisticated and seductive form...." \textit{Law and the Modern Mind}, p. 264. See app. II, "Notes on Rule-Fetichism and Realism," in this book, pp. 264-84, where Frank discusses Dickinson and Dean Leon Green. Frank is not alone in this criticism of Dickinson. Cf. "On a realistic view, law consists of decisions in the past and predictions of decisions in the future. The decisions have authority for the parties to the cases in which they were rendered, and the predictions have a lesser authority for possible parties to future cases, whose actions may be governed by them. But rules themselves cannot be authoritative, for as Mr. Justice Holmes remarked, "general propositions do not decide concrete cases"; judges decide and judges can always choose among competing rules. Moreover, rule-making is not a prerogative of judges; administrators and textbook writers can make them too, and sometimes better ones than judges. The ideal of generality in law, which Dickinson stresses, is in fact a will-of-the-wisp. He connects it with the quest for certainty and predictability, but in common observation the outcome of a lawsuit is among the most uncertain of human events. Jerome Frank has taken Dickinson specifically to task for his definition of law in terms of rules....In the writer's opinion Frank's criticisms are unanswerable...." Harvey C. Mansfield, "An Appraisal of John Dickinson's Administrative Justice and the Supremacy of Law," Committee on Appraisal of Research, Social Science Research Council, N.Y., 1940, p. 73.
\end{quote}

To follow Beale and those who believe in the theory that rules are the law would lead us into the wasteland in which much of current legal thinking still remains. Hence, Jerome Frank, being a \textit{bona fide} legal realist, must reaffirm Justice Holmes.
...Rules, whether stated by judges or others, whether in statutes, opinions or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go in making the law of the cases tried before them....The law, therefore, consists of decisions, not of rules. If so, then *whenever a judge decides a case he is making law....*31


The desire for legal codification, like the urge for fixed legal rules, ended up in the same blind alley of illusion. Although codification had a good purpose, Frank says that it was doomed to the same sterile wish-fulfillment of legal fundamentalism.

And the hope of attaining a large measure of legal certainty by codification proved vain. It produced not certainty, but sterile logic-chopping....Belief in a man-made code, which shall be exhaustive and final, is essentially the same dream in another form, but a form which hides from superficial study the nature of the dream. But a dream it is, nevertheless. For only a dream-code can anticipate all possible legal disputes and regulate them in advance.32


The urge for legal finality and exactitude can not be found in codification of the law, any more than it could be
found in legal rules, for after all, what is a legal code, if not merely an elaboration of these legal rules? 33

In all of these attacks by Jerome Frank, the essential element under scrutiny has been the urge to find legal certainty and hence security and stability. Not only does Frank think that this is humanly impossible, but it is highly doubtful if a changing legal order could allow for such a paradox: change and fixity. Yet, every society must have some fixity and some flexibility by its very definition. 34

33 "The childish belief in legal finality is not to be realized by codification. It is and will ever be based upon illusion." Frank, op. cit., p. 193.

34 "...Our common phrase 'law and order' inverts the true order of priority, both historically and logically. Law never creates order; the most it can do is to help to sustain order when that has once been firmly established, for it sometimes acquires a prestige of its own which enables it to foster an atmosphere favourable to the continuance of orderly social relations when these are called upon to stand a strain. But always there has to be order before law can ever begin to take root and grow. When the circumstances are propitious, law is the sequel, but it is never the instrument, of the establishment of order." J.L. Brierly, The Outlook For International Law. Oxford: Clarendon Press, 1944, p. 74. If we accept Brierly's assertion that law comes after social order has been established, then we can also assume that this stability must be maintained at least minimally by some kind of system of rules, which is where law (or taboo or mores or some other set of standards) enters the picture. If social solidarity and stability are
the prerequisites of law, then certainly the purpose of law would not be the creation of chaos, but the preservation of social order. Hence, some degree of fixity is assumed in this definition of the role of law. Cf.: "To secure a good society, whether it is good because it is characterized by an abstractly derived justice or by an ideal taken from experience, cannot be the purpose of law for the simple reason that it is the purpose of the entire mechanism of political and social organization...." Radin, Law as Logic and Experience, p. 145.

In addition, Frank argues that legal certitude is loathsome because it takes away from life that which he calls "if-y" and "chancy." Without the element of contingency, would men want to struggle to improve their lot? The will to believe, and the will to believe with certainty have been written in the records of human history, and Frank would not deny this fact. But should men continue to think and behave in this manner? Since most of this uncertainty is "of immense social value." Frank would answer

35 Frank, supra, n. 2, p. 51.

with an emphatic "no."

Another explanation that Frank uses for understanding the basic legal myth of rule certainty is the religious one. Religion gives men security because of its universalistic elements. The immutability of natural law gave the medieval world a kind of security it has never recaptured since
the Reformation. Some writers argue, e.g., the historian Arnold Toynbee and the psychoanalyst Erich Fromm, that men still crave a return to that kind of security.

...On this basis it is arguable that in law, as everywhere else, this religious impulse is operative; it drives men to postulate a legal system touched with the divine spirit and therefore free of the indefinite, the arbitrary and the capricious.36

36 Frank, op. cit., p. 197.

However, Frank does not believe that modern law is inherently a substitute for the function that religion once had in the lives of men. Religion lost its potency, serenity, and all-encompassing control over men when science crashed through the barrier between religion and philosophy and slowly began to supplant the former. The secular father-images took root and have yet to be routed from their pre-eminent position in the modern world.

...Finally, as in our times, the longing for a father-who-lays-down-the-law (for the Father-as-Judge) can "short-circuit" the Heavenly Father. No longer, medially as a derivative of religion, but now immediately, the Law is looked to as a substitute for the infallible Father-Judge of childhood. The law is "paternalized," not "divinified."37
Thus, it is not the religious, universalistic element in law that enables lawyers and judges as well as legal publicists to dupe the innocent public. It is the basic legal myth, its perpetuation, consciously or otherwise, and the pitiful state of what Frank calls "the value of lay ignorance" that enables the myth of legal rule certainty to flourish and grow.

If this is the case, and many writers on law doubt the validity of Frank's arguments, how does Frank propose to eliminate, or at least to alleviate, this deplorable state of affairs? Again, according to the gospel of Jerome Frank, the answer is a simple one, if you can follow his argument: judicial self-limitation and self-awareness.

...The judge is trying to decide what is just; his judgment is a "value judgment" and most value judgments rest upon obscure antecedents. We cannot, if we would, get rid of emotions in the field of justice. The best we can hope for is that the emotions of the judge will become more sensitive, more nicely balanced, more subject to his own scrutiny, more capable of detailed articulation.38

This would seem a simple thing for intelligent judges to do, but not all judges are equally qualified to practice self-limitation of their own actions. Judges must not only understand themselves (which is hard enough for most laymen, except perhaps those who have undergone psychoanalysis), but also human nature in general.

But the systematic, deliberate and openly disclosed use of the unique facts of a case will not be of much service until the judges develop the notion of law as a portion of the science of human nature. And that development cannot come to fruition until the judges come to grips with the human nature operative in themselves. ...What this implies is that the judge should be not a mere thinking-machine but well trained, not only in rules of law, but also in the best available methods of psychology. And among the most important objects which would be subject to his scrutiny as a psychologist would be his own personality so that he might become keenly aware of his own prejudices, biases, antipathies, and the like, not only in connection with attitudes political, economic, and moral but with respect to more minute and less easily discoverable preferences and disinclinations. 39


The heart of the matter is man's unavoidable ignorance. If we could realize the folly of certainty-seeking, then perhaps we might be able to face legal reality with the new knowledge that only self-awareness can free us from the search for final truth. Once we admit our childish thinking and infantile illusions, they will not vanish automatically,
but we will have made the start that can eventually lead us to facts. Law in action is the realist credo, and their only credo.

...That is the paradox of wisdom: In so far as we become mindful that life is more dangerous than we had naively supposed in childhood, we help ourselves to approach nearer to actual security....By abandoning an infantile hope of absolute legal certainty we may augment markedly the amount of actual legal certainty.40


Once we can rid ourselves of the need for father-authority, we will have made the first step in the direction of legal realism, for there is no room for illusion in the realist's creed. Throw off the shackles of father-authority, and the facts will be clear in themselves. Learn to search for probabilities, not eternal truths. And, as the great Justice Holmes said, and the legal realists after him have reiterated: "To have doubted one's first principles is the mark of a civilized man." For, as Frank writes:

Increasing constructive doubt is the sign of advancing civilizations. We must put question marks alongside many of our inherited legal dogmas, since they are dangerously out of line with social facts.41
To Jerome Frank, this struggle is not exclusively in the domain of jurisprudence: it is the battle of modern science, the search for empirical truth amidst dogma, the age-old struggle to free men's minds from the shackles of past emotion and sentimentality; but above all, it is a liberation from authority. This freedom to doubt, to search for the facts, to question preconceived dogma, is the touchstone of Jerome Frank's legal realism and his search for a new approach to legal history and legal action.

...Humanity increases its chances of survival and of progress to the extent that it becomes able to question --- neither blindly to accept nor violently to defy --- the father's guesses, and to discontinue calling them self-evident truths....

The most that we can find will not always be satisfying, namely, probabilities; but we must be content with the
Inherent limitations of human reason. If we constantly

probe further, we can increase the realm of our knowledge
about the legal order until we reach the point where some
temporary generalizations can be made.

...We must be content with modest probabilities, as
Dewey puts it, and not foolishly pretend that our legal
abstractions are mathematically accurate, for that pre-
tense obstructs the will to modify and adjust these ab-
stractions in the light of careful observation of their
working results.
The crusade against ignorance, through the use of self-awareness, is Jerome Frank's major purpose in *Law and the Modern Mind*, and in one fashion or another, he has carried on this crusade for almost twenty five years.

It is time that we gave up the notion that indirection and evasion are necessary to legal technique and that in law we shall better achieve our ends if lawyers and judges remain half-ignorant, not only of these ends, but of the means of achieving them. No, the pretense that judges are without the power to exercise an immense amount of discretion and to individualize controversies, does not relieve us of those which result from the abuse of that judicial power. On the contrary, it increases the evils. The honest, well-trained judge with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses is the best guaranty of justice. Efforts to eliminate the personality of the judge are doomed to failure. The correct course is to recognize the necessary existence of this personal element and to act accordingly.45


45 Ibid., p. 138. Frank regards Judge Learned Hand as the best living example of this type of jurist. What Frank means by the statement "...and to act accordingly" is still unclear to me. The psychoanalyst may free a patient from his illusions, but that in itself is not a prescription for future action. In an age of anxiety, self-awareness does not make anxiety vanish, or at least the preconditions of that anxiety. And so it is with the judge. Granted, he understands himself, where does he go from there? Perhaps Judge Frank can answer that one.
Since the scientific mind, according to Frank, is the adult and emotionally mature mind, what the modern legal order needs is more adult minds and less childish thinking. This brings us to the core of Frank's solution of the basic legal myth in *Law and the Modern Mind*, namely, what he calls "the modern mind," a mind free of father-authority and childish ways of thinking. It is, as Dr. Harry Overstreet has said, the mature mind, and as Frank has written:

Modern civilization demands a mind free of father-governance. To remain father-governed in adult years is peculiarly the modern sin. The modern mind is a mind free of childish emotional drag, a mature mind. And law, if it is to meet the needs of modern civilization, must adapt itself to the modern mind. It must cease to embody a philosophy opposed to change. It must become avowedly pragmatic. To this end there must be developed a recognition and elimination of the carry-over of the childish dread of, and respect for, paternal omnipotence; that dread and respect are powerful strongholds of resistance to change. Until we become thoroughly cognizant of, and cease to be controlled by, the image of the father hidden away in the authority of the law, we shall not reach that first step in the civilized administration of justice, the recognition that man is not made for the law, but that the law is made by and for men.\(^46\)


To be completely free of dogma, the modern mature, scientific mind must be constantly open to change, and must continually reassess its axioms and postulates. The essence
of this self-labelled pragmatist outlook is *skepticism*. But while the skeptical outlook is a necessary tool, the psychological basis of Frank's writing demands a more detailed examination and assessment than this writer is qualified to undertake.

Jerome Frank was in the *avant-garde* of the psychological movement within the school of American legal realism. Whereas Harold Lasswell chose the free phantasy method as his fetish, Frank chose Piaget and his ideas on child psychology. Many cogent questions have been asked of Frank in respect to his psychological analysis of law, and perhaps some of the criticisms and comments on the use of psychology in jurisprudential literature ought now to be more closely examined.
The Use of Psychological Materials in Jurisprudence

Even though Jerome Frank has persisted in announcing that his use of child psychology is but "a partial explanation" of the so-called basic legal myth, some distinctions ought to be made at the outset between the use of psychological techniques and psychiatric treatment (which Harold Lasswell has, on a number of occasions, suggested and which Frank mentions only sparingly). For example, in writing about the frictions in government departments (Frank was a commissioner and later chairman of the Securities and Exchange Commission), Frank wrote:

...My experience in government leads me to believe that a very considerable part of the friction between government departments, if one peered behind the rationalizations, could be traced to personality difficulties of one or more of the disputants. Under severe pressure, the best of men at times become the creatures of inner drives and obsessions of which they have no awareness. An occasional chat by an overworked official with a government psychiatrist would make government run more smoothly. I do not suggest that psychiatry is or can be an exact science. At best, it is but an art, still in its infancy or adolescence.... 47

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This is therapy, not psychological theory, but nevertheless
Frank has his doubts about psychiatry. If, according to Morris Cohen, psychology is but a "mushroom science," where does that leave psychiatry (or psychotherapy), which at least has an empirical medical foundation? At times, those who use psychiatry in connection with law, even though they are professional psychiatrists, are equally unclear about its aims. An example in this respect is that of Dr. Ranyard West, a British psychiatrist, who is highly respected by Frank, but uncited by other legal realists. West wrote:

Equally, no "debunking" of law or lawyers, no precarious "psychoanalysis" with a flourishing of Freudian terminology need disturb the well-grounded law or the wise lawyer. The core of the very process that shows us all as irrational human beings, we doctors who dodge the scientific issue in pursuit of the possible as well as we lawyers who yearn for rules and guidance firmer than either history or science can give us, has shown us a function for law to fulfill so firm and clear as to give the legal profession the thrill of all modern thrills.48


What if human beings are irrational creatures? Is that a new and startling observation? And even if it were, where does that leave the question of the relation between psychology and jurisprudence? Perhaps one of the more careful and
moderate legal realists, Karl Llewellyn, can help to clear up the confusion:

And it would seem to go without demonstration that the most significant (I do not say the only significant) aspects of the relations of law and society lie in the field of behavior, and that words take on importance either because and insofar as they are behavior, or because and insofar as they demonstrably reflect or influence other behavior. This statement seems not worth making. Its truth is absurdly apparent. For all that, it reverses, it upsets the whole traditional approach to law. It turns accepted theory on its head....

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49 "A Realistic Jurisprudence -- The Next Step" 30 Col.L. Rev. 431 (1930), p. 443. Llewellyn goes on to say that we should study judges' and officials' behavior as judges and as officials, not as children, or as immature adults. Official behavior as such is the core of his psychological technique.

This is at least an improvement over the views of Frank, Lasswell, and West. "Behavior," in the Llewellyn sense, is what officials do, not their unconscious or subconscious motives or explanations of their inner drives. In my opinion, this is a far more realistic (and I might add scientific and pragmatic) approach to jurisprudence than Frank has proposed because Llewellyn, as legal philosopher, has the necessary tools for an evaluation of the kind of legal "behavior" he examines. In short, Llewellyn does not venture into areas in which he is inexpert.
In the hands of experts, psychology and psychiatry can be of real value to the lawyer, the judge, and the student of law. This, in all fairness, I would not deny, but the

50 There are many good examples of co-operation between medical and psychiatric personnel and lawyers that have resulted in legal reforms, new state laws, or proposed model state laws for the future, e.g., State of Michigan, Report of the Governor's Commission on the Deviated Sex Offender, Detroit, Michigan, 1951; also, the recent report by Dean Roscoe L. Barrow of the University of Cincinnati College of Law and a joint committee of psychiatrists and neurologists on the need for modernization and improvement of state laws concerning the treatment of epileptics. (New York Times, May 2, 1954, sec. 1, p. 57). Another area of fruitful exploration between the lawyer and the psychiatrist, as well as the social worker, has been divorce law reform. It seems to me that these inter-disciplinary efforts have been far more valuable than the proposed psychoanalysis of individual judicial behavior.

problem is really one of who uses these special tools and in what fashion? 51 When the Gluecks use psychological

51 Cf.: "Shall we not do more by a less rigidly behaviorist psychological method, tempered by the consideration that we need to take account of the restraints upon non-rational individual judicial behavior and that judges are not likely to do better than we expect them to do. There was a psychological efficacy in the nineteenth-century ideal." Pound, "Fifty Years of Jurisprudence" 51 Harv. L.Rev. 777 (1938), p. 790. Pound says that the legal realists do good work, but realism is not the whole story of what law is and how it functions.
techniques in criminology, or courts call on competent psychiatric experts in the treatment of certain types of criminal behavior, this is a far different and more expert use of psychological tools than is Jerome Frank's exposure of the myth of legal certainty. In any case, professional and amateur are trying to understand what they call "behavior" at the level of judicial action. Here is another example of the psychiatric approach to the problem of legal behavior:

Today psychiatry has reached the point where it can tell us some significant things about the very nature and need of law. It may seem startling to think of the psychiatrist as preceptor in legal, moral, and political philosophy, but by throwing light on man's potentialities for growth, and on the factors which lead individuals to retreat from maturity and growth, psychiatry helps law to focus on its goal, the development of the individual's potentialities for freedom and productivity....

52 This is not to say that Frank as amateur has no right to employ psychological tools of analysis, but that the findings of amateur and professional alike should be clearly distinguished from each other.

53 Manfred S. Guttmacher and Henry Weihoefen, Psychiatry and the Law. N.Y.: W.W. Norton, 1952, p. 11. This is an extremely useful text-book on the various uses of psychiatry in trials, hearings, and legal procedure in general.
Even the most confirmed critics of Jerome Frank's use of psychology can still see the value of some psychological techniques, as long as the focus is on the overt and not the hidden behavior of judges and juries. Roscoe Pound, like Karl Llewellyn, has a much more modest view of the role that psychological analysis should play in studying the behavior of judges. Pound writes:

Psychological realism could well direct its program to the psychology of courts, rather than proceed on dogmatic assumptions as to the individual behavior of individual judges, and especially to the psychological bases of the persistence and vitality of a taught tradition systematized in received treatises and studied both in the formative student period and, in the case of judges, continuously during long periods of practice before courts and later of sitting in them. Such an investigation would be more practicable and profitable than the elaborate study of the relation of the individual psychology of particular individual judges to particular individual cases, which has been suggested as the foundation of a science of law.54


For Roscoe Pound, then, it is the court itself and the action that transpires there that deserves attention, not the individual unconscious behavior of judges. Frank would answer Pound by saying that this is much too modest a view of psychology. It leaves out what Frank considers to be the crucial element in the picture, namely, the hidden elements
in the judge's actions.

Among the legal realists, the argument ranges far and wide over this precise issue: what, if any, are the hidden or covert elements of judicial behavior, and if there are such phenomena, how should students of law proceed to examine them? Lasswell would use the free-phantasy method and Frank the teachings of modern child psychology; Schroeder and Malan, the findings of behavioristic psychology. Even if there is some common agreement on the fact that legal behavior should be studied with care, where does this take the argument that psychology is the best or the most accurate tool for studying this type of behavior? Again, I will turn to Dr. West, who bases his answer to this question on the humanness as he sees it of legal behavior:

...It is upon the fact of the potential criminal in every man that I would give to law its psychological grounding....

55 Conscience and Society; A Study of the Psychological Prerequisites of Law and Order. N.Y.: Emerson Books, 1945, p. 165.

If Dr. West can argue that it is the potential criminal in every man that justifies the use of psychology, why become even more basic and say that it is the very fact that man is man and that his behavior is human behavior (whether
we choose to call it "rational" or "irrational," or a mixture of both, or neither) that makes legal activity conducive to psychological explanation? Even one of Jerome Frank's strongest supporters has this to say about Frank's use of psychology in Law and the Modern Mind:

...The psychology of this book must be regarded as a weapon of attack upon a cumbersome set of judicial inhibitions, not an instrument of precision....

Yet, if Thurman Arnold is correct is saying that Frank is using a "weapon of attack," how can we judge its accuracy, validity, or even its effectiveness, if it is not a precise instrument of analysis? Is it the "attack" that counts the most, the debunking of the basic legal myth, that counts more than the evidence presented? If, as Frank has said in

Cf.: "Mr. Frank, however, has no clear idea as to what he is thus committing himself to; and elsewhere, especially in the footnotes, he explicitly recognizes the existence and need of some rules and certainty in the law. This admission, however, still leaves his fundamental thesis rather vague and inconsequential, and his polemics pointless, if not unfair. For obviously, if the law contains both rules and discretion, both certainty and uncertainty, the significant issue is precisely the one that Dean Pound faces and that
Mr. Frank dodges, viz., where to draw the line between legal rule and judicial discretion....There can be no doubt that the desire for complete certainty -- the craving for absolute truth -- is a trait of all creatures born of woman...." Morris R. Cohen, Law and the Social Order, pp. 359, 360. See n. 40, supra, pp. 38-9.

so much of his writing, jurisprudence must be scientifically sound and pragmatic to the best of its ability, how can Arnold's explanation be justified?

Smashing the mechanistic legal idols of the cave is one thing, but doing it in a manner that convinces the students of jurisprudence is quite another matter. If Frank is merely waging battle, he has succeeded many times over since 1930. But it seems to this writer that the contributions of Frank, Arnold, Lasswell, Robinson, and West have been tendentious at their best, and that their ablest work has not shown the accuracy and care that they accuse the non- and anti-realists of lacking. If psychology and psychiatry are to be useful tools in jurisprudence, the empirical method that Frank has described so well must prevail, not the "fight theory" of the court room, or of the law journal.58

58 On the problems and the dangers of empirical study in the social sciences, see Barrington Moore, Jr., "The New Scholasticism," 6 World Politics 122 (1953).
As I said in the introduction to this paper, Jerome Frank has been a provocateur in American jurisprudence. This, in itself, is a contribution of note, but debunking by itself cannot upset the work of Pound, Cardozo, and Morris Cohen, or the wisdom of many other legal minds down through the ages.

The debunking of a Mencken or a Steffens had its social and even intellectual value, but in age of science, Frank must find more precise tools of analysis if he expects to make jurisprudence a more exact "art," as he puts it. Even if we accept his assertion that jurisprudence is an art and not a science, the instruments that are used in the study of legal phenomena must be exact and time-tested.

59 "...The torch that Holmes had lit was being carried by the younger school of "realists" in jurisprudence --- the names of Jerome Frank, Leon Green, and Karl Llewellyn come first to mind --- and its flame was used at times rather in the spirit of Mohammedan conquest than of Olympian inquiry...." Harvey C. Mansfield, op. cit., p. 12.

60 "...Certainty is an ideal that law must never cease to aim at, but it is also one that it can never realize at all completely; for the main cause of uncertainty in any kind of law is the uncertainty of the facts to which it has to be applied. Law has necessarily to be stated in the form of general principles, but facts are never general; they are
always particular, they are often obscure or disputed, and they were very likely not foreseen, and therefore not expressly provided for, at the time when the rule of law received its formulation. It is this intractability of facts that prevents the practice of law from ever becoming a science; it is and always will be an art." Brierly, op. cit., p. 16.

It is perhaps characteristic of intellectual pioneers that they chip away too much in their zeal and haste and excitement for change. Yet, even though the work of Beard and Veblen, J. Allen Smith, Parrington and Bentley was somewhat "shocking" to the people of the early twentieth century and still remains so for some contemporary minds, these men tried carefully to refine and redefine their work in the light of new materials. This is the mark of an educated man, of Emerson's "Man Thinking," and of the liberal imagination that was so well-represented in modern jurisprudence by the work of the late Benjamin Cardozo and Morris Cohen.

The shock that Jerome Frank gave to the world of American jurisprudence was a needed one, but the manner in which he did it left much to be desired. His was not the first analysis of legal behavior, nor was it the most unique one. By 1930, the pragmatic tradition in American jurisprudence was pretty much a settled matter, insofar as legal realism was concerned. But Jerome Frank wanted to go one step further. Whereas the realist could look behind the legal rules to official behavior, Frank wanted to look behind the official behavior of judges and juries to find what he considered
to be the *real* bases of their actions. The *reductio ad absurdum* of his case was his slavish reliance on the tenets of child psychology. His somewhat arbitrary selection of the work of Piaget and Rignano did not convince most legal philosophers that his conclusions were valid ones. Many important questions still justified examination, and among those questions that still lurked in the minds of legal writers were the following:

1. Can adult behavior *always* be traced to childhood behavior?
2. What do we mean by *legal behavior*, and how do we analyze it?
3. What is meant by the "unconscious" behavior of judges and juries?
4. Do *all* children have the *same* degree of father-worship?
5. Do *all* men look for a father-substitute after childhood ends and adulthood begins?
6. Is Law *always* the father-substitute that men choose in adult life?
7. Are words *always* used "magically" with the intent to deceive others?
8. Are the *legal rules* that men follow and respect part of their *legal* behavior?
9. Is the search for security and stability, and especially legal certainty, *always* childish?
10. Is self-awareness in judges really a panacea, for what happens to the biases and value judgments that still remain in their personality?

In the next chapter of this dissertation, I will turn to Frank's analysis of the role of the judge in the judicial process, where some of these questions can be examined in more detail.
A Final Note On Legal Rules

Jerome Frank would be the last person to deny the existence and the utility of legal rules. Yet, his attack

61 In answering Morris Cohen, who had criticized the legal skeptics (realists) for what he called extreme "nominalism" because they denied the existence of legal rules, Frank wrote: "The skeptics insist that legal rules exist and must be studied. But they say that knowledge of the rules is but a small part of what lawyers and judges use in their work and that a definition of law as rules does an injury to clear thinking about law." "Are Judges Human?" 80 U. of Pa. L. Rev. 17, 233 (1931), p. 45.

on those writers who see only the legal rules and nothing else as law (especially Beale, in his opinion) has led some writers to believe that Frank wanted a legal system that operated on a purely pragmatic basis. Frank fervently denies this accusation and says that men like Gray, Wigmore, and Judge Cuthbert Pound expressed similar doubts about the prediction-value of legal rules and precedents.

On these points, as to uncertainty in the legal rules, the so-called "realists" have but followed in the footsteps of their predecessors. The difference between the "realists" and those other writers has been, in this respect, chiefly one of emphasis and shading. And it is simply not true that most of the "realists" (and the writer in particular), to any greater extent than many of the "non-realists" above cited, have expressed or implied a belief that imprecision in the
Although Jerome Frank clearly distinguishes his efforts to describe the legal rule myth from his desire for the eradication (or at least amelioration) of the bad traces of this myth, many of his critics are still not certain that this distinction is a clear one, especially Morris Cohen, Kennedy, and Dickinson.

Frank feels that once men are freed of childish notions about legal certainty, they will be free to find the kind of legal axioms that will best serve them. This, he continues,

not does/lead to anarchy in the law, but, on the contrary, to an intelligent, balanced attitude toward constructive legal change.
According to Frank's analysis, there will be so-called "temporary absolutes" open to change and further discussion. But this need not be a legal system without rules. The only things missing in Frank's legal world are the inherent fixity and immutability of legal rules. The anarchic reign of legal rule certainty will have ended, and the process of constant reappraisal of our basic assumptions begun.

If such sentiments disclose a delight in legal uncertainty, then the writer is a one-eyed Eskimo. 64

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64 Frank, If Men Were Angels, p. 307. This statement requires no further comment.

Roscoe Pound feels that the assault on legal rules has led to some deleterious consequences, even if not intended by the legal realists. The search for flexibility and pragmatic or free judicial decisions has resulted in what some writers call "executive justice." For Pound, the problem is one of balance:

Three persistent problems recurring in different forms in all stages of legal development may well be termed fundamental in jurisprudence: the problem of rule and discretion; the problem of the valuing of interests; and the limits of effective legal action. Analytical jurists have assumed an antithesis between law and administration, holding that justice according to law is necessarily judicial justice according to formula ("a government of laws and not of men"). The doctrine
of separation of powers, in which the judicial power is carefully segregated from the executive and the legislative, was taken over from political theorists and became a cardinal tenet in the juristic faith of the nineteenth century. The trend today is to recognize that reliance must be placed both upon men and upon rules in any effective fulfillment of the ends of law. The problem is not rigidly to exclude the one or the other but to effect a proper adjustment between judicial justice and administrative justice, and between a judicial justice held down to an application of authoritative legal precepts by an authoritative technique and a necessary measure of individualization to be achieved only by free judicial action. Experience seems to show that in large part rule must be assigned to one portion of the domain of the legal order and discretion to another....

65 "Jurisprudence," 8 Ency. of the Soc. Sci. 477 (1935), pp. 488-9. Pound also says that nineteenth century jurisprudence considered three questions: the nature of law; the relation of law and morals; and the interpretation of legal history. An answer to the first question presupposed an answer to the second question.

Pound does not assume that the desire for executive justice is the direct result of the work of the legal realists. Yet, the realists' well-meaning assault on many of the myths of contemporary American jurisprudence (especially that of legal rule certainty) might have opened the way, intellectually at least, to a worship of uncertainty and instability for its own sake. While most of the legal realists, including Frank, have suggested positive reforms of the legal system, and in all sincerity have criticized their predecessors of the analytical school for failing to see legal realities, they are nonetheless responsible for many
of the exaggerated attacks on the non- and anti-realists who felt that without legal rules there could be no viable legal order.

The purpose of this dissertation is not to search for "blameworthy" persons, but rather to examine a man's ideas in the light of modern American legal thought. However, the consequences of a man's thinking, whether intended or not, are certainly, in this writer's opinion, as important as the ideas themselves. 66 "Ideas are weapons," wrote the

political historian Max Lerner, and he was not the first writer to recognize this truism of intellectual history.

Jerome Frank's ideas, alongside those of other legal realists, have made their mark on modern legal thinking. They have stimulated and exacerbated, debunked and enlightened. But the results have at times been on the negative side of the ledger. For when a school of jurisprudence makes an assault on what it considers to the bad results of legal rule certainty, the attack against stability (if the
legal rules really create stability) sometimes becomes an end in itself. And in an age of mass communication and mass distortion, it need not be reiterated that the good effects of an idea can be outdone by its bad, even if unintended, effects.

The final assessment of American legal realism is far from completed, but when that appraisal is made by future students of American legal philosophy, the admonitions of M. Cohen, Cardozo, Fuller, Pound, Rheinstein and others will not escape examination. For the man of ideas ultimately bears responsibility for what he has said and written, even though his presence has long since passed. Although this is not always fair to the intentions of the writer, it is still the case.

Jerome Frank, like Karl Marx and other prolific writers, will bear the brunt of much future haggling over what he meant at the time he wrote his major works. And, like

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Here is an example of the conglomeration of ideas that Frank mixes into his basic assumptions about the legal order and which usually end with a statement that does damage to his intellectual ability: "Perhaps there is no greater obstacle to effective governmental activity than the prevalent notion that the "law," at any given period of time, is moderately well known or knowable. That notion reeks with fallacies. And the prime fallacy is the belief that we know what we are talking about when we use the word "law." I venture to say that there are not less than a dozen definitions of that word, each of which is irrefutably correct. The truth is that there are at least a dozen more or less distinct subject matters which by usage may be designated correctly as "law." A label which can be used to mean so many different things is of little use; worse, it can be
dangerous because its ambiguity creates and yet conceals stubbornly dogmatic but erroneous thinking, which often leads to socially dangerous conduct." "Realistic Reflections on Law as a Constructive Social Force," Proceedings of the National Conference of Social Work, Detroit, 1933, pub. by the Univ. of Chicago Press, 1933, p. 326.

Marx, his ideas will have to bear the test of historical judgment. But today, in an era that has witnessed almost cataclysmic social and scientific changes, this writer is wont to believe that an attack on legal certainty and an urge for flexibility in the legal order does not always lead to the desired results.

The use of psychological techniques as the sine qua non of Frank's legal theory was ingenious and perhaps even unique in approach, but it was not necessarily convincing in the amount of or the kind of evidence that was marshalled against the basic legal myth. Perhaps new evidence and

68 "Unfortunately, the fruitful results attained by the realists have been somewhat obscured. The realists, in recognizing the underlying bias of the characteristic traditional emphasis in law, often overreached in seeking arguments and illustrations which would bring into the sharpest focus possible the weakness of the more usual approach. Not always content with a factual and operational approach to their own problems, nor satisfied with providing evidence of the irrelevance of most of the prevailing philosophies to the pressing needs of law, and proceeding cautiously to state the realists' own method and perspective, some realists brought confusion into their arguments by attitudes and analyses which are misleading if not erroneous...." Edwin M. Garlan, Legal Realism and Justice. N.Y.: Columbia Univ. Press, 1941, p. 11. Though not specifically mentioned, I think that Frank fits this description.
experimentation in the field of psychology and law will lead to a refinement of these techniques. But until

69 A good example of Frank's use of psychological materials is his Appendix VIII in *Law and the Modern Mind*, pp. 323-4, entitled, "For Readers Who Dislike References To Unconscious Mental Processes." Here, in order to "mollify" his critics, Frank refers to Hart and Northridge, and quotes from the work of Rignano. Perhaps these men are good authorities on man's unconscious thought processes, but how is the reader to judge their work? For a man who bases an entire book and a good share of the rest of his writings on a fundamental concept from the field of psychology, I would feel that a two-page appendix that merely repeats what has already been said in the body of his book is not sufficient evidence to convince the unbelieving reader. To my mind, this is not mollification.

reliable and empirical evidence is found by the psychological legal realists, Frank's notion of Law as a Father-substitute will be suspect and at the most merely an interesting hypothesis. Even as a "partial explanation," most American legal writers would not accept it today. And, it seems to this writer, until American jurisprudence accepts psychological evidence at face-value for its own purposes, the use of such data will be of value only to those who already believe in its efficacy.

70 When I discussed this question with a practicing psychiatrist, he said that the "validity" of Frank's ideas on the psychology of law depended not upon what psychologists or psychiatrists said, but on how the members of the legal frat-
ernity accepted such evidence. In essence, he was saying that the psychiatrist and the legal philosopher might use similar techniques, but with entirely different criteria of judgment, and with different purposes in mind. Jerome Frank took his first step out of line: he went to the psychologists for their conclusions, without any positive evidence that these conclusions could apply to legal analysis. Piaget, Hart, West, and Rignano may be reputable men in their own field, but until American writers on law accept their ideas as applicable to the study of legal behavior, they are merely Frank's assertions and nothing more. Of course, the "truth" of such assertions will still be in doubt, whether they are accepted by psychologists, psychiatrists, legal writers, or no one. Let it suffice at this moment to say that the legal philosopher is under no obligation to accept the findings of psychology, psychoanalysis, or psychiatry, any more than the members of these professions are under obligation to accept Frank's use (or Lasswell and others) of their findings. The validity of such work is independent of what any of the professions think of each other. But Jerome Frank still bears the burden of convincing his own brethren. And, in my opinion, the major problem still remains unanswered: how can students of jurisprudence judge a man (e.g., Frank) who uses materials from a field that is alien to their thought, and that requires professional judgment by persons other than themselves? I confess that I still do not know the answer.
CHAPTER TWO

THE ROLE OF THE JUDGE IN JEROME FRANK'S PHILOSOPHY OF THE LAW

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What is a judge? One may be the owner of himself coming to his decisions often in a blur of hesitations knowing by what snarled courses and ropes of reason justice operates, with reservations, in twilight/ zones.

What is a judge? Another owns no more than the little finger of himself, others owning him, others having placed him where he is, others telling him what they want and getting it, others referring to him as "our/ judge" as though he is measured and weighed beforehand the same as/ a stockyards hog, others holding him to decisions evasive of right or/ wrong, others writing his decisions for him, the atmosphere hushed/ and guarded, the atmosphere having a faint stockyard perfume.

What is a judge? Sometimes a mind giving one side the decision and the/ other side a lot of language and sympathy, sometimes washing his/ hands and rolling a pair of bones and leaving equity to a pair of galloping ivories.

What is a judge? A man picked for a job by politicians with an eye some/ times on justice for the public, equal rights to all persons entering --- or again with an eye on lucrative favors and special accomodations --- a man having bowels, glands, bladders, and intricate blood vessels of the brain.

Take that cigar out of your face. Take that hat off your head./

And why? why? Because here we are sworn never to sell justice and here/ burns the white light of that priceless abstraction named justice.

What is a judge?

He is a man.

Yes, after all, and no matter what, and beyond all procedures and investitures, a judge is nothing more nor less than a man— one man having his one-man path, his one- man circle and orbit among other men each of whom is one man.

Therefore should any judge open his mouth and speak as though his words have an added light and weight beyond the speech of one man?

Of what is he the mouthpiece when he speaks? Of any ideas or passions other than those gathered and met in the mesh of his own personality? Can his words be measured forth in so special a realm of exact justice instructed by tradition, that they do not relate to the living transitory blood of his
vitals and brain, the blood so soon to cool in evidence of his mortal kinship with all other men? 1

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Jerome Frank's attack on what he considers the basic legal myth is severely critical of the role that judges play in the judicial process. As a crusading reformer, Frank is not a carping critic, for he makes many helpful suggestions of how the courts could function more smoothly and intelligently, especially in the process of finding the facts in a particular case. The myth of legal rule certainty plagues the entire legal system, and hence, Frank is bent on examining this myth wherever it does harm.

Yet trial-court fact-finding is the toughest part of the judicial function. It is there that courthouse government is least satisfactory. It is there that most of the very considerable amount of

1 From Carl Sandburg, "The People, Yes" in his Complete Poems. N.Y.: Harcourt, Brace and Company, 1950, pp. 556-7. In regard to the judge and jury trial, the behavior of lawyers, and the judicial process in general, Sandburg and Francois Rabelais are among Frank's favorites.
judicial injustice occurs. It is there that reform is most needed.²


If legal rules could be relied upon in every type of case, Frank feels the problem of adjudication would be a simple one. But the legal rules, as he has said on so many occasions, can serve only as guides to future decisions.

But what, with unfortunately few exceptions, judges have failed to see is that, in a sense, all legal rules, principles, precepts, concepts, standards --- all generalized statements of law --- are fictions. In their application to any precise state of facts they must be taken with a lively sense of their unexpressed qualifications, of their purely "operational" character. Used without awareness of their artificial character they become harmful dogmas....We want judges who, thus viewing and employing all rules as fictions, will appreciate that, as rules are fictions "intended for the sake of justice," it is not to be endured that they shall work injustice in any particular case, and must be moulded in furtherance of those equitable objects to promote which they were designed.³

The mature judge is the judge who can recognize the provisional nature of legal rules and consequently avoid their harmful effects. He is the completely conscious jurist, conscious of his role as a user of legal rules, and conscious of the inherent limitations of the rules themselves. For this type of judge, rules are but --- psychological pulleys, psychical levers, mental bridges or ladders, means of orientation, modes of reflection, "As-Ifs," convenient hypostatisations, provisional formulations, sign-posts, guides....

Even if we accept rules as guides to future decisions, this still leaves the actual process of decision-making in a quagmire of uncertainty.

The rules, that is, do not produce uniformity of decisions (judgments, orders or decrees) in what we have called "contested" cases, but only uniformity of that portion of opinions containing the rules.... And the legal rights and duties of any man are equally unknowable. Before and until a specific enforceable judgment has been entered, every bit of advice a lawyer gives about any man's legal rights and duties, and all the rights and duties under every document a lawyer prepares, are subject to that unavoidable uncertainty which results from the fact that no specific rights or duties can be known until a specific enforceable judgment has been entered in a future lawsuit pertaining to those specific rights or duties -- a judgment, which, so far as anyone can tell, may turn on conflicting testimony, a judgment which is therefore unguessable....
The uncertainty of most legal rights and duties is then due to their dependence on the decisions in future lawsuits which, in turn, are affected by at least three elements of uncertainty: (1) Many of the legal rules are unsettled or vague. (2) Some legal rules are clear and precise. But the guess of the judge or jury as to the facts in a contested lawsuit is unguessable, even when the legal rules are exact. And no one can prophesy which lawsuits will be "contested" or what conflicting testimony will be introduced in any lawsuit. (3) The reaction of the judge to his guess or the jury to its guess about the facts in a "contested" suit, is unpredictable.\(^5\)

\(^5\) Frank, "Are Judges Human?" 80 U. of Pa. L. Rev. 17, 233 (1931), pp. 36, 46, 47-8. By "contested case," Frank means "a case in which a question of fact is raised and in which conflicting testimony is introduced with respect to the facts in question." "What Courts Do In Fact" 26 Ill. L. Rev. 645, 761 (1932), n. 10, p. 650.

"What courts do in fact," then, is quite different from what the layman thinks they do. The notion of a perfect set of legal rules that the judges can fit to the particular facts of a specific case simply does not stand the test of scrutiny.

Frank summarizes the difference between the myth and the reality of judicial decisions with a set of formulas: the conventional formula is \( R \) (legal rules) \( \times F \) (the facts of a case) gives \( D \) (the decision in that case). The actual process of adjudication, according to Frank, is \( S \) (all of the stimuli surrounding the judge and the case) \( \times P \) (the personality of the judge) gives \( D \) (the decision). But the
latter formula has no predictive value, so Frank uses this formula instead: \( R \) (legal rules) \( \times \) \( SF \) (the subjective facts) gives \( D \) (the decision). "Subjective" facts are those facts that are found by the judge and the jury, not the actual objective facts that took place in a particular place at a particular time prior to trial.

The lawyer's task is to predict and anticipate future court enforceable decisions and to try to win specific cases. No lawyer can be sure of what the objective facts actually are, or what impression his side of the facts will make on the judge and the jury. He must take his chances and hope for the best.

Opinions, then, disclose little of how judges come to their conclusions. The opinions are often ex post facto; they are censored expositions....The lawyer's task, then, becomes this: The determination of what produces the judge's hunches....It is perhaps wise to add that I have no naïve notion that an "unprejudiced" judge -- one without any preconceptions and emotional attitudes -- has ever existed, or will ever exist, and that I have no desire to live in a society in which such sub-human or super-human judges exercised the power of judging. What is wanted in any given society are judges with what the society conceives to be the correct prejudices....But it is desirable and, I think possible, to have judges moderately conscious of and therefore able to check the worst effects of their own biases.6

6 Frank, "What Courts Do In Fact" 26 Ill.L.Rev. 645, 761 (1932), pp. 653, 655, and n. 55, 764. But what are the community's "correct prejudices"? And how is a judge to know whether his prejudices are the "correct" ones in a particular case at a particular time?
Since the facts in a case have to be "found," they are never really the objective facts because the real situation that occurred is being reconstructed by human minds that select and remember only certain facts. Finding the facts is the most difficult problem in judicial fact-finding.

For, if the facts as "found" by the trial court do not approximate the "objective" facts of the case --- the facts as they actually occurred --- the court's decision will be wrong and unjust, no matter how impeccable are the legal rules applied by the court. The "right" rule applied to the wrong facts --- to facts which do not match the actual facts --- cannot produce a correct or just decision.7

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7 Frank, Book Review, 56 Yale L.J. 589 (1947), p. 592. In most of his writings, Frank does not concern himself with the "just" decision, or the problem of "justice" in general. In the case of this 1947 review, he equates a factually "correct" decision with the "just" decision in a case, but does not trouble himself with the philosophical implications of this view. Aside from the problem of justice, the question of what is meant by objectivity (what is a fact?) is left unanswered.

How can a court find the "actual" facts of a case? Especially where there is conflicting testimony. Frank does not have a pat answer, except that the judge should show some humility and recognize the problem for what it is.

In the many cases where the testimony is in conflict, can there ever be much "objectivity" in judicial decisions, or --- more important, for present purposes --- much of uniformity in the translation of community
ideals into those decisions? I confess that I do not know the answer. To some extent, the difficulty can be surmounted by self-knowledge on the part of the judge, but a self-scrutiny revealing to him his biases, followed by an effort on his part to bring them into line with acceptable moral ideals. But that is no complete solution.8

8 Frank, Book Review, 59 Harv. L.Rev. 1004 (1946), p. 1011. What Frank means by "acceptable moral ideals" is nebulous and undefined in most of his writing. This particular use of careless philosophical language may be the result of Frank's eclectic nature, but being an eclectic does not excuse him for not being a scholar.

If the lawyer must predict what the judge's "hunch" will be, how should he undertake his hazardous endeavor? The answer to this question is for Jerome Frank the key to a clearer understanding of what makes judges human.

...If the law consists of the decisions of the judges and if those decisions are based on the judge's hunches, then the way in which the judge gets his hunches is the key to the judicial process. Whatever produces the judge's hunches makes the law. What, then, are the hunch-producers? What are the stimuli which make a judge feel that he should try to justify one conclusion rather than another?...What are the hidden factors in the inferences and opinions of ordinary men? The answer surely is that those factors are multitudinous and complicated, depending often on peculiarly individual traits of the persons whose inferences and opinions are to be explained. These uniquely individual factors often are more important causes of judgments than anything which could be described as political, economic, or moral biases.9
Yet, if the witnesses cannot accurately reproduce the facts, where does that leave the judge? In the search for the real or "actual" facts, the judge really deals with two sets of facts: the facts that are being sought (the original or objective facts), and those facts that come out in the trial itself.

Strangely enough, it has been little observed that, while the witness is in this sense a judge, the judge, in a like sense, is a witness. He is a witness of what is occurring in his court-room. ... If his final decision is based upon a hunch and that hunch is a function of the "facts," then of course what, as a fallible witness of what went on in his court room, he believes to be the "facts," will often be of controlling importance. So that the judge's innumerable unique traits, dispositions and habits often get in their work in shaping his decisions not only in his determination of what he thinks fair or just with reference to a given set of facts, but in the very process by which he becomes convinced what those facts are.10


Since the individual personality of the judge is the cardinal factor in the adjudicatory process, law will vary
according to the type of personality exhibited by the individual judge passing decision in any specific case, and the various stimuli operating to make the individual judge behave in a particular manner. This is the view of Theodore Schroeder,\textsuperscript{11} who believes that psychology is the answer to our problem. But even though Frank is strongly addicted to the myth of the Law as a father-substitute, he cannot wholly accept this explanation.

\textit{If Schroeder were right, the discovery of the hidden causes of decisions would be fairly simple. But the job is not so easy. The directing impulses of judges will not so readily appear from analyses of their rationalizing words. We shall not learn how judges think until the judges are able and ready to engage in ventures of self-discovery....For in the last push, a judge's decisions are the outcome of his entire life-history....} \textsuperscript{12}

\textsuperscript{11} \textit{Supra, n. 35, p. 35.}

\textsuperscript{12} \textit{Law and the Modern Mind, pp. 114, 115. And interestingly enough, Frank is quick to add: "It should be obvious from the above that we do not think psychological studies are likely to make decisions markedly more predictable." Ibid., note, p. 117.}

Once it is recognized that objectivity in the trial
process is an *impossibility*, Frank's search for the actual realities of court-house government begins:

In our modern method of trial, as I told you, there are two factors which make subjectivity unavoidable. The first relates to the witnesses. They do not reproduce mechanically the events which they saw and heard. Their sight and hearing are often faulty, and so are their memories. More than that, they often err in telling their stories in court. So here is one element of subjectivity. There is another, which, as I said, is less frequently recognized and acknowledged: The trial judges or juries are fallible witnesses of the fallible witnesses.  

If each judge's reactions are unique, then the judge's decision is a unique experience, not a mechanical one, as the nineteenth century jurists visualized it.  

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13 *Courts on Trial*, p. 47.

14 Cf. Max Rheinstein: "...As long as judges held the belief that their activity was of a semi-automatic character, and that by the very nature of things and by intrinsic necessity, they could not but apply the law, judicial law observance was well guaranteed, indeed. 'Free law' jurisprudence of Europe and sociological jurisprudence and legal realism of America have shattered that idyllic belief, have analyzed the judicial process, and have taught the judges that their activity is far from being automatic. For those of us who have grown up under the influence of the New Jurisprudence, it is hard to imagine how judges could ever so deceive themselves about the scope and extent of their powers. But they were serious and sincere men who declared that in judging, they were only putting the text of the law on one side, the facts of the case on the other, and by logical
necessity were thus led to the one and only correct decision; or who declared that they were only finding and never creating law; or that they were only interpreting and never supplementing the expressed intention of a testator, of contracting parties, or of a legislature. Such statements can be explained not only by the desire of evading criticism for a decision by ascribing it to the logical compulsion of a system of rules created by others, but also by a sincere self-deception which could give the judge a soothing sense of freedom from responsibility for decisions by which human fates would be made or crushed. The conscience of the judge is eased when he can ascribe the decision which appears repugnant to his own sense of justice to a compelling necessity rather than to a volitional decision of his own." "Who Watches the Watchmen?" in Interpretations of Modern Legal Philosophies, pp. 601-2. This rationalistic, mechanistic approach to decision-making was no longer acceptable to the legal realists; yet, not all of them could go to the other extreme and exclaim that if the decision wasn't automatic, it was all "hunch" on the part of the judge.

the process of discovering the "truth" about judicial behavior that Frank turns to a discussion of what he calls "what courts do in fact." If it is the facts that are being sought, then the judge's reactions to and interpretation of what he thinks the facts are become part of this search for legal reality.

...A trial judge is himself a witness -- a witness of the witnesses. His faulty observation of the witnesses, due to inattention or other factors, or his mistaken recollection of his observations, affect his fact determinations.15

15 Frank, "Judicial Fact-Finding and Psychology" 14 Ohio St.L.J. 183 (1953), pp. 186-7. Note that after twenty three years, even Frank's wording has not changed much.
One legal realist, Professor Fred Rodell of the Yale Law School, in reviewing Frank's *Courts on Trial*, said that a distinction ought to be made between what Rodell considers to be the inevitable and not-so-inelvitable factors in judicial fact-finding:

Now it happens that Judge Frank's fluid human factors which prevent precise fact-finding fall, by my judgment, into two groups although Frank does not so divide them. One group might be called the inevitable factors — the factors which would still be present if every person in the courtroom were completely honest, completely impartial, and reasonably intelligent. They include the fallibility of witnesses' powers of observation and perception; the fallibility of witnesses' memories; the fallibility of witnesses' efforts to communicate in speech things "remembered" as having been "seen"; the fallibility of judges' or jury's powers of observation and attention; the fallibility of judges' or jury's memories of what they think they hear; and the ultimate fallibility of any human attempt to pull a strictly mechanical judgment about alleged facts out of an emotion-laden preconception-filled human mind. None of these muddying or distorting factors can ever be completely eliminated from any effort to recapture past facts in any kind of court. 16

16 Book Review, 25 Ind. L.J. 114 (1949), pp. 117-18. The not-so-inelvitable factors or obstacles to accurate trial court fact-finding, according to Rodell, are bias, the dramatic atmosphere of the courtroom, and the "game" that adversaries play in trying to win their case. "But nowhere does he specify that all these not-so-inelvitable obstacles to accurate fact-finding stem from one single basic root. That root is the adversary nature of all our court-house government — our stubborn retention of a somewhat more civilized form of trial-by-combat as the foundation of all that we call law." Ibid., p. 118.
The guess-work that Frank describes applies to the facts of the case, as well as the behavior of the judge, for no lawyer or client can ever be completely sure that the judge will understand what has transpired in his courtroom.  

17 "Therefore, my description of the nature of a legal rule needs revision: a legal rule means, 'If the jury or trial judge (expressly or impliedly) says that it believes the facts are thus and so, and if there is some substantial evidence to justify that statement of belief, then these legal consequences ensue.'" Frank, "Cardozo and the Upper-Court Myth" 13 Law & Contemp. Prob. 369 (1948), p. 379.

It is the unpredictable (what he calls "unguessable") nature of legal rights and duties that bothers Frank so much:

...Guessing legal rights, before litigation occurs, is, then, guessing what judges or juries will guess were the facts, and that is by no means easy. Legal rights and duties are, then, often guessy, if-y. See what this means: Most legal rights turn on the facts as "proved" in a future lawsuit, and proof of those facts, in "contested" cases, is at the mercy of such matters as mistaken witnesses, perjured witnesses, missing or dead witnesses, mistaken judges, inattentive judges, biased judges, inattentive juries, and biased juries. In short, a legal right is usually a bet, a wager, on the chancy outcome of a possible future lawsuit.  

18 Courts on Trial, p. 27.
The Judicial "Hunch": The Contrapuntal Strains of Jerome Frank's Analysis of the Judicial Process

Since Jerome Frank believes that judges are human beings, their reasoning processes are like those of their fellow humans, viz., they make their judgments and then work backwards to find premises (rationalizations) that will justify and substantiate their conclusions. This is the syllogistic process of decision-making (Frank terms it "sterile logic-chopping") that Frank thinks the legal profession has so blindly failed to acknowledge.

The judicial "hunch," as Frank and other writers have called it, is nothing more or less than what most judges do in fact. But few judges will recognize or admit what is considered normal everyday behavior on their part.

For the reaction of a trial court to conflicting oral testimony frequently does not start with a nice differentiation between rules and facts, but starts with an unanalyzed, undifferentiated, composite reaction -- a "hunch" or unanalytic "gestalt" (a "whole"). There is very considerable reason to believe that juries often do not go beyond such composite (or gestalt) reactions in arriving at their verdicts. 19

Jerome Frank is far from being the first critic (and later judge) to admit that decisions are not always spontaneous "finds" that appear to fit the facts, but are usually the result of complicated deliberation and rationalization. What judges say, the *dicta* as well as the *obiter dicta*, is certainly, in many cases, far different from the results of their decisions. The late Justice Benjamin N. Cardozo was one judge who believed in the "lucky find":

...The law has its piercing intuitions, its tense, apocalyptic moments. We gather together our principles and precedents and analogies, even at times our fictions, and summon them to yield the energy that will best attain the jural end. If our wand has the divining touch, it will seldom knock in vain. So it is that the conclusion, however deliberate and labored, has often the aspect in the end of nothing but a lucky find....

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20 *The Paradoxes of Legal Science*, p. 60.

Judge Joseph C. Hutcheson, Jr. came to a similar conclusion:

...I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the
feeling, the hunch --- that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way....in feeling or "hunching" out his decisions, the judge acts not differently from, but precisely as the lawyers do in working out their cases, with only this exception; that the lawyer, having a predetermined destination in view, --- to win the law suit for his client --- looks for and regards only those hunches which keep him in the path that he has chosen, while the judge, being merely on his way with a roving commission to find the just solution, will follow his hunch wherever it leads him....

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Judge Hutcheson, in a jocular mood, adds:

I shall further affirm, and I think maintain, that the judge is, in the exercise of this faculty, popularly considered to be an attribute of only the gambler and the short story detective, in the most gallant of gallant companies....

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22 Ibid., p. 279. The company would also excite Frank.

In addition to his discussion of syllogistic reasoning and psychological rationalization, Frank turns to an alien
field, music, for a novel explanation of what takes place when a judge arrives at a decision:

His response to that testimony is, in part, "wordless knowledge." To be completely articulate, to communicate that response satisfactorily, he would be obliged -- as a more popular song put it -- to "say it with music." For his emotion-toned experience is contrapuntal....Since the trial judge is not, then, engaged in a wholly logical enterprise, the effort to squeeze his "hunch," his wordless rationality, into a logical verbal form must distort it, deform it. His ineffable intuition cannot be wholly set down in an R and an F. There are overtones inexpressible in words. He has come upon non-logical truth.23


The analogy to music suggested to Frank another prop for his argument. Most judges would deny the allegation that they legislate in their decision-making, for this would be a violation of our sacred separation of powers doctrine. Frank feels that it is impossible for a judge to completely avoid statutory interpretation at some stage of the judicial process.

The legislature is like a composer. It cannot help itself. It must leave interpretation to others, principally to the courts....Yet most of our "common law" is
judge-made. When judges modify a common-law rule, by expansion or contraction, they continue this process of legislation. They do so also when they apply such a rule to a set of facts of a kind to which that rule has not previously been applied. That holds true when the rule was enacted by the legislature. For, in so doing, they interpret the statute -- and interpretation is inescapably a kind of legislation.

When a court applies a legal rule -- statutory or not -- to the facts of a case, the court must interpret not only the rule but the evidence. For a court nullifies a statute when the court mis-finds the facts of a case in such a way that the statute is inapplicable. The delegated "discretion" to find the facts can, then, become a power to prevent the operation of the legislative process. 24


In order to understand the function of the judicial "hunch," we must turn our attention, for the most part, to the actions of trial courts, where the facts are initially presented and where Frank feels the "hunch" will sooner or later take place. This introduces another element in Frank's critique of the judge, namely, the upper-court myth.
The Upper-Court Myth And Its Effects: Rule-Skepticism And Fact-Skepticism in Frank's Analysis

In almost the entire discussion up to this point, Jerome Frank has been concerned with the decisions of trial court judges and juries, the area he calls "court-house government." The important fact-determinations are made at this level of the judicial process, and hence, the nub of the problem is what "facts" are discoverable at the level of the trial court?

The school of "sociological jurisprudence" wisely noted the effects of the social, economic, and political views of judges. But because that school primarily studied the legal rules, and therefore, the published opinions of upper courts, it disregarded, for the most part, the less obvious components of judges' attitudes.25

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Within the school of American legal realism, Frank distinguishes between what he calls the rule-skeptics (such as Cardozo and Llewellyn), who concentrate their attention on the decisions of upper or appellate courts, and the fact-skeptics (such as Frank and Arnold), who concentrate their
attention on lower or trial court decisions. The function of the rule-skeptic is to peer behind the "paper rules" of legal opinions, which do not always prove reliable as guides to the prediction of future decisions.

...In other words, these rule skeptics seek means for making accurate guesses, not about decisions of trial courts, but about decisions of upper courts where trial-court decisions are appealed. These skeptics cold-shoulder the trial courts. Yet, in most instances, these skeptics do not inform their readers that they are writing chiefly of upper courts.26

26 Frank, Courts on Trial, pp. 73-4.

Jerome Frank has a deep respect for the questioning mind of the late Justice Cardozo, but in Frank's opinion, Cardozo's cardinal "sin" was that he concentrated on the legal rules applied by appellate courts, and ignored the pioneering work of the trial court judges who dealt with the facts.27


The fact-skeptics also peer behind the so-called "paper rules" of upper court decisions, but their primary interest
is in the more basic work, as they see it, of the trial courts.

...No matter how precise or definite may be the formal legal rules, say these fact-skeptics, no matter what the discoverable uniformities behind these formal rules, nevertheless, it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in most (not all) law-suits not yet begun or not yet tried. The fact-skeptics, thinking that therefore the pursuit of greatly increased legal certainty is, for the most part, futile — and that its pursuit, indeed may well work injustice — aim rather at increased judicial justice. This group of fact-skeptics includes, among others, Dean Leon Green, Max Radin, Thurman Arnold, William O. Douglas (now Mr. Justice Douglas), and perhaps Professor E.M. Morgan.  

28 Frank, Courts on Trial, p. 74.

According to this analysis by Frank, the rule-skeptics live in an artificial two-dimensional legal world, while the legal world of the fact-skeptics is three-dimensional and is wholly free of the old magical tradition of the law. Frank would like to go one step further to what he calls "four-dimensional" thinking, but even legal realism is not mature

29 "I suggested earlier that most legal thinking is two-dimensional, that considerations of trial-court processes in "finding" the "facts" demands three-dimensional legal thinking. Perhaps that suggestion should be amended: The physicists now deem it artificial to separate space and time.
Using the idea of space-time, they add space as a fourth dimension. In the same way, if we take into account the trial court's gestalt, we should perhaps regard it as adding a fourth dimension, and see the need of fourth-dimensional legal thinking, which requires not mere intellectual but also artistic insights." Courts on Trial, pp. 182-3. What Frank would do with Alfred Korzybski's "time binding" elements in law, I cannot say, for Frank's use of Krenek and Langer is still a puzzle to me. Cf. the approach of Max Rheinstein: "What needs be achieved is a correcting or, better, a refinement, of one of the main insights of the New Jurisprudence. We have properly been shown that the judicial process is not an automatic one, but that it contains an inevitable element of creative activity. That creativeness, however, is of a peculiar kind. It is not the creativeness of free volition but that of articulation of a pre-existing standard, a standard pre-existing in the unexpressed and inarticulated value consciousness of the community. The formulated rules of the law do not contain solutions for every conceivable case. The New Jurisprudence is correct in holding that there are gaps in the law, but 'law' in that connection only means the formulated, the articulated rules of the community. For the new case a decision is in existence, hidden and unconscious, perhaps, but indicated by those faiths, ideals, and aspirations which guide, inspire, and determine the community, or its valentior pars. For the 'new' case a new rule must be made by the judge, but not upon the basis of his own, individual predilections and personal ideals, but in conformity with the value judgments of that society of which he is a functionary. These value judgments of the community are, of course, those of the individuals of which it is composed, and, especially, of those who are its recognized guides and leaders. Of these individuals, the judge is one himself, and in that sense his individual value judgments help to shape those of the community. But, as judge, he is not to give way to them unless they have become those of the community. As judge, he has to search for that solution which is the 'right' one in the eyes of his society. In this sense, he has to 'find' the law. But he has also to 'make' it, since he has to articulate the norm which has only been vaguely felt before. That process of articulation is delicate and difficult, it requires skill, tact, training, craftsmanship, and above all, sensitivity. It is of a truly creative character, like that of the artist, poet, or musician, who feels the sentiments living in his people and gives expression to them, so that each individual can now recognize them as really his own, and make them into a new source of strength and inspiration. Simultaneously to make and to find the law requires self-discipline, strength, and responsibility. The judge, the watchman of society, holds
power in his hands, which he can use and abuse. No institution can ultimately safeguard the proper use of that power. No self-deceiving belief in judicial automatism stands any longer in the way of abuse. Religious scruples exert but weak force in this present age of disbelief. Nothing but moral virtue restrains the watchmen." Op. cit., p. 603.

This view is similar to that of the great German legal philosopher, Eugen Ehrlich. "...It is a demand of political prudence that the norms for decision which are prescribed to the judges by the lawmakers conform to the value judgments held by the people whose controversies the judges decide. History shows that such conformity exists frequently but not always...." Rheinstein, "Sociology of Law. Apropos Moll's Translation of Eugen Ehrlich's Grundlegung Der Soziologie Des Rechts" 48 Intl. J. of Ethics 232 (1938), p. 235. Frank, without acknowledgment of Ehrlich, Rheinstein, or even Max Weber, semi-consciously accepts these arguments when he says that the mature judge must discover "what the society conceives to be the correct prejudices." Supra, n. 6, p. 109.

enough for that kind of advanced thinking. Instead of going to Montana to study the legal system and the mores of the Cheyenne Indians, Frank believes that Professor Karl Llewellyn, for example,

...By spending a few nickels on subway-fares for short trips from Columbia Law School, where he teaches, to lower New York City, Llewellyn could have studied in detail the trial courts of that metropolis. He could then have written a book on the anthropology of Tammany-Hall Indians, many of whom are first-rate trial judges.30

30 Courts on Trial, p. 77. Could it be that the Cheyenne Indians had something that Professor Llewellyn could not by any stretch of the imagination find in Tammany Hall? Isn't Frank's view somewhat short-sighted, in view of the fact that Llewellyn made no pretense of what he was setting out to accomplish with Hoebel? Why not accept Llewellyn's work
at face-value and let the matter rest?

But why is the trial court so important for the fact-skeptics? Why is it pre-eminently at the heart of their analysis? Jerome Frank has an answer:

And now I come to a major matter, one which most non-lawyers do not understand, and one which puts the trial courts at the heart of our judicial system: An upper court can seldom do anything to correct a trial court's mistaken belief about the facts. Where, as happens in most cases, the testimony at the trial was oral, the upper court usually feels obliged to adopt the trial court's determination of the facts. Why? Because in such a case the trial court heard and saw the witnesses as they testified, but the upper court did not. The upper court has only a typewritten or printed record of the testimony. The trial court alone is in a position to interpret the demeanor-clues, this "language without words...."31

31 Courts on Trial, p. 23.

Frank believes that the upper-court myth was created for the purpose of hiding in the minds of lawyers, judges, and legal scholars alike what actually takes place in the judicial process. It is part of what he calls "legal magic."

Legal rules, therefore, will not suffice to control the trial courts, even if those rules are applied conscientiously. You cannot control such courts
unless you can also control their fact-finding. But that you usually can't do. For the process of fact-finding is altogether too subjective and, consequently, too elusive. It is "un-ruly." The refusal to recognize such unruliness constitutes modern legal magic. It stems from a "desire to be deceived." 

32 Courts on Trial, p. 61. And, like all mythical thinking, it is "childish."

Another contemporary judge, Judge Charles Wyzanski, Jr., is substantially in agreement with Frank on the importance of the trial judge's work:

...What is the whole law of procedure but the crystallization of judicial custom? The trial judges made the law of evidence by their usages; and perhaps now they are unmaking it by their usages. The revocation is hidden by appellate courts which treat departures from the proclaimed evidentiary rules not as though they represented new doctrine, but as though they were insignificant nonreversible errors....Let us not suppose that because our jurisdiction is limited, because so much of our work goes unreported, because we are immersed in the detail of fact, we trial judges are clothed with small responsibility in relating law to justice. It is we who make the law a living teacher as we transmit it from the legislature and the appellate court to the citizen who stands before us. It is we who watch the impact of the formal rule, explain the purpose to laymen, and seek to make its application conform to the durable and reasonable expectations of our communities. It is we who determine whether the process of common-law growth shall decay or flower with a new vigor.

the District Court, while Frank is a judge on the Circuit Court of Appeals.

Julius Stone, like Max Rheinstein and Judge Wyzanski, feels that the reaction of the community to the judge's decision is far more important than the judge's "unconscious" drives or his overt rationalizations of his decision. In referring to Frank's suggested reforms (especially, the use of special findings of fact instead of the more commonly used general verdict) in *Courts on Trial*, Stone wrote:

I think that he has not, even then, quite made the final point. In the end the question may be whether the decision on the facts is outrageous to the moderate reasonableness of most of the community, and of the appellate courts as representing them, rather than the relation of the decision to the judge's subjective state of mind. It is immaterial from this aspect whether that relation be viewed as visceral, reflex, biochemical, emotional (wish-love or hate-fear) or in quasi-mystical Gestalt terms. Only on some such basis can the requirement of special findings of fact be justified without assuming that the "inescapable" can be escaped or the "un-get-able" got at.34


An even more fundamental distrust of any such mechanical remedy as the requirement of special findings of fact for the difficulties Frank finds in trial courts is illustrated
in Justice Cardozo's emphasis on the need for agreement on first principles:

...I feel profoundly that much of the criticism of courts and many of the blunders of courts have their origin in false conceptions, or at any rate in varying conceptions, of the limits of judicial power, the essence of the judicial function, the nature of the judicial process. We may not hope to eliminate impatience of judicial restraint, and even revolutionary encroachments upon the integrity of judicial power, till we settle down to some agreement about the things that are fundamental.35

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35 The Growth of the Law. New Haven: Yale Univ. Press, 1922, pp. 144-5. This quotation goes some way towards indicating how far Frank failed to understand the true basis of his own disagreement with Cardozo. Professor Earl Latham of Amherst College, in a letter to the editor of the New York Times a few years ago said nearly the same thing in commenting on criticism of the Supreme Court today. Professor Latham said that if American society is in doubt about many of our fundamental ideas, how can the Supreme Court be expected to have fixed and final answers to our most pressing problems? See James Reston, infra, n.7, p.71.

According to Frank's argument, the upper-court myth reduces our interest in the competence and qualifications of trial-court judges, who are the core of so-called court-house government. Aside from his suggestion of self-awareness, Frank is not optimistic about the practical prospects of solving this problem:
It may occur to someone that the upper-court myth would become a reality if every trial judge were required to state in writing why he believed or disbelieved witnesses, and to give a detailed report of his demeanor; for, in that way, the upper court could get rid of the subjectivity of the trial judge's reactions to testimony. But the upper court would still not know whether the trial judge's report was "objective." A better device would be one I proposed in 1930: Have a "talking movie" of each trial. It would completely reproduce the manner in which the witnesses testified, so that the upper court judges could form their own, independent, impressions of the trial. But these impressions would still be subjective reactions -- those of the upper-court judges. Each appeal would be but another trial in the upper court, a cumbersome procedure. At any rate, the upper-court judges would become trial judges, and they would then need training in trial judging.36

36 Courts on Trial, p. 224. Frank adds in a note: "Because of the subjectivity in the witnesses' testimony, it would still be impossible to be sure of knowing the actual past facts." Ibid., p. 224.

Although he urged that trial courts be required to make special findings, and urges other technical changes, Jerome Frank professes little respect for the procedural reformers, chiefly because he feels that procedural reform cannot solve the problem of finding the facts, or materially improve the competence of those who conduct trials.

Since about such matters the procedural rules are silent, the procedural reformers err in over-emphasizing the importance of the rule-aspects of procedure. For, as we have seen, often the "unruly" elements in the trial process -- the factors that inherently cannot be formulated in rules -- play a dominant part in pro-
ducing decisions. Thus these reformers turn out to be, not "fact-skeptics," but merely one species of "rule-skeptics." They, too, live in a one-dimensional legal world, an artificial world in which rules control decisions. Insufficiently bitten by "fact-skepticism," these reformers have under-estimated the effects of trial-court "discretion" concerning credibility. The procedural reformers are, then, in part, devotees of legal magic. (From this criticism there must be excepted some of these reformers, among them my colleague, Judge Charles E. Clark, and Professor Morgan.)

Inevitably, the search for a viable solution to the problem of court-house government ends on the word, objectivity, but Frank fully recognizes the impossibility of ever getting completely objective judges. The judicial process, by its very nature, is made up of men, fallible men, whose judgment is never a complete reproduction of past events. No human institution could ever do this; hence, the judicial process can never wholly be free of subjectivity. But what it needs, according to Frank's analysis, is a frank recognition of the limits of human knowledge, and the techniques that the human mind uses for hiding its own fallibility. The possibility of human error will always make the judicial process something less than perfect.

Another trouble with court-house government is the trial-by-combat that takes place between the competing adversaries. Frank calls this the "fight theory" of the
court room, contrasted with the "truth theory" that ought to be pursued (what are the facts, not what are your facts, Mr. Opposing Attorney?).

In short, the lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interests. Our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.38

38 Courts on Trial, p. 85.

Advocacy, like trial-judging, requires special ability. As an art, it is one of the most difficult attributes of the entire process of finding the just answer to disputes that arise between men. This has been underlined by Chief Justice Arthur T. Vanderbilt of the New Jersey Supreme Court, who says that advocacy is a special art that not all lawyers possess:

To learn the law of a case---given industry and intelligence---is relatively simple, but to know the facts of case after case is indeed a life sentence to hard labor. To master the varying stories of each of your witnesses (if they do not vary in some degree you may well suspect perjury) and to ascertain or to forecast the testimony of each of your adversary's witnesses and from it all construct the facts as they will emerge in court under the compulsion of a solemn oath to speak "the truth, the whole truth and nothing but the
"truth" requires intellectual ability of a high order. ...Advocacy, very obviously, is no calling for the intellec
tually, physically or morally weak.39

The formula, $R \times F$ or $R \times OF$ (the objective facts) equals $D$ is never really possible in the court room situation. According to Frank, what actually happens, what actually emerges from the trial itself is $R$ (rule) $\times SF$ (subjective facts) equals $D$ (decision). No matter how much we discuss the weaknesses of our present trial court system, we can never ignore the inherent difficulty that has always existed and that will continue to exist, viz., the search for truth on the basis of ex post facto facts.40

40 Several recent American cases point up the problem of judicial fact-finding. See Milton Lehman, "Rosenberg Case: Judge Kaufman's Two Terrible Years" 226 Sat.Eve.Post 20(84) (August 8, 1953) for a discussion of the agony of Judge Kaufman's decision in that celebrated case, and especially the religious and political pressures that weighed so heavily over the judge. Also, Charles Alan Wright, Book Review, 35 Minn.L.Rev. 228 (1951) on the case of Alger Hiss and his famous typewriter. Another recent example outside of the court room was the case of the "doctored" photograph in the Secretary Stevens-Senator McCarthy congressional hearings during April and May, 1954 in Washington.
Judge Bridlegoose's throw of the dice,\textsuperscript{41} or the mecha-

\textsuperscript{41} In Francois Rabelais' charming \textit{Five Books of the Lives, Heroic Deeds and Sayings of Gargantua and His Son Pantagruel}, Pantagruel says: "'...But this continuation of Bridlegoose, for so many years, still hitting the nail on the head, never missing the mark, and always judging aright by the mere throwing of the dice and the chance thereof, is that which most astonisheth and amazeth me.'" Vol. II, ch. XLIV of \textit{The Works of Francis Rabelais}, the Urquhart-Le Mott-eux translation, ed. by Albert J. Nock and Catherine R. Wilson. N.Y.: Harcourt, Brace & Co., 1931, p. 585.

analytical and completely rationalistic jurist merely looking at a treatise or a code for the "perfect" decision, or the judicial "hunch" alone are not wholly acceptable to Jerome Frank. Again, his solution is the mature judge with a mature legal mind who knows his inherent limitations, understands "human nature," but can still act as a judge without denying his essentially human qualities. At almost every point of Frank's theory of law, judicial self-awareness is a prerequisite of a more realistic appraisal of the role of the judge in the judicial process.\textsuperscript{42}

\textsuperscript{42} See Frank, \textit{supra}, ns. 12 and 15, pp. 113, 115.

Self-awareness will clear the judge's mind of legal magic, especially the glib verbalizations that are now so
prevalent in written opinions. Legal rules will be accepted only for what they are worth. Precedents will be viewed realistically:

For precedential purposes, a case, then, means only what a judge in any later case says it means. Any case is an authoritative precedent only for a judge who, as a result of his own reflection, decides that it is authoritative....

\[\text{\textsuperscript{43}}\]

\[\text{\textsuperscript{43}} \textit{Courts on Trial}, p. 279.\]

But even further than this type of self-awareness by the judge will be the community's awareness of the judge's function in the judicial process. The judge must be humble, conscientious, and above all, democratic.\[\text{\textsuperscript{44}}\] For example,

\[\text{\textsuperscript{44}} \textit{Cf.} Poet Carl Sandburg's view of this matter:}\]

Who was the twentieth century lawyer who said of another lawyer, "He/ has one of the most enlightened minds of the eighteenth century"? and why did fate put both of them on the Supreme Court bench?\[\text{\textsuperscript{Op. cit.}}, p. 552.\]

after discussing the intricate problems that contemporary Supreme Court justices must face, Frank has this to say about the qualifications of the now Mr. Justice Douglas:
And, since the preservation of democracy is the paramount issue of the day, he should be an ardent lover of democracy, possessed of face-to-face acquaintance with American democracy as a living fact expressed in the daily lives not merely of notables but as well of our humblest citizens. This book reveals Mr. Justice Douglas as one who meets all the requirements of the recipe. 45

45 Book Review of Douglas' Democracy and Finance, 54 Harv. L.Rev. 905 (1941), pp. 906-7. In my opinion, this sounds like a lot of gibberish, since the choice of Supreme Court justices is not based on the same criteria as a Fair Employment Practices Commission might use in its work. Cf.: "The Supreme Court will undoubtedly preserve much of its present character, but the philosophy behind its work will be substantially changed. The new jurisprudence has already discovered that its function is not that of accurately classifying cases which come before it in their appropriate conceptual pigeonholes. More and more we are realizing that this great tribunal possesses broad political powers. The court must recognize the dynamic character of our civilization. It may not thwart the inevitable process of change and progress, but it must insure that this change and progress assume an orderly and consistent form, that reasonable respect for traditional values and for the experience of the past operate to modify the impulses for radical reform. The function of the Court will become less that of a formal judicial tribunal and more that of a board of political censors, an agency removed from the swirl of practical politics, unaffected by the pressure of immediate events, and thus in a position to exercise essential controls in the interest of continuity and adequate deliberation." Walter J. Shepard, "Democracy in Transition," p. 17.

Unfrock the judges! cries Jerome Frank, and then we can bare judicial reality to the public.

The judge's vestments are historically connected with the deplorable desire to thwart democracy by means of the courts....The courts should feel obligated to make themselves intelligible to the man on the street or in
the subway. Unfrock the judge, have him dress like ordinary men, become in appearance like his fellows, and he may well be more inclined to talk and write more comprehensibly. Plain dress may encourage plain speaking.46

46 "The Cult of the Robe" 28 Sat. Rev. of Lit. 12 (80), October 13, 1945, pp. 12, 80. And what, I ask in all fairness, will "plain speaking" accomplish in respect to the problem of the judge's decision-making function? Isn't this somewhat naive, considering the level at which Frank attacked the problem of judicial fact-finding in some of his other writings, above-mentioned?

Once the judge is unfrocked, exposed, and wriggling before the public, like T. S. Eliot's Prufrock, he will be a new man. His divinity, as well as his paternalistic position in the community, will have been denuded, and he will emerge as a completely unpretentious legal functionary in the best democratic sense.

The concept of governmental guardians cannot be reconciled with the basic concept of a democracy. We have rejected hereditary father-rulers....In recent years, the Supreme Court has boldly abandoned the papa role. The justices have openly acknowledged their human fallibilities, have discarded the "opportune lie" that judges possess some sort of semi-divinity. This new democratic attitude has distressed the followers of Plato among us, partly because they are afraid to grow up, partly because they lack faith in the capacity of their fellow Americans to achieve maturity, to become responsible members of a democratic society. But the Court has set a splendid example. Let all our other governmental officials follow it. Then, democratically, we can become self-guardians.47
Frank, "Self-Guardianship and Democracy," editorial in 16 Amer. Scholar 265 (1947), pp. 266-7. I'm not sure how Frank jumped from more accurate fact-finding to judicial self-awareness and then to democracy, but this type of intellectual and philosophical hocus-pocus is more akin to Frank's approach to law than it is to mine. In my opinion, the issue of democracy had no place in the discussion, certainly not at this point.

Justice Oliver Wendell Holmes and Judge Learned Hand are the prototypes of the kind of mature judge that Frank is searching for. He saw Holmes as freeing American jurisprudence from its reliance on black-letter law and its slavish worship of history and tradition ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV"). History, for Justice Holmes, is chiefly valuable for the light it can throw on the present. ("A page of history is worth a volume of logic").

If, according to Holmes, a theory of law should fit the facts, the problem of finding the facts still remains. The touchstone of Holmes' life and of his work is the element of courage. To Frank, as it was to Holmes, life is a constant challenge, physically as well as intellectually.

In Judge Hand, Frank saw another man who has the courage of his beliefs and in whom he found in a supreme degree the quality of wisdom. He is, for Frank, "our wisest judge" because he is fully aware of his limitations.
as a man and as a judge. He is as explicit and as honest a jurist as could be humanly possible in a system such as our own.

Courage and wisdom are values. As Felix Cohen, Roscoe Pound, and Max Rheinstein have all so clearly said, the element of values, of the moral components of the legal order, are always uppermost in the picture that we have of the judicial process after the problem of fact-finding is disposed of. For Jerome Frank, the pendulum is swinging away from the worship of paper rules, mechanically chosen, to men, especially men who can be trusted in a democratic society.

The final hope for democracy must be, not in its letter law, but in its leadership. The day must come when the people's trust must be less in law and more in men. In the last analysis, the main test that will determine the survival of democracy will be its capacity for the wise selection of men — men sufficient in character and wisdom to be trusted with the powers of the State.48

48 From an article by George Alger, as quoted in Frank, Courts on Trial, pp. 408-9. Cf.: "A government is as good as the men who operate it, and no better. To obscure that fact is to foster corruption, stupidity, and inefficiency in government. No more deadly obscuring agent has ever been devised than the slogan that we have, and should have, a government of laws and not of men. And at the core of the vice of that slogan is that fatally ambiguous word "law."... Government is what it does. It consists of the acts of human beings. It does not consist of inert entities known as laws, but of human activities — activities of the men who at the moment constitute the government." Frank, "Realistic Reflections on Law as a Constructive Social Force,"
p. 326. This argument is somewhat illogical, because laws that are made by human beings (men) are part of what Frank calls "human activities." A truly "realistic" view of government would have to include laws and men.

But whenever the argument over laws and men arises, the inevitable question, from the democratic point of view, is "who watches the watchmen?" What values should they possess? Again, I must return to Pound, Morris and Felix Cohen, and Rheinstein, to the problem of law and of men, of rule and of discretion, of fixity and of change, of social solidarity and of individualization. Though Frank has exploded a set of legal myths, he has not answered the really formidable questions, the metaphysical ones. (Of course, Frank would say that these are the questions that do not concern a "legal realist" of his definition).

An exaggerated reliance on men rather than on rules is no full solution, certainly not if the past three decades of European history is read with any insight. The experience of totalitarian regimes suggests that replacing a rule of law by reliance on human leadership only invites another form of disaster.

As Morris Cohen has so aptly said, the main questions have been side-stepped by Jerome Frank. Although he has probed deeply and conscientiously into the very vitals of the court room process, he has left himself in a state of limbo, and like Eliot's J. Alfred Prufrock, his love song
is really no love song at all. It is really the swan song of a man in need.
CHAPTER THREE

THE JURY: FACT AND FICTION

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What is a jury? Twelve men picked by chance and a couple of lawyers,/ twelve men good and true or not-so-good, six of one and half dozen/ of the other.

A jury? A bundle of twelve fagots, a dozen human sticks light and dark/ with loves and hates, Protestant, Catholic, Jew, free-thinker, merchant,/ farmer, workingman, thief, wets and drys, union and scab, savers and/ spenders, tightwads and crapshooters, locked in a room to come out/ saying Yes in one voice, No in one voice, or else, "Don't ask us what is justice, we agree to disagree," all in one voice.

A jury? Twelve names out* a hat. Twelve picked blindfolded from a city/ directory or a polling list. The next twelve crossing Main Street, two/ blocks from the post office: Odd Fellows, Masons, Knights of Colum/bus, deacons, poker-players, Democrats, Republicans, Independents,/ Ku Klux and Anti-Ku Klux, ball fans, chippe chasers, teetotalers, con­verts and backsliders.

Now you got a jury. Add one judge. Add a few lawyers. Add newspapers,/ town gossip, "what everybody says." Add witnesses and evidence. Add/ it all. The jury verdict is guilty not-guilty or agree-to-disagree.

"Do you solemnly swear before the ever­living God that the testimony you are about to give in this case shall be the truth, the whole truth, and nothing but the truth?"

"No, I don't. I can tell you what I saw and what I heard and I'll swear to that by the everliving God but the more I study about it the more sure I am that nobody but the everliving God knows the whole truth and if you summoned Christ as a witness in
this case what He would tell you
would burn your insides with the
pity and the mystery of it." 1

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As one who professes to be a thorough-going democrat,
Jerome Frank has a respect for the historical basis of
trial by jury, but as a lawyer and now a judge, he finds
the jury system not only a grossly inefficient system of
finding the facts, but also a system that has dangerously
outgrown its original functions.

In most jury cases, then, the jury determines not the
"facts" but the legal rights and obligations of the
parties to the suit. For the judgment of the court
follows the general verdict of the jury, so that the
verdict, since it produces a judgment which determined
the respective rights and obligations, decides the law
of the particular case. But this decision is made by
persons with little understanding of the pre-existing
"rules of law" and scant will to adhere to or employ

1 Carl Sandburg, from "The People, Yes" in his Complete
these rules even so far as they are comprehended. ²

2 Frank, Law and the Modern Mind, p. 172. In a note on the same page, Frank adds: "In criminal cases the verdict, if for the accused, is conclusive and, therefore, there should be little doubt that the jury, in such cases, decides the law."

This usurpation of the powers of the judge by the jury is termed "surreptitious" by Frank, who finds this sleight-of-hand technique another example of the negation of the myth of legal certainty.

The general-verdict jury-trial, in practice, negates that which the dogma of precise legal predictability maintains to be the nature of law. A better instrument could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions -- utter unpredictability....³

3 Ibid., p. 172.

But why have men who craved for certainty allowed this craving to be placed in the hands of twelve men who are incapable of even approaching this ideal? The answer lies in the desire for father-authority and the basic legal myth:
For while men want the law to be father-like, aloof, stern, coldly impartial, they also want it to be flexible, understanding, humanized. The judges too emphatically announce that they are serving the first of these wants. The public takes the judges seriously, assumes that the judges will apply hard-and-fast law to human facts, and turns to the jury for relief from such dehumanized justice....The result is that, to preserve the self-delusion of legal fixity, certainty and impartiality, in many cases we hand over the determination of legal rights and liabilities to the whims of twelve men casually gathered together. Seeking to escape judge-made law, we have evolved jury-made law.\(^4\)


This "jury-made" law is not the same as judge-made law. It is a unique type of law, according to Frank's description.

Jury-made law, as compared with judge-made law, is peculiar in form. It does not issue general pronouncements. You will not find it set forth in the law reports or in text-books. It does not become embodied in a series of precedents. It is nowhere codified. For each jury makes its own law in each case with little or no knowledge of or reference to what has been done before or regard to what will be done thereafter in similar cases. Yet jury law, although not referred to as law, is real law none the less. If all cases were general-verdict jury cases and if judges directed a verdict, the law of all decided cases would be jury law.\(^5\)

\(^5\) Ibid., note, p. 174.
According to Frank, the results of this phenomenon, for the legal system, as well as for the social order that is being deceived by this process of jury-made law, are harmful and dangerous.

The demand for an impossible legal stability, resulting from an infantile longing to find a father-substitute in the law, thus actually leads, in the use of the jury, to a capriciousness that is unnecessary and socially harmful. The jury, then, are hopelessly incompetent as fact-finders. It is possible, by training, to improve the ability of our judges to pass upon facts more objectively. But no one can be fatuous enough to believe that the entire community can be so educated that a crowd of twelve men chosen at random can do, even moderately well, what painstaking judges now find it difficult to do. It follows that the use of fact-verbs, while it may slightly reduce the evils of the jury system, cannot eliminate them. The jury makes the orderly administration of justice virtually impossible.  


These are harsh words of dispraise for the jury system; yet Jerome Frank is not a man without pity in his heart, especially for the jurors in this inadequate system of administering justice.

Are jurors to blame when they decide cases in the ways I've described? I think not. In the first place, often they cannot understand what the judge tells them about
the legal rules. To comprehend the meaning of many a legal rule requires special training. It is inconceivable that a body of twelve ordinary men, casually gathered together for a few days, could, merely from listening to the instructions of the judge, gain the knowledge necessary to grasp the true import of the judge's words. For these words have often acquired their meaning as the result of hundreds of years of professional disputation in the courts. The jurors usually are as unlikely to get the meaning of those words as if they were spoken in Chinese, Sanskrit, or Choctaw. "Can anything be more fatuous," queries Sunderland, "than the expectation that the law which the judge so carefully, learnedly and laboriously expounds to the laymen in the jury box becomes operative in their minds in true form?"...7

7 Courts on Trial, p. 116.

But sympathy for the role that jurors are forced to play does not exonerate the jury system from its inherent defects, which are numerous. They are present, nonetheless, and Frank feels a strong need for exposing these defects to public scrutiny and for suggesting reforms. The harm done by such a system is too serious to ignore in an age such as the present one.

The jury system, praised because, in its origins, it was apparently a bulwark against an arbitrary tyrannical executive, is today the quintessence of governmental arbitrariness. The jury system almost completely wipes out the principle of "equality before the law" which the "supremacy of law" and the "reign of law" symbolizes---and does so, too, at the expense of justice, which requires fairness and competence in finding the facts in specific cases. If anywhere we have a "government of men," in the worst sense of that phrase,
it is in the operations of the jury system....If we want juries to act as legislators, we should tell them so. Instead, we have the judges tell them the exact opposite....

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8 Courts on Trial, pp. 132, 133. To Frank, who has been a staunch opponent of a "government of laws," the opposite phenomenon, in this case at least, is equally undesirable in his theory of democracy.

Thus, the essential defects in the jury system, according to Frank's analysis of the problem, are: usurpation of the judge's function of rule-making; inefficiency and incompetence in finding the facts; an exaggerated sense of a "government of men" in their usurpation of legislative functions; and the preservation of the worst elements of court-house government.

I have told you of the excessive fighting spirit in trials which still unfortunately dominates too much of court-house government, and which prevents needed improvement in court-room fact-finding. The jury helps to keep alive this fight-theory. More than anything else in the judicial system, the jury blocks the road to better ways of finding the facts.9

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Frank feels ought to be seriously considered in any proposed jury reform, for juries "discover" the facts principally on the basis of what they hear and see in the court room. How can this type of evidence be reduced or perhaps even eliminated from the trial process? Jerome Frank suggests two devices: pre-trial fact-finding (similar to the type used by administrative agencies such as the Securities and Exchange Commission); and special findings of fact by the judge himself. The first suggestion irked many of Frank's critics, including Federal Judge John C. Knox, who wrote:

Unfortunately, neither Judge Frank nor I can give any figure for the amount of perjury there actually is, and I certainly agree there is too much. But I myself am entirely convinced that perjury plays a vastly less important part in our trials than does the inaccurate testimony offered by completely honest witnesses.10

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9 Ibid., p. 138.

Perjured evidence is one of the major problems that

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10 "Just Justice" 216 Sat. Eve Post 22 (72), July 24, 1943, p. 72. This article was written as an answer to Frank's "White Collar Justice" 216 id. 22 (55), July 17, 1943. Justice according to Frank's formula did not please his colleague, Judge Knox, who went to severely criticize Frank's suggestion of pre-trial fact-finding as a dangerous administrative inroad on our legal system that might do more harm than good.

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Insofar as special findings of fact are concerned, even Frank is dubious of the practical value of his own suggestion:
Nevertheless, to require the trial judge to make and publish his findings of fact will yield no panacea where, because of a conflict in the oral testimony, the credibility of witnesses becomes crucial. Frus-tration of the purpose of the requirement occurs where, as too often happens, the judge uncritically adopts the findings drafted by the lawyer for the winning side. For then the judge may ostensibly make a finding of some facts of which -- although they are based on some testimony -- the judge never thought, and which, had he done his own job, he would not have included; in that event, his finding does not re-pre-sent any real inference he drew from the evidence -- does not reflect his own actual views concerning the witnesses' credibility. With conscientious trial judges, however, the difficulty is not insurmount-able.11

11 Courts on Trial, p. 185. This was written sixteen years after the Saturday Evening Post article mentioned above, and perhaps represents a view that benefited from these years spent on the Federal Bench. Frank continued: "But a graver difficulty remains: the facts, as "found," can never be known to be the same as the actual past facts ---as what (adapting Kant's phrase) may be termed the "facts in themselves." How closely the judge's "findings" approximate those actual facts he can never be sure---nor can anyone else." Ibid., p. 185.

Not only is the witnesses' credibility of importance to the judge and the jury, but the manner in which evidence is presented by the witnesses is sometimes a crucial part of the processing of finding the facts.12

12 The New York Times carried an article which included a statement by Charles C. McCloskey, Jr., Sheriff of Chatauqua County and a former special agent with the Federal Bureau of Investigation, advising law enforcement officers who have to
take the witness stand always to give strictly factual answers and never to volunteer information either for the prosecution or the defense. "A good case may be destroyed by a single bad impression given to the jury," he said. "The juror is a human being, subject to the same feelings as you. He may not like the way you part your hair or the way you walk into court, even though your manner is strictly proper." McCloskey also urged law enforcement officers "to be natural" as witnesses and to remember that their role is "to collect the facts and then present them in court impartially." New York Times, August 5, 1953, p. 32.

As a result of these many defects in the jury system, Jerome Frank, in another article, recommended the following reforms:

For the truth is that, in general, the courts don't want to know, and won't permit themselves to learn, how juries reach their verdicts....To sum up, here are the reforms I think would improve our jury system:

(1) Use "special" or "fact" verdicts in most cases.
(2) Have the judge, at the trial's beginning, roughly outline the issues for the jurors.
(3) Let the jurors take with them to the jury room a transcript of the evidence and of the judge's charge.
(4) Supply the jury with an expert's report of complicated facts.
(5) Employ, in many cases, "special juries" composed of jurors having knowledge of the customs of the trade involved.
(6) Strictly enforce the ban against jurors who have defective hearing or eyesight or who are physically or mentally ill.
(7) Require all prospective jurors to take a detailed course of study dealing with the function of juries.
(8) Eliminate many of the "exclusionary" evidence rules.
(9) Discourage publication, in the press or on the air, of anything but straight reporting of the courtroom evidence in a jury trial, until the case ends.

Although trial by jury can be improved, in my opinion it will remain the weakest spot in our judicial system -- reform it as we may. But the judges (like
me) who want to see the civil jury abolished and the use of the criminal jury limited, will, of course, as long as the jury system endures, comply with their oaths of office and strive to make the jury system work as best it can.13

13 "Something's Wrong With Our Jury System" 126 Colliers 28 (64), Dec. 9, 1950, pp. 29, 66. Cf. Frank: "Our complicated and cumbersome rules of evidence could be simplified immeasurably if we did away with the jury. The hearsay rule, for instance, is largely due to the mistrust of the jury's competence to weigh evidence." Law and the Modern Mind, note, p. 185. This statement was written in 1930. Frank's ninth point of his suggested reforms, or variations of it, has been an extremely controversial issue at all levels of our judicial system in recent years. In respect to "trial by newspapers," see Shepherd v. Florida, 341 U.S. 50 (1951), especially Justice Jackson's concurring opinion, and Stroble v. California, 343 U.S. 181 (1952), and Moore v. Dempsey, 261 U.S. 86 (1923). At the state and local level, New York and Ohio courts have recently dealt with the public nature of trial by jury. The Ohio Supreme Court unanimously adopted a rule of judicial ethics (Canon #35 in the Adopted Canons of Judicial Ethics) prohibiting the photographing, broadcasting or televising of proceedings of any state court, based on recommendations of the American Bar Association and the Ohio State Bar Association. (New York Times, January 28, 1954, p. 23). The Ohio Court of Appeals upheld the conviction of three Cleveland Press employees on contempt of court charges which resulted from the taking of a photograph in a courtroom of the Cleveland Common Pleas Court. This case is now on appeal to the Ohio Supreme Court. (New York Times, April 15, 1954, p. 31). The Appellate Division of the New York Supreme Court in a recent 3-2 decision reversed the conviction of Minot Jelke because of the exclusion of the press and of the public during this celebrated trial on compulsory prostitution. Another case involving freedom of press in this case is still pending before the Court of Appeals of New York. (New York Times, May 19, 1954, pp. 1, 43). Also, see the following notes; "Due Process For Whom -- Newspaper or Defendant," 4 Stan.L.Rev. 101-11 (1951), and "Freedom of the Press -- A Menace to Justice," 37 Iowa L. Rev. 249-61 (1952).
Some of these suggestions have found approval in other quarters. Judge Charles Wyzanski, Jr., for instance, has written:

Indeed, except for tort cases, I find myself in agreement with Judge Frank that the trial judge ought to use special verdicts to a much larger extent, though it is more difficult than may at first be realized to frame questions to the satisfaction of counsel and to the comprehension of juries.14

Another member of the profession, Judge Curtis Bok of Philadelphia, is more humble than Judge Frank is his criticism of the jury system in America:

The jury system is not necessarily a bad system. If it fails, it will be because it is worked at less than top capacity and intensity, which is the reason most things fail. Even so, it might no longer be considered flexible enough to fill the bill. In that event, legal solutions will be left to judges or to fixed administrative tribunals; but whatever happens, the social fabric will not be rent asunder. Thus far no better guaranteed method has been found than a verdict by a jury of the vicinage.15


15 "The Jury System in America" 278 Annals 92 (May, 1953), p. 96. The earlier Jerome Frank would have vehemently
stressed the point that the jury system was able to achieve plasticity and flexibility, but only by circumvention of its original aims. But after thirteen years on the Federal Bench, Judge Frank is still critical of the jury system, but also more practical in his basic analysis of the jury. Unlike his earlier criticism, he is no longer content with a complete defloration of the system, but recognizes the human elements in the picture, and the necessity for practical solutions.

Jury Verdicts and the Problem of Cadi-Justice

Proposals for the improvement of the administration of justice usually include reforms in the field of jury verdicts. Jerome Frank believes that the best suggestion is still the special (or fact) verdict, where the jury reports its specific findings on specified issues of fact to the judge, who then applies the appropriate legal rule. Of course, this does not eliminate the possibility of perjured evidence, or the fallible elements of the human mind, whether it be the judge's or the jurors'. But at least the false appearance that a jury gives of finding the facts can be partially alleviated.

Perhaps next to the special verdict, Frank would regard the most important element in jury reform that is practical and feasible at the present time to be the training of future jurors. Yet, regardless of the kind or the degree of
jury reform, Frank does not believe it is possible to estab-
lish a perfectly desirable jury system, short of its total
abolition. The "perfect jury" is an impossibility, in view

16 "Were all those reforms adopted, trials by jury would be
less dangerous to litigants than they now are; but I think
they would still be far less desirable than jury-less trials
before well trained honest trial judges." Courts on Trial,
p. 145. Desirability is one thing and practicality quite
another; Jerome Frank as judge realizes the limitations
under which he labors, although the jury is not one of them.
Judge Frank is an appellate judge.

of the limitations of the human mind (especially memory),
and the circumstances that surround any type of judicial
trial.17

17 Cf. the story related by Governor Goodwin J. Knight of
California on the "perfect jury": "...It seems that a judge
got tired of the hemming and hawing that a jury of laymen
was likely to engage in; so he drew up a panel of twelve
lawyers. Being experienced in the law and in logic, they
would surely get to the point immediately and return an in-
telligent verdict in record time. However, the jury, once it
had heard all the evidence in the case and retired to ponder
it, was out for an extraordinarily long time. Finally a
bailiff came in from the jury room. The judge asked eagerly,
"Have they reached a verdict yet?" 'Reached a verdict?'
said the bailiff. 'They haven't finished yet with the nomin-
ating speeches for foreman.'..." Ernest Havemann, "Calif-
ornia's 'Excellency' Exceels at Jokes as Well as Politics"

Jerome Frank characterizes the jury system in America
as the Cadi system of justice at its maximum and its worst. By Cadi-justice, he means the use of one man or a group of men serving as both fact-finder and witness-audience; the term Cadi derives from Islamic practice. The Cadi element in both the judge and the jury is thoroughly discussed in Frank, "Are Judges Human?" 80 U. of Pa. L. Rev. 17, 233 (1931), pp. 24-31. Whereas Frank regards the jury as the Cadi element in American justice, Roscoe Pound and other leading figures in American law regard the administrative tribunal as the best example of "Cadi-justice" in the United States.

in our present jury system, in the opinion of Frank, would be impossible to eliminate. All that we can do is to be more aware of Cadi-justice as it really operates in courthouse government, understand its true nature, use it more efficiently and, if and where possible, improve it.

Cf. Max Weber: "The 'rational' interpretation of law on the basis of strictly formal conceptions stands opposite the kind of adjudication that is primarily bound to sacred tradition. The single case that cannot be unambiguously decided by tradition is either settled by concrete 'revelation' (oracle, prophetic dicta, or ordeal -- that is, by 'charismatic' justice) or -- and only these cases interest us here -- by informal judgments rendered in terms of concrete ethical or other practical valuations. This is 'Kadi-justice,' as R. Schmidt has fittingly called it. Or, formal judgments are rendered, though not by subsumption under rational concepts, but by drawing on 'analogies' and by depending upon and interpreting concrete 'precedents.' This is 'empirical
justice.' Kadi-justice knows no reasoned judgment whatever. Nor does empirical justice of the pure type give any reason which in our sense could be called rational. The concrete valuational character of Kadi-justice can advance to a prophetic break with all tradition. Empirical justice, on the other hand, can be sublimated and rationalized into a 'technology.' All non-bureaucratic forms of domination display a peculiar coexistence: on the one hand, there is a sphere of strict traditionalism, and, on the other, a sphere of free arbitrariness and lordly grace. Therefore, combinations and transitional forms between these two principles are very frequent...." "Bureaucracy and Law" in From Max Weber: Essays in Sociology, ed. and transl. by H.H. Gerth and C. Wright Mills. N.Y.: Oxford Univ. Press, 1946, pp. 216-17.

Perhaps, if there is any viable solution or even partial solution to the problem of the jury system as it now exists, that solution will be found in education, whether it be of the jurors, the judge, and/or the lawyers. While training jurors would be a short-term process, the training of lawyers and future judges is a much more complicated and difficult task. This will be the subject of discussion in my next chapter on Jerome Frank's views on legal education in American law schools. 20

20 Ironically, John Dickinson, whose views on the nature of law and the role of judges form one of Frank's main targets, is just as concerned as is Frank with the need for reforming legal education. But, although Dickinson is critical of the case method of teaching law, he does not go as far as Frank does in creating a "clinical" atmosphere for the study of law. Dickinson's major emphasis is on changes in the pre-law and law school curriculum.
CHAPTER FOUR

LEGAL EDUCATION: JEROME FRANK'S VIEWS ON LANGDELL, THE CASE METHOD, AND THE USES OF THE SOCIAL SCIENCES IN JURISPRUDENCE

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...If ever a man hid his light under a bushel it was Pound. He was like a man walking backwards up a steep hill. For if "discretion" and "individualization" were not law, if law was "typically" the use of rules, then one needed to apologize for the consideration by law students and law-yers of what is "anti-legal" or "non-legal."

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If the legal order is replete with legal myths, why not begin the process of attempting to reform and regenerate the judicial process at the grass roots, viz., the system of legal education of lawyers and judges? If reforms are needed, they must be clearly understood and acceptable to those who have done the most to perpetuate the legal myth of rule certainty.

American legal education has for many generations been under the influence generated by the late Dean Christopher Columbus Langdell of the Harvard Law School, especially his introduction of the "case book" method of teaching law. Jerome Frank takes great pains to blame Langdell for most of the "sins" of contemporary American legal education.

American legal education went badly wrong some seventy years ago when it was seduced by a brilliant neurotic. ...The sole way for these law schools to get back on the main track is unequivocally to repudiate Langdell's morbid repudiation of actual legal practice, to bring the students into intimate contact with courts and lawyers.2


Dean Langdell's approach to the study of law was excessively bibliographical, with little or no stress on the living elements in the judicial process. Frank characterizes Langdell's approach as "library law," law in books and books only, and having confined itself to cases that involved decisions of upper courts for the most part, the process of legal myth-making became a circular one.

Due to Langdell's idiosyncrasies, law school law came to mean "library-law."...The trouble with much law school teaching is that, confining its attention to a study of upper court opinions, it is hopelessly oversimplified....Our law schools must learn from our medical schools. Law students should be given the opportunity to see legal operations.3

Law students should work in legal clinics, just as medical and dental students do. They should be given the opportunity to practice elements of their art before their formal legal education is finished. This would be done in conjunction with a local legal aid clinic, which would serve the purpose (as it now does in many law schools) of giving the student a kind of apprenticeship in the law.

One of the first requirements of better legal education is to put men on the law faculty who have practiced law, so that law schools can become lawyer-schools, not law-teacher schools. Book-teachers of the law can be useful, and every law school should have them, Frank argues, but the majority of the law faculty should consist of men with from five to ten years of "varied experience in actual legal practice." They should be men who have practiced

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4 "A Plea For Lawyer-Schools," pp. 1313-14. The fact that the Harvard Law School has produced many great trial lawyers, as well as jurists and law teachers, is no anomaly to Jerome Frank, for he explains that by saying that this was the "lucky" result (or accidental result) of a system of teaching that should have turned out differently. Professor Edmund M. Morgan thinks most of Frank's criticisms of the Harvard Law School are unjustified, while Professor Lon L. Fuller of the same school agrees with Frank that there is an over-emphasis on upper courts in the law school curriculum.

before trial courts, appellate courts, administrative tribunals, but above all, outside of the law library. These teachers should be experienced practitioners of law, not
walking bibliophiles.

The gimmick of this discussion boils down to this question: would you want to be treated by a doctor who studied his medicine in books and classrooms only and had no practical experience before receiving his diploma? The answer is obvious for Jerome Frank: if a doctor can intern, so can a lawyer, at least in some form of legal internship.

The case system of teaching law has value, if properly used and recognized as but one technique in the educational process. Instead of using the opinions of upper courts,

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5 On the basis of my own experience as a law student, I would say that the case method depends largely on the kind of cases and materials that are selected for study, and the type of presentation of these materials. Certainly, Professors Edmund M. Morgan, Warren Seavey, Benjamin Kaplan, Zechariah Chafee, Jr., and Paul Freund at the Harvard Law School are excellent examples (among many, at other institutions as well) of how this method can be used intelligently and efficaciously. Professor Kaplan has a singular knack of giving students in his courses the unofficial and sometimes unprinted materials that preceded and followed the cases he chose. His clear separation of dicta from obiter dicta was almost aesthetic in approach, indeed it was a beautiful thing to watch as well as to hear. On the non-legal side of the ledger, Professor Earl Latham, now Joseph B. Eastman Professor of Political Science at Amherst College, was an extremely capable user of case-book materials in his courses on government and the economic order at the University of Minnesota. So far as the differences in approach of the Harvard and Yale Law Schools are concerned, the main emphasis of the Harvard method is to confine the study of non-legal materials to the third or last year of study, whereas Yale begins with a social science approach and mixes law study with the study of non-legal materials throughout the three year program. Insofar as results are concerned, both schools can claim able graduates of their respective schools of law. And even conservative Harvard is more and more approaching the kind of program of study that Frank recommends. And
with the recent entrance of women to the Harvard Law School, a new leaven has been added, for as Frank has mentioned on occasion, without the female, the wisdom of the system is lost. Cf. Frank, "Women Lawyers," 119 Good Housekeeping 43 (158), December, 1944, p. 159.

Frank thinks that the complete records of a few select cases would be far more valuable than two years spent on twenty case-books now in use. An upper court opinion, according to Frank, is not a "case." It is only the final and rationalized portion of the case (and actually not even the final part, for the execution of the decision after the opinion is handed down is also a vital part of a case).

The core of the law school I propose would be a sort of sublimated law office. Those who attended it would learn by "doing," not merely by reading and talking about doings. But such a school would not limit itself to instruction in legal techniques. It would consider "strictly legal problems" in the light supplied by the other social studies (miscalled "social sciences")—history, ethics, economics, politics, psychology and anthropology. Mere pre-legal courses in those fields, unconnected with the live materials of human actions with which lawyers must cope, have proved a failure. The integration ought to be achieved inside the law schools....

6 Courts on Trial, pp. 238-9.

This sounds like mere advocacy of a more realistic training in legal techniques, to the neglect of social
values to be served by these improved skills. But Frank is
of course concerned about values too. Just as the judge
should understand the psychology of human nature, the law
student should understand the kind of society that law must
operate within. He must thoroughly ground himself in the
social sciences (which Frank calls "arts" or "studies"), or
in what is sometimes called "the science of man." But
Frank warns against over-emphasizing the non-legal studies
in the law school curriculum. 7

7 E.g., "Both Ends Against the Middle" 100 U. of Pa. L.
Rev. 20 (1951), where he discusses the two ends of the pen­
dulum: legal rules, cases, and treatises on the one hand,
and the social sciences on the other, both of which tend
to "crowd" out the middle, the realities of trial courts
and court-house government.

There should be a happy balance between the social and
legal studies as such. But it is disturbing to find Frank
introducing the inculcation of democratic ideals and the
lawyer's role of policy-maker into the law school curricu­
lum without any apparent realization of the problems in­
volved in combining teaching with preaching.

It is a pleasure to report that many of the law
schools today give marked emphasis to the role of
lawyers as policy-makers or policy-advisers, and
bring home to the students the need for embodying
democratic ideals and values in the legal rules.
But a law school which really means business about democratic ideals should interest itself mightily, as most of our schools do not, in the problem of thoroughly overhauling our trial methods, and in the problem of the inability of many litigants to obtain justice because of lack of money to meet the expense of obtaining crucial testimony.8

8 Courts on Trial, pp. 239-40. For the most part, Frank's discussion of "values" is confined to situations where he is critical of specific "evils" in the judicial process, e.g., the "third degree," or the high costs of litigation.

Which democratic values should the law school inculcate in its students? And how far must the law teacher go in transforming his podium into a pulpit? On this matter, Frank is none too clear, except that he fully agrees with the approach of the Yale Law School and especially the work of Professors Lasswell and McDougal at that institution.

Entertaining such views, of course, I thoroughly agree with those who, like Professors Lasswell and McDougal, urge that law schools should emphasize democratic values and ideals, and should stimulate future lawyers to think of themselves in the role of makers of policies which will implement such values.9

9 "A Plea For Lawyer-Schools," p. 1323. Not too long ago, Professors Clinton Rossiter and Louis Hartz engaged in a discussion over the proper role of the teacher of American government in the pages of the American Political Science Review. I am inclined to agree with Professor Hartz that the function of the teacher is not the same as that of the preacher or the social reformer, and I feel that his main
arguments would apply to legal education as well. See, Rossiter, "Political Science 1 and Political Indoctrination" 42 A.P.S.R. 542-9 (1948); Hartz, "Goals For Political Science: A Discussion" 45 id. 1001-5 (1951); and Rossiter's answer to Hartz in 46 id. 505-6 (1952).

In a recent article by Frank, mention was made of Professor Lasswell's suggestions for reforming legal education, including: (1) the use of a sequence of training films on personality growth and the dynamism of collective action for law students; and (2) appraisal centers for the guidance and testing for the purpose of self-understanding of those persons who want to embark on the study of law. It is not clear whether the latter suggestion would consist of psychoanalysis of each law student or prospective law student, but Lasswell implies that the law student who understands himself would be in a better position to understand his clients.10


Robert M. Hutchins, formerly President of the University of Chicago, and prior to that, Dean of the Yale Law School, has this to say about the kind of legal education that would best fit our current needs:
The problem of the law schools today is therefore the problem of resolution and synthesis. We must conserve the beneficial features of what Langdell and his successors have done and absorb them into a sounder and more adequate policy of legal education. In short, legal education must consist of the study of law as it is and operates, the study of how law came to be what it is, and the study of the principles which must be employed to solve the problem of what the law ought to be. Not the study of cases alone, nor the study of how the law operates in fact, nor the study of legal philosophy will give us a legal education. We must have all three, and in an ordered relation to one another. Jurisprudence is the ordered relation of all these studies.11

11 "Legal Education" 4 U. of Chi. L. Rev. 357 (1937), pp. 364, 368. Frank would argue that legal realists should be concerned only with what the law is (in action), rather than what the law ought to be (legal ideals), but the distinction should always remain a clear one, if that is at all possible. Cf. Frank, "Mr. Justice Holmes and Non-Euclidean Legal Thinking" 17 Cornell L.Q. 568 ff. (1932).

Although Jerome Frank has been a strong believer in the value of the social sciences (née "studies") in modern legal education, he is certainly not the first writer to recognize the utility of such studies. As early as 1913, William Draper Lewis was urging the incorporation of the social sciences in legal education:

If a knowledge of the social sciences is an important part of legal education, it is never so important a part as when the social ideas of the community are undergoing comparatively rapid modification and change. ...If, therefore, I am right in the main position I am here taking, that the important function of the judge
is to adapt, within the limits and in the way indicated, the law to existing social ideas, that function at a time like the present cannot be properly performed unless we emphasize the importance of the social sciences as a necessary basis of legal education....It is vitally important that law should express dominant social ideas. Without a reasonable correlation between law and dominant social ideas orderly progress is impossible. A law which does not express a dominant social idea is worse than useless....

12 "The Social Sciences As the Basis of Legal Education" 61 U. of Pa. L. Rev. 531 (1913), pp. 533, 538, 539. I would submit that the "Brandeis brief" would have been a pertinent part of what Draper was calling for, since its major emphasis was on bringing the social and economic facts before the attention of the courts. Cf. James Reston, "A Sociological Decision" (Court Founded Its Segregation Ruling On Hearts And Minds Rather Than Laws), New York Times, May 18, 1954, p. 14, for a good discussion of the sociological implications of a Supreme Court decision in regard to racial segregation in the public schools. Whether this particular decision approximates Draper's "social ideas" will depend to a large extent on the implementation of the Court's holding and the long-range effects it will have on the minds and hearts of men.

A more modern modern (some writers feel advanced) view of the relation between law and the allied social sciences is the inter-disciplinary approach of sociology and anthropology. Professor Karl Llewellyn of the Columbia Law School has been a proponent of this view:

Again, the view of law-and-government as in essence a single institution opens up at one stroke an answer to two problems which have for centuries been eluding effective answer-in-words: that of the relation of rules and discretion, and of the relation of rules and the
official. In the first place, no person who is thinking "government" along with law can ever fall into the misconception that things get done by rules of law alone "and not men"; instead, the picture becomes at once and of course that of an interaction -- of men acting under and within rules, and under and within a tradition both of goodwill and of know-how each of which is part of what we know as "under law."...As between disciplines, as between persons, as between nations, it pays to be neighborly.13

However, Frank is dubious about the value of anthropo- polgy and behavioristic psychology in analyzing legal behavior. Nevertheless, he does recognize the limited value of psychological theory, though admittedly it is a tool that must be used with caution.

However, it will not do to reason that, because the pseudo-scientific legal behaviorists were wrong in what they affirmed, they were therefore also wrong in what they denied, i.e., the possibility of predicting a judicial decision through a knowledge of the legal rules which the trial judge will probably employ in deciding any particular law-suit.14
Although psychological legal realism might have been exaggerated in its claims, and at times monistic in its approach (especially Schroeder and Lasswell), it still made a significant contribution to legal knowledge by its exposé of the non-rational factors of legal action and behavior.

Nor does the rejection of behaviorism as a legal prediction-technique justify the scorn sometimes heaped on those who point to the numerous non-rational factors in the decisional process. Many legal scholars, instead of giving serious consideration to that subject, resort to derision. Absurdly lumping together all the non-rational, non-logical, elements, and describing them as the "state of the judge's digestion," these scholars often jeeringly speak of "gastronomical jurisprudence." Under the heading of gastronomical ailments, one cannot subsume all the irrationalities of judges.... And how can we know that many another judge, in deciding cases, has not been affected by mental aberrations, although less abnormal and entirely imperceptible?15

15 Courts on Trial, pp. 161-2. Is the "state of the judge's digestion" any less derisive than the "state of the judge's psyche"?

In an earlier article,16 Frank said that the lawyer
was a practicing anthropologist, but anthropological theory as such has some glaring weaknesses, including:

(1) It assumes that, ordinarily, as to any particular set of facts, there is a fairly precise and knowable social norm, group habit, "non-litigious custom," or customary attitude. But that is untrue even in the most "primitive" societies; it is far less true in so shifting and changing a society as that of the U.S.A. today...(2) In the next place, the customary attitudes or social norms do not, in "pure" form, pass through the minds of judges. The "personalities" of the individual judges sometimes refract and bend the mores in unforetellable ways....

Frank believes that the anthropological thesis breaks down for the same reason as do most legal myths, namely, the subjective nature of the facts of a case.
What is more, the decision of the trial judge or jury
is not the product of an $R$ and an $E$, but, as we saw,
often is a gestalt, a composite, the analysis into $R$
and $E$ being somewhat artificial. However, for present
purposes, we may overlook that artificiality, since,
even supposing that the $E$ were a distinctly separable
ingredient of the decision, yet its subjective, un-
predictable character would destroy the anthropolog-
ic thesis, which rests on the assumption of knowable
uniformities.  

18 Courts on Trial, p. 335.

Yet, Frank argues that although the variables are num-
erous and complex, the lawyer-as-anthropologist is perhaps
in a better position to assess the "unknowables" of the
judicial process than is the professional anthropologist.

It might be said that the lawyer's special training,
his legal knowledge, gives him no special skills in
such matters, that a non-lawyer could as well serve
as a practicing anthropologist. But the lawyer has
some advantages not possessed by the non-lawyer in
such anthropological undertakings. First, litigation
may always break out, and the lawyer's guess about its
outcome, dependent in part on knowledge of the legal
rules and surmises as to the judges' reaction to the
mores (i.e., the anthropology of the judiciary), is
likely to be better than that of a layman. Second,
the non-litigious customs are affected by the legal
rules as enunciated in court opinions: What society,
or some social subgroup, believes the courts have de-
cided or will decide will often influence out-of-court
behavior. The lawyer may therefore be more efficient
than a non-lawyer as a working anthropologist. For
the lawyer probably has a keener awareness of the
mutual interaction of the legal rules and the non-
litigious customs.
Returning again to his discussion of legal education, Frank says that these psychological and anthropological elements, the "un-ruly" and "chancy" elements as he would label them, ought to be part of the education of the lawyer-to-be.

These guessy "intervening human acts" -- which are "un-ruly" -- constitute no part of Hornstein's, or most law teachers', description of the decisional process. So, once more, we have from Hornstein an endorsement of a sort of legal pedagogy which, by ignoring trials and trial courts, miseducates law students. 20

Of course, the special training that Frank suggests for law students, if successful, would permeate the entire legal system and would eventually be the foundation for the training of better trial judges.

Rheinstein, commenting on my notions of a revised law-school curriculum, says that I am calling for
the development of the "science of administration of justice." Change the word "science" to "art," and I agree. Instruction in such an art would include first-hand observation of all that courts, administrative agencies, and legislatures actually do. Such instruction would serve three purposes. First, it would aim to equip future lawyers to cope with courthouse realities, no matter how ugly and socially detrimental some of these realities are; for a lawyer cannot competently represent his clients if he is ignorant of the devices which his adversaries may utilize on behalf of their clients. Second, such instruction would stimulate the contrivance of specific practical means by which existing trial-court techniques can be improved, in order that justice may be judicially administered more in accord with democratic ideals. Third, it would train men to become trial judges.21

21 Courts on Trial, p. 245. In addition to being an amateur psychologist and anthropologist of a sort, the good lawyer would need to be a social worker as well. In my opinion, this places a terribly heavy burden on the young fresh lawyer just out of law school, but, of course, lawyers are a special breed of men.

Even if this new kind of legal education could produce better judges, Jerome Frank still thinks that it is also necessary to have additional special training for trial court judges.

I suggest that we should at once set about contriving methods of avoiding the avoidable tragedies caused by lack of systematic training of trial judges. Here are my tentative ideas on the subject: Such a man should be specially educated for that job. In law school, he should be taught not only what a law student now learns ---that is much about upper courts, the legal rules, the values, policies, and ideals which are or should be expressed in those rules---but also what no law school
now teaches. He should be shown, in great detail, the problems, relating to the facts, which confront a trial judge, as they do not confront a higher court judge. He should learn all that is now known about psychological devices for testing the trustworthiness of witnesses as to their individual capacities for observation, memory and accuracy in narrating what they remember. He should be taught to be alert in the possibilities of using such devices, as they become improved, in trials.22

22 Courts on Trial, p. 247.

If all of these suggested reforms for training better lawyers and judges (especially wiser trial court judges) were immediately adopted, perhaps a frontal assault on many of the legal myths that Jerome Frank has so assiduously tried to expose to public scrutiny could be made. And yet, Frank would not feel that our present judicial system could be completely freed of its childish reliance on father-authority.

But a good beginning would have been made, for what better place is there for getting at the root of the problem of the basic legal myth than by beginning this process of public enlightenment about the nature of the legal order in the law schools? If it is the lawyers and judges who "dupe" the public, and who themselves do so much to preserve what Frank regards as the legal myths, especially that of certainty in the law, then it is through the education of these
lawyers and future judges that the public will eventually begin to understand the realities of the legal system under which they must live.

Exorcise legal myths, legal magic, and legal logic, cries Jerome Frank!! Tear away the facade of legal rule certainty. Bare the realities of court-house government to lawyers, judges and laymen alike. Perhaps then, given the tools for better understanding ourselves and the peculiarities of human behavior (and especially legal behavior), we can begin to reconstruct and reform our judicial order so that it can better meet the needs of a rapidly changing social and political system. If law is to serve men, then men must first learn to understand the nature and function of law and the purposes of the legal order.

Education, perhaps more than any other single device, is at the heart of Jerome Frank's philosophy of law, for a pragmatic, functionally-oriented jurisprudence must first understand law in action before it can reform court-house government.23

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23 Even though both Frank and Dickinson think that legal education is a serious problem, their respective approaches to educational reform are far apart. See the chapter, "The Supremacy of Law and the Problem of Legal Education," in John Dickinson's Administrative Justice and the Supremacy of Law. Cambridge: Harvard Univ. Press, 1927, pp. 333-58.
CHAPTER FIVE

A SUMMARY OF JEROME FRANK'S PHILOSOPHY

OF LAW AND SOME CRITICISMS OF IT

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The major elements of Jerome Frank's philosophy of law have been contained in four of his five books. *Law and the Modern Mind*, originally published in 1930, was the pace-setter. In his quest for the debunking of the major legal myths, Frank attempted to show the uncertainty and vagueness of the legal rules. *If Men Were Angels*, published in 1942, attempted to show the uncertainty and vagueness (the contingent nature) of the facts, both at the administrative level as well as at the judicial level of court-house government. *Fate and Freedom*, which followed in 1945, was mainly devoted to a discussion of historical and scientific methods of inquiry and disavowed most of the isms that Frank had been accused of believing in.

Jerome Frank's last book, *Courts on Trial*, was published in 1949. This book was a compendium of most of his previous writing on the legal myths, the function of the judge, the jury system and legal education, and added very little new material to his previous publications. Frank's fifth book, *Save America First*, which was published in 1938, was devoted to problems of economic welfare and foreign trade.

In the nineteen years between the publication of *Law and the Modern Mind* and *Courts on Trial*, Jerome Frank vigorously went forth into the wilderness of law on his crusade against the legal myth of rule certainty and finality, and
despite the heat of the criticism on all sides of his arguments, he still emerged a man of good humor and sweet disposition. But American jurisprudence is not, however, always prone to accept good humor as good law, nor is it always conducive to the sweet disposition. The criticism of the legal journals is at times vitriolic and bitter, sometimes with good intentions in mind, and at other times, bent on complete demolition of the opponent's arguments.

But Jerome Frank, crusader that he is, is a reformer to the last. He has never flinched from a good fight, and even when he was the center of controversy, he has attempted to revise or alter his original ideas so that he would not become a victim of the dogmatism that he so severely disparaged. For the most part, this writer believes that Frank's revisions of his own work have not materially changed the core of his philosophy of law.

Yet, the world of American jurisprudence is a strange one, if we probe deeply into its environs. Its opinions run the gamut, in the case of Jerome Frank's philosophy, from Fred Rodell to Owen J. Roberts. Professor Rodell, for example, is an admirer of Frank, but not a slavish follower of all his ideas. Rodell, being a legal realist and something of an intellectual "radical" himself, has high praise for the "eclectic" element in Frank's writing.
For Judge Frank, in the breadth and scope of his curiosity and knowledge, comes about as close as anyone I know to being the modern counterpart of the fabulous "compleat man" of medieval and earlier times. His book abounds with eclectic references to anthropology, psychology, philosophy, literature, mathematics, physics, even music, and with casual quotations from pundits, past and present, in these and other fields of learning. So familiar is the Judge with all this stuff, and with his more legal material as well, that he frequently forgets to footnote for sources the quotes and paraphrases he tosses off in such profusion....

1 Rodell, Book Review of Courts on Trial, 25 Ind. L.J. 114 (1949), p. 115. Literary technicalities are apparently unimportant to an "eclectic" like Jerome Frank.

To the more conservative legal mind, over half of Frank's work that is commonly labelled "philosophy of law" is really non-legal. The materials that Professor Rodell mentions with respect are not ordinarily considered the rightful domain of the legal philosopher. Owen J. Roberts, who was formerly Dean of the Law School of the University of Pennsylvania, and prior to that, Associate Justice of the United States Supreme Court, does not think that Courts on Trial presented anything that was fundamentally new in Frank's writing. He suggests that the lay reader concen-

with Roberts' suggestion that the lay reader *confine himself* to pp. 419 ff. of the book for the kernel of Frank's thought on law and related matters.

I think that Roberts is correct in saying that the differences between Frank's earlier work and the conclusions of *Courts on Trial* are indeed slight ones. It is noteworthy that much of his previous writing is incorporated into his last book. Most of the fundamental assertions contained in

3 I found that on the subject of legal education, for example, Frank wrote five articles, all of them alike in style of presentation and content, *containing pretty* much the same material. Most of these articles had initially been speeches. In another instance, the article, originally a speech, was reprinted in two journals under two different titles.

*Law and the Modern Mind* remained intact in *Courts On Trial*, despite Frank's previous eighteen years on the federal bench.

Although on many occasions, Jerome Frank has claimed the right to correct his mistakes, his philosophy has remained fundamentally what it was in 1930, when the first edition of *Law and the Modern Mind* came off the press. I think that a close perusal of the legal axioms and suggested
reforms that Roberts referred to above will prove that the Jerome Frank of 1949 was pretty much the same as the Jerome Frank of 1930:

...Here is a list of some of the old "axioms" I have thus discussed:

1. The "personal element" in the judicial process should not and usually does not have much effect on either legal rights or court decisions. Even if we admit that the "personalities" of witnesses, lawyers, jurors and judges do have considerable effect, we must disregard all elements of those "personalities" which are not fairly uniform.

2. The legal rules are the dominant factor in decision-making.

3. When those rules are precise, they ordinarily prevent litigation; and, if litigation does occur, it will be easy to predict the decisions.

4. Trial judges and juries have only the limited discretion conferred by the legal rules; they have no discretion when those rules are precise.

5. Decisions result from the application of legal rules to the actual facts involved in law-suits.

6. If the actual facts of two cases are the same, usually the decisions in those cases will be identical.

7. Trial courts usually discover the actual facts of cases; usually "the truth will out"; innocent men are hardly ever convicted; seldom does a man lose his property or his means of livelihood because of a court's mistaken notion of the facts.

8. The intense fighting method of conducting trials is the best aid in discovering those facts.

9. Effective criticism of most decisions is easy.

10. Upper courts can, and do, correct most of the mistakes of trial courts.

11. Upper courts are far more important than trial courts.

12. Less attention need be paid to the selection of trial judges than to that of upper-court judges.

13. Almost any man licensed to practice as a lawyer is qualified to be a trial judge.

14. Juries are better fact-finders than judges.

15. Juries are better at rule-making and rule-revising than judges.

16. It is desirable that juries should ignore any legal rules they deem undesirable.

17. In law-suits (whether or not tried by juries),
legal rules relating to property and commercial transactions are precise and usually lead to predictable decisions.

18. Individualization of cases, if desirable, should be accomplished surreptitiously, not openly.

19. The method of following precedents, if properly used, ensures certainty and stability, supplies rules on which men can safely rely.

20. Trial courts, in fact finding, have little to do with the interpretation of statutes.

21. Non-lawyers should be deceived into believing that the results of the judicial process are more certain, regular, uniform and just than in truth they are or can be.

22. Law students should not be persuaded to observe at first-hand what goes on in trial courts and law offices.

23. The attempt to obtain legal certainty (i.e., predictability of decisions) is more important than the attempt to obtain just decisions of specific law suits.4

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4 Courts on Trial, pp. 419-20. Reverse all of these axioms and you will get Jerome Frank's legal philosophy. Frank thinks that points no. 17 and 18 are the "blind spots" in Roscoe Pound, whom he severely criticized in a long appendix to If Men Were Angels, pp. 332-49.

Frank says that these legal "axioms" (which are not his assumptions) are not a true reflection of legal reality. One of the major defects of legal axioms (or assumptions) is that the distinction between what Frank calls "wish-assumptions" (the ought) and "is assumptions" (the is) is not clearly distinguishable in most legal writing. Since these "wish-assumptions" are really programmatic in the sense that they represent the kind of legal order that ought to
exist in the future, they can only be useful if one realizes what the actual legal order is like.

Clear thinking demands a recognition of legal actuality. Once the "is-ness" of the legal order can be established, some suggested reforms can then be intelligently presented to the lay public. This is what Frank attempts to do when he suggests that the legal axioms that he listed were the opposite of legal reality. They served only as the prolegomena to his subsequent list of proposed reforms:

I have done my best to keep separate my own two kinds of assumptions. Endeavoring honestly to describe the actualities of court-house activities, I have criticized some of them, and have proposed some reforms. For the reader's convenience, I here list some of those suggested reforms:

1. Reduce the excesses of the present fighting method of conducting trials:
   (a) Have the government accept more responsibility for seeing that all practically available, important, evidence is introduced at a trial of a civil suit.
   (b) Have trial judges play a more active part in examining witnesses.
   (c) Require court-room examination of witnesses to be more humane and intelligent.
   (d) Use non-partisan "testimonial experts," called by the judge, to testify concerning the detectible fallibilities of witnesses; circumspectly employ "lie-detectors."
   (e) Discard most of the exclusionary evidence rules.
   (f) Provide liberal pre-trial "discovery" for defendants in criminal cases.

2. Reform legal education by moving it far closer to court-house and law office actualities, largely through the use of the apprentice method of teaching.

3. Provide and require special education for future trial judges, such education to include intensive psychological self-exploration by each prospective trial judge.
4. Provide and require special education for future prosecutors which, among other things, will emphasize the obligation of a prosecutor to obtain and to bring out all important evidence, including that which favors the accused.
5. Provide and require special education for the police so that they will be unwilling to use the "third degree."
6. Have judges abandon their official robes, conduct trials less formally, and in general give up "robe-ism."
7. Require trial judges in all cases to publish special findings of fact.
8. Abandon jury trials except in major criminal cases.
9. At any rate, while we have the jury system, overhaul it:
   (a) Require fact-verdicts (special verdicts) in all jury trials.
   (b) Use informed "special" juries.
   (c) Educate men in the schools for jury service.
10. Encourage the openly disclosed individualization of law suits by trial judges; to that end, revise most of the legal rules so that they avowedly grant such individualizing power to trial judges, instead of achieving individualization surreptitiously as we now largely do.
11. Reduce the formality of appeals by permitting the trial judge to sit with the upper court on an appeal from his decision, but without a vote.
12. Have talking movies of trials.
13. Teach the non-lawyers to recognize that trial courts have more importance than upper courts. 

5 Courts on Trial, pp. 422-23. Number 1(e) does not include the major privilege rules, especially those relating to self-incrimination and evidence obtained by unlawful searches and seizures, which of course Frank wants to preserve intact. Numbers 1(a) and 1(b) are reminiscent of the continental European tradition of trial procedure.

These are only tentative proposals, for Jerome Frank knows that it will take many legal minds and perhaps many generations before the judicial process can even begin to
fit the needs of a changing legal order, especially at a juncture in human history when life is changing so fast in the technological and political realm that man's moral and spiritual guides have had little time to catch up with the mechanisms of his own making. The atomic age of modern science is still, in many respects, the eighteenth century of the jural order. But this is no reason, says Frank, for abdicating the search for truth.

It is true that, as to vast areas of experience, the human race is ignorant and will always remain largely so. For there are factors in the universe of which, because of our limited equipment, we shall always, almost surely, remain in darkness. Ignorance will therefore always play an important part in human affairs. But because our ignorance is and must be large, that is no reason why we should wallow in it, no reason why we should diminish our efforts to reduce the unknowable so far as possible.5

5 Courts on Trial, p. 125.

If ignorance is not bliss and since man is the creature of imperfect knowledge, the most that we can expect to find are probabilities, and not nirvana or some kind of perfect certainty.

...The insane asylum, and not any part of the ordinary walks of life, is the place for those who demand complete freedom from all uncertainties. We are but
mortal, and contingency is the essence of mortality. Only in the grave do we escape it....7

7 Frank, op. cit., p. 425. Cf.: "...J.S. Mill said that 'when it is impossible to obtain good tools, the next best thing is to understand the defects of those we have.'” Ibid., n. 13, p. 425.

It is the element of chance, of contingency, and of uncertainty (what Frank earlier called "possibilism") that makes life for Jerome Frank a challenging experience, a pragmatic search for meaning amidst chaos, paradoxical as that may sound.

...To ask for absolute exactitude in any phase of government is absurd. "Every day, if not every year," said Mr. Justice Holmes, "we have to wager our salvation upon some prophecy based upon imperfect knowledge.” 3

8 Ibid., p. 426.
Criticism and Counter-Criticism of Jerome Frank's Philosophy of Law and of Legal Realism in General

As a member of the so-called school of legal realism, Jerome Frank has always been under attack for his basic assumptions on law and the legal order. He has always answered his critics, but he has hotly denied that a "school" of legal realism really existed. As early as 1931, Frank protested the use of the term "realism" and suggested some better term of reference, e.g., "possibilism," "experimental..."
jurisprudence," "constructive skepticism," "legal actualism," "legal observationism," or just plain "legal modesty." Whatever the label used, Frank felt that the so-called legal "realists" were related only in the negative sense, in their skeptical attitude toward legal rules, and in their curiosity for observing the law in action. Skepticism and pragmatism were the main ingredients of their philosophy of law, but variations of this realistic outlook were numerous.

...When writers of realistic inclination are writing in general, they are bound to stress the need of more accurate description, of Is and not of Ought. There lies the common ground of their thinking; there lies the area of new and puzzling development. There lies the point of discrimination which they must drive home. To get perspective on their stand about ethically normative matters one must pick up the work of each man in his special field of work. There one will find no lack of interest or effort toward improvement in the law. As to whether change is called for, on any given point of our law, and if so, how much change, and in what direction, there is no agreement. Why should there be? A group philosophy or program, a group credo of social welfare, these realists have not. They are not a group.10

10 Karl N. Llewellyn, "Some Realism About Realism --- Responding to Dean Pound" 44 Harv.L.Rev. 1222 (1931), pp. 1255-56. Also, see pp. 1260-64 for the details of Llewellyn's point-by-point answer to Roscoe Pound's earlier article, "The Call For a Realist Jurisprudence" in 44 Harv.L.Rev. 697 (1931). Frank helped Llewellyn to write his article, but he did not jointly sign it. It is interesting to note that in Llewellyn's answer to Pound, he includes such men as Clark, Corbin, Klaus, Lorenzen, Francis, Sturges, and Tulin within the general framework of legal realism. See n. 32, p. 33, supra. These two articles by Pound and Llewellyn constitute a significant part of the realist-functionalist controversy.

Jerome Frank is not unhappy about the company he keeps; what he really frets about is the fact that the non- and anti-realists do not adequately or accurately distinguish the wide variation of viewpoints among writers of realist persuasion.

The fallacy of the Dickinson-Pound-Fuller-Cohen method of lumping all the so-called "realists" together can be shown by applying that same method to critics of the "realists." One would then say that Kennedy, Pound and Morris Cohen must be assumed to agree with one another on virtually everything concerning the judicial process because they both disagree with Llewellyn. On that basis, one would ascribe to Morris Cohen all the views of Fuller. But everyone who knows the attitudes of those men knows how absurd that would be. And Kennedy would surely be shocked if all Cohen's ideas were taken as his. 11

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11 Frank, If Men Were Angels, p. 278. Frank devoted a long Appendix V, entitled "Comments on Some Criticism of the So-Called "Realists"", pp. 276-315, to a discussion of the attacks made on him and on other "realists."

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When it comes to distinguishing among his critics, Frank is bound to be much harder on his "armchair" critics
than he is on those who come from the ranks of judges or practicing lawyers. There are exceptions, of course, but men such as Morris Cohen, Lon L. Fuller, and Mortimer J. Adler have been good targets for the spirited elements of Frank's criticism.

...Like most armchair students of matters legal, Cohen, for lack of courtroom experience, shuts his eyes to almost everything but legal rules and principles. And he is able to do so by insisting on discussing nothing but "law" -- defined as legal rules and principles. One wished that some day Cohen would read and write his reactions to a book like Goldstein's *Trial Technique* or Wigmore's *Principles of Judicial Proof*.  

12 *If Men Were Angels*, p. 283. Of course, Morris Cohen was not a lawyer, and never claimed to be. He was a logician and a philosopher almost all of his adult life and always approached the problems of law from that vantage-point. I would venture to say that in most respects, Cohen had more of the characteristics of the legal philosopher than Jerome Frank has. This I will discuss at the end of this chapter.

One of these "exceptions" is the late Justice Benjamin N. Cardozo. Cardozo, in a paper read before the New York State Bar Association in 1932, set out to demolish most of the arguments of the legal realists. Frank was unhappy, not so much about the general nature of this attack on legal realism, but about Cardozo's failure to distinguish the two general types of legal realists, the "fact-skeptics" and
In Cardozo's article in 1932, on the "realists," he falls into the usual errors: (1) He mistakenly assumes that all of them, in describing legal uncertainty, are referring exclusively to uncertainty in the legal rules and principles. (2) He also erroneously asserts that they regard as desirable the extent of the legal imprecision which they describe as existent. The second error we may, at this point, ignore. The first is more significant. For it makes plain Cardozo's lack of great concern with the difficulties of the fact-finding process and with the grave importance of that process. It is, indeed, remarkable that in this paper by Cardozo, criticizing the "realists" (a paper forty-four pages in length) he does not, even once, so much as mention the discussion of the elusiveness of the "facts" by those "realists" whom he singles out for special criticism. ...13

13 If Men Were Angels, p. 288. Cardozo's paper was printed in 55 N.Y.S.B.A.Rep. 263 (1932), and repr. in his Selected Writings, ed. by Margaret E. Hall. N.Y.: Fallow Publications, 1947.

Insofar as a science of law is concerned, in the sense of a body of knowledge that would suffice to enable the confident prediction of the outcome of a case, Frank has always denied its possibility, because of the large extent of what he calls "inherent inexactitude," both as to the rules and the facts.14 But Frank's attack on the myth of rule certain-

14 On a science of law, Ehrlich wrote: "...What men consider just depends upon the ideas they have concerning the
end of human endeavor in this world of ours, but it is not
the function of science to dictate the final ends of human
endeavor on earth. This is the function of the founder of
a religion, of the preacher, of the prophet, of the preacher
of ethics, of the practical jurist, of the judge, of the
politician. Science can be concerned only with those things
that are susceptible of scientific demonstration. That a
certain thing is just is no more scientifically demonstrable
than is the beauty of a Gothic cathedral or of a Beethoven
symphony to a person who is insensible to it. All of these
are questions of the emotional life. Science can ascertain
the effects of a legal proposition, but it cannot make
these effects appear either desirable or loathsome to man.
Justice is a social force, and it is always a question
whether it is potent enough to influence the disinterested
persons whose function it is to create juristic and statute
law." Fundamental Principles of the Sociology of Law (1913),
Cf. Lee Loevinger, "Jurimetrics -- The Next Step Forward"
33 Minn. L.R. 455 (1949).

...ty has at times been interpreted as an attack on all legal
rules. For this reason, he has been labelled a "nominalist"
on many occasions, in contrast to the "conceptualists" who
believe in the existence of legal rules. Felix Cohen,
Morris Cohen, Mortimer Adler, and Lon Fuller would fit into
the latter category.

Jerome Frank is extremely critical of Felix Cohen's use
of mathematical logic, and what Frank considers to be his
complete failure to see the "gestalt" factors in the judicial
process, especially at the level of court-house government.15

15 Frank, "'Short of Sickness and Death': A Study of Moral
Frank is especially contemptuous of Felix Cohen for his
failure to cite Edwin M. Borchard's book, Convicting the
Innocent in his discussion of legal values. This "omission," in my opinion, is not a serious one, and does not materially affect Cohen's philosophy of law. I might add that this particular article on Felix Cohen, along with the "armchair" criticism of M.R. Cohen, Dickinson and Adler, and the remarks about Karl Llewellyn's "failure" to study Tammany Hall "Indians," represent Jerome Frank in a carping, at times picayune, critical mood.

Professor Fuller believes that American legal realism has done some good, especially in its exorcism of many of the philosophical and methodological dogmas of nineteenth century jurisprudence, but it has also created new confusion. Fuller writes:

The law has always to weigh against the advantages of conforming to life, the advantages of reshaping and clarifying life, bearing always in mind that its attempt to reshape life may miscarry, or may cost more than they achieve....16


Furthermore, the "conceptualist" and "realist" schools have not always been clear about what was being discussed.

It is well to remember that the difference between the realist and the "conceptualist" is not so much a matter of specific beliefs as it is of mental constitutions. The conceptualist is not naïve enough to suppose that his principles always realize themselves in practice. Indeed, since he is usually a practical man, he is apt
to be more familiar with the specific ways in which life fails to conform to the rules imposed on it than the more philosophic realist. It is not, then, that the conceptualist is ignorant of the discrepancy between Is and Ought. He is simply undisturbed by it. ...The realist ends in ambiguity. About one thing he is clear. The disgraceful discrepancy between life and rules must be eliminated....

17 Fuller, op. cit., p. 461.

Fuller says that the realist desire for concrete things (e.g., the facts, or the law in action) has some dangerous pitfalls:

...Now this intellectual bias, for it is a bias, has its value in a science which has suffered for centuries from an unbridled pseudo-rationalism. But like all biases the realist's peculiar bias may sometimes lead him astray. He should remember that not all significant facts are "concrete." He needs to be reminded that the love of the tangible and concrete, like other human loves, may sometimes, when thwarted, fabricate its own object.

18 Ibid., p. 447. Fuller does not specifically mention Jerome Frank in these criticisms of American legal realism, but it is my view that he meant them to apply to writers such as Frank. Many other critics of legal realism, and certainly much of Fuller's discussion, sound remotely like the New Criticism vs. the Formalist Criticism of modern American literary criticism. I would even suggest that at times Frank plays the role for American legal philosophy that the late Gertrude Stein played in modern literature.
Felix S. Cohen, whom Frank described as a "rule-skeptic," has always concerned himself with the metaphysical aspects of law, especially in his book, *Ethical Systems and Legal Ideals* (1933). Cohen's main criticism of legal realism, or what he calls "functional jurisprudence," is that the task of valuation has been ignored:

Functional description of the workings of a legal rule will be indispensable to one who seeks to pass ethical judgments on law. The functionalist, however, is likely to be lost in an infinite maze of trivialities unless he is able to concentrate on the important consequences of a legal rule and ignore the unimportant consequences, a distinction which can be made only in terms of an ethical theory.19

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19 "The Problems of a Functional Jurisprudence" in *Mod. L. Rev.* 5 (1937), p. 7. On this point, I think that Roscoe Pound would be in full agreement with Cohen, namely, that many of the legal realists have ignored the most important element in the judging process, viz., values. In respect to the problem of language and the law, Cohen wrote: "The object of a realistic legal criticism will be not the divine vision which follows the words "Be it enacted:" but the probable reaction between the words of the legislature and the professional prejudices and distorting apparatus of the bench, between the ideas that emerge from this often bloody encounter and the social pressures that play upon enforcing officials. Words are frail packages for legislative hopes. The voyage to the realm of law-observance is long and dangerous. Seldom do meanings arrive at their destination intact. Whether or not we approve of storms and pirates, let us be aware of them when we appraise the cargo." *Ethical Systems and Legal Ideals*, p. 240.

One valid criticism of Jerome Frank's writing has been
the slipshod manner in which he deals with his materials. His books are a conglomeration of various and diverse materials gleaning from voluminous reading, but sometimes without adequate digestion of their contents.\textsuperscript{20} Elmer Davis, in reviewing Frank's \textit{Save America First}, found the book written in a loose fashion that gave the impression of reading "half a dozen different essays printed for convenience in a single volume." Davis said that during the seven years that Frank wrote this book, his objective and emphasis had shifted.

\textsuperscript{20} Cf. : "Intelligent eclecticism deserves no dispraise. But Blackstone's eclecticism in the field of political and legal philosophy is sadly wanting in intelligent selection and synthesis. He produced a sort of intellectual bouillabaisse. Holdsworth most inadequately seeks to defend this goulash when he says that Blackstone 'had read and mastered this philosophic learning; but he was not mastered by it.' But Blackstone had obviously not 'mastered' this learning. He slung it together in so inexcusably a careless manner as to show no real comprehension of it. His discussion of earlier political philosophizing recalls the story of a student who composed a paper on 'Chinese Philosophy' by reading and combining an encyclopedia article on 'China' with one on 'Philosophy.' Blackstone's was a shoddy scissors-and-paste job." Frank, ch. X, "A Sketch of an Influence," in \textit{Interpretations of Modern Legal Philosophies}, p. 228.
"Keep the Home Fires Burning" 18 Sat. Rev. of Lit. 5 (June 18, 1938), pp. 5, 6. Most of what Davis said about this book would apply to Frank's other books as well. Cf., Professor Alburey Castell in a review of F.C.S. Northrop's The Meeting of East and West: An Enquiry Concerning World Understanding wrote: "The book contains both a story and an argument. It should be read first for the story....But once the book is read for the story, reflection recurs to the argument...." 9 J. of Hist. of Ideas 237 (1948), p. 237.

Professor Edmund M. Morgan, who is highly respected by Frank, was tempted to cry after reading Courts on Trial:

...'Jerome, thou art beside thyself; much learning hath made thee mad.'...I have never before read a book which contained so much of what seems to me good plain common sense and so much arrant nonsense.22

22 Book Review, 2 J. of Legal Educ. 385 (1950), pp. 385, 386. Morgan thinks that a good example of Frank's "nonsense" is his definition of a legal right as "In short, a legal right is usually a bet, a wager, on the chancy outcome of a future possible lawsuit." (Courts on Trial, p. 27).

But "arrant nonsense" is a weak expletive, compared to some of the things Frank has been accused of being: Freudian, economic determinist, psychological determinist, behaviorist, Marxist, isolationist, etc. Frank has denied his addiction to any ism, philosophical or otherwise. Yet, Edward F. Barrett, for example, feels that Frank does believe in an absolute, even if it is a strange one, namely,
the "non-absolute." But Frank would not consider this a serious indictment of his work.

In a similar vein, Lee Loevinger writes that Frank's method of approaching legal problems is somewhat backward. It seems to me that Judge Frank, implicitly in his criticism of existing institutions and explicitly in his proposed reforms, would have us proceed from the more specific to the more general and from the more concrete to the more abstract.... However, it seems to me that we have arrived at the point at which we can move forward only by asking specific questions about the legal process which are capable of relatively scientific investigation. It seems to me that Judge Frank's last book illustrates many of the pitfalls of the philosophical approach to the legal process. It is filled with assumptions as to the nature of lawsuits, the methods by which they are handled, and the results achieved, which are obviously too broad to be supported by the personal observations of one man and yet are asserted without any apparent basis other than the author's opinion. On the basis of these assertions, it is argued that substantial improvement would be achieved by giving judges greater power to decide cases according to their own individual ideas of 'justice.' But the argument rests upon no more than its own mere assertion. How or why the results achieved would be better is not disclosed.

24 Loevinger, Book Review of *Courts on Trial*, "The Seman-

Whereas Roscoe Pound calls the legal realists (or at least some of them) the "give-it-up" philosophers, Professor Philip Mechem calls legal realism the "jurisprudence of despair." This infuriated one of Jerome Frank's most loyal defenders and former colleague, Thurman W. Arnold, who answered Mechem with the following statement:

...It was a natural reaction which may be compared to the reaction of the ethical philosophers at the beginning of the century toward psychoanalytical descriptions of "love" and "honesty." They felt their ethical world crumbling, just as Professor Mechem felt his jurisprudential world crumbling under the impact of an objective analysis.26

26 "The Jurisprudence of Edward S. Robinson" 46 Yale L.J. 1282 (1937), p. 1288. This article was an answer to Mechem, "The Jurisprudence of Despair" 21 Iowa L. Rev. 669 (1936), which dealt mainly with the work of Arnold and Robinson of the Yale Law School, but indirectly included much of Jerome Frank's philosophy of law. Note Arnold's use of the term "objective analysis." This did not get by Morris Cohen, who attacked both Arnold and Robinson in a scathing book review.
of Robinson's *Law and the Lawyers*, 22 *Cornell L.Q.* 171 (1936). Thus far, so far as I can determine, Professor Mechem's jurisprudential world is still pretty much intact.

Much of the criticism of the work of Robinson, Arnold, and Lasswell was directed not at their use of Freudian terminology and psychological techniques, but at their exaggerated and slavish use of these techniques. In my opinion, Jerome Frank is not guilty of this extremism, but lies somewhere between Lasswell on the one hand and perhaps Mechem on the other.27 Some critics felt that the Freudian fetish

27 Nevertheless, Frank still believes in the psychological ideas that he presented in *Law and the Modern Mind*, e.g., father-authority, father-substitution, Law-as-Father, the Father-as-Judge, etc. It seems to me that the whole notion of father-authority as used by Frank has some serious weaknesses. In the twentieth century, when the authoritarian personality has been under such vigorous attack, in the home, the school, the church, and in politics, how can such an anachronistic theory hold water? The nineteenth century father, or clergyman, or even teacher did have an authoritarian position and a role that would have fit the Law-as-Father analysis. But in an era of unprecedented social and political reform, together with the emancipation of the female, how can Frank still propound a thesis that is so far afield from the historical facts? Perhaps Frank's recent interest in natural law and Thomistic philosophy is an attempt to recapture the security and father-authority that scholasticism gave to the medieval world. If this is the case, then there are some very serious contradictions in Frank's philosophy of law. Then again, the confusion may be all mine.

was a passing fancy of Frank in one stage of his growth.
Judge Frank is a pragmatist, as ardent a pragmatist in 1946 as he was a Freudian in 1930 when he published *Law and the Modern Mind.*

Ralph Gabriel, Book Review of *Fate and Freedom*, 59 Harv. L.Rev. 633 (1946), p. 634. Of course, Professor Gabriel might have meant that Frank was both an ardent Freudian and a pragmatist in 1946.

While it is true that Frank is a legal pragmatist, he was not always felt that those who followed John Dewey (e.g., Cook, Llewellyn, Patterson, Cardozo, and Felix Cohen) were truly pragmatic. He says that their legal pragmatism, if it can be called that, is only two-dimensional (they haven't achieved 3-D as yet), and that these so-called legal pragmatists have failed to appreciate the pragmatic bent of Aristotle's legal writings.

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Having discovered Aristotle's discussion of equity at such a late stage of his own writing, Frank was prone to believe that he had discovered a hitherto unknown gold mine. His virtuous air of originality in seeing for the first time what philosophers had pondered time out of mind has bothered some reviewers, and this writer is inclined to believe that the "compleat man" that Professor Rodell wrote about can sometimes behave like the compleat fool of modern vintage. 30

30 Cf. Milton Konvitz: "He takes pains to avoid the charge of nihilism or antinomianism. He is more prone to cite Aristotle than Freud. A time there was when Jerome Frank was the Robinson Jeffers of jurisprudence. It is hardly in order, however, to expect a judge of the United States circuit court of appeals to live on locusts and wild honey, to carry fire in his bosom and walk upon hot coals." Book Review of If Men Were Angels, 56 Harv. L.Rev. 1020 (1943), p. 1022. If Frank was once the Jeffers of jurisprudence, might I add the suggestion that he is now the John Masefield of the modern school?

Jerome Frank has stoutly denied the anti-realists' assertions that the legal realists do not believe in legal certainty, ideals, 31 or in reason. Frank has a healthy

31 If this were the case in respect to Frank, how could his life-long fight against the use of "third degree" methods by police officials be explained? In regard to the use of reason, there is still some doubt in the minds of many of his critics, e.g., Arthur N. Holcombe: "We like to believe that men's conscious and deliberate purposes have to
some extent affected the past, and can also to some extent affect the shape of the future. But is there such a sharp conflict between Americans' natural faith in themselves and interpretations of history which recognize the validity of at least the possibility of scientific laws in the realm of human behavior?...He seems not to try to go beyond the will to believe in his articles of faith and to search the ultimate foundations of faith itself. Lacking further interest in philosophy, he might have fortified his faith with poetry." Book Review of Fate and Freedom, 40 Am. Pol. Sci. Rev. 356 (1946), pp. 356, 357. "When he tells us that history is not a science, he rides this essentially sound theme so hard that he almost undermines our conviction that we can make any useful interpretations of history. He has had to make many such interpretations himself, and he often makes them with undue ease." Richard Hofstadter, Book Review of Fate and Freedom, New York Times Book Review, (July 8, 1945), p. 5.

respect for all of these, but where he differs strongly from his "non-realist" critics is ---

...in description of the extent of legal uncertainty occasioned by the power of courts to find the "facts in litigation"....32

32 If Men Were Angels, p. 305. Frank regards his deep respect for Justice Holmes as positive proof of his regard for syllogistic reasoning. Adler and F.S. Cohen strongly dissent.

As a legal philosopher, Jerome Frank has never delighted in legal uncertainty; his main purpose throughout his basic writings has been to bring about improvements in the difficult process of finding the facts (subjective as they are) in
lawsuits. One could almost argue that Frank felt that he had the **moral duty** to tell the American people what was wrong (in his opinion) with their legal system.

The legal traditionalists' viewpoint has carried over to many educated non-lawyers, giving them a false and generally soothing impression of the operations of our court-house government. In this book, I tried -- I hope in a manner understandable to intelligent laymen -- to dissipate that false impression, because I felt that, in a democracy, the citizens have the right to know the truth about all parts of their government, and because, without public knowledge of the realities of court-house doings, essential reforms of those doings will not soon arrive.33

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33 Preface to the sixth printing of *Law and the Modern Mind*, 1949, p. xvii.

Another accusation that Jerome Frank disavows is the assertion that the legal realists believe in nothing but force.

Since the violation of some laws is a normal part of the behavior of every member of every group, lawlessness reduces to a charge of a mistaken selection of the existing laws which are to be ignored. It is evident that the notions of what constitutes such a mistaken selection vary from group to group and are not uniform even within any particular group....The seeming lawlessness of any group is the result of the gap between the legal standards apparently set by the political community and the more exigent ethical standards and psychological drives operative within that particular group.34
The legal realists have achieved at least one noteworthy accomplishment in the history of modern American legal thought, namely, the stimulation of creative discussion about the content and the quality of our legal institutions. They have evoked criticism from the most fertile minds in the field of jurisprudence and this, in itself, is an achievement that deserves praise.

Because Jerome Frank was a crusader in the most complete sense of the term, he has evoked more criticism of his work than some of the other legal realists. He has not failed to attack even the giants in the field if he felt that their logic was in error.\(^\text{35}\)

\(^{35}\) "No one with a taste for philosophy can fail to find interest and stimulation in Judge Frank's review of the history of political ideals. Of course, he attacks everyone who does not fit into his synthesis but this is the beauty of a crusader who believes in his cause...." Thurman W.

Jerome Frank's conception of his "mission" has been far broader and all-inclusive than the purposes of men like Karl Llewellyn or Max Radin, who are much humbler in their efforts to find a pragmatic basis for legal reform. For example, Llewellyn writes that ---

Law's precise office is not to change, but to prevent change; or when that will not do, then to adjust with the least possible rearrangement to the new condition. 36


Karl Llewellyn, like Frank, is not happy about the way some of the anti-realists have attacked his writings. In 1930, he published privately a small but important book called *The Bramble Bush* (On Our Law and Its Study), in which he gave a definition of what he thought the "law" really is:

...This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself. 37
The reaction to this statement by Llewellyn was as vigorous in 1930 as the criticism that was forthcoming when Frank published *Law and the Modern Mind* in the same year. Llewellyn was incensed over the reaction to the definition of law that he presented in his book.

...No piece of ammunition in the whole teapot compares in the frequency of its use, nor yet in the irresponsibility thereof, with our little thirteen word passage. With its help, I was shown to disbelieve in rules, to deny them and their existence and desirability, to approve and exult brute force and arbitrary power and unfettered tyranny, to disbelieve in ideals and particularly in justice. This was painful to me. But it was even more painful to observe that none of the attackers, exactly none, gave any evidence, as they slung around the little sentence, of having looked even at the rest of *Bramble Bush* itself. A single sentence, if it made a good brick-bat for a current fight, was enough to characterize a whole man and his whole position. And that ought to be painful to anybody....

While Frank regards law as what courts do in fact, Llewellyn stretches this definition to include all public officials who act in respect to disputes. Both definitions
have created havoc among those non- and anti-realists who feel that this nihilistic-type definition can only lead to complete and utter chaos. An example of a critic who finds these realistic definitions of law almost fantastic in their implications is William Seagle, who wrote:

Thus a hard-boiled school of American "realists" tends to regard the law as simply "what the courts do in fact." It is one of the few definitions in which the point of view of the lawyer advising the practical-minded client is taken into consideration. But no lawyer can tell a client what the courts will do in fact. He can only tell him what the courts are supposed to do....A leading realist defines law as simply "official action." But if law is thus what legal officials will do, why not say with equal logic that the law is what laymen will do? There is much law which is followed by laymen although it has never been litigated in the courts. The reductio ad absurdum of the whole position is that a statute is not law until it has been interpreted by the courts. Yet it is a position from which one of the founders of realism has not shrunk. Thus the legislator vanishes completely. Moreover, the whole conception of legal error and a hierarchy of appellate tribunals becomes impossible. There can be no such thing as an error of law if there is no such thing as law. The courts may freely disregard law if the law is what they do in fact....39


Edgar Bodenheimer is fearful of what the realists have done to what he calls "a government of law":

A second objection to realist jurisprudence is that it constitutes a new form of Austinianism. The realist theory of law has dethroned the Austinian legislator and put in his place the American judge as the sovereign creator of the law. Austin conceived of law as a command of a sovereign legislator. The legal realists, particularly Frank, conceive of law as a command or pronouncement of a sovereign judge. Both views throw little light on the essential character of the law....

40 Jurisprudence. N.Y.: McGraw-Hill, 1940, p. 314. Casting a plague on "both your houses" still leaves Bodenheimer with the problem of finding a better definition of law.

Jerome Frank would emphatically deny that he made anybody or anything sovereign in the sense that Bodenheimer uses. He has said on many occasions that all he was doing was describing how the judicial system actually worked, not how it ought to work. If it is the judges who make law, that is a fact, and not a "wish-assumption"; or, if it is not an objective "fact," it is at least the best statement of legal reality that a contemporary legal philosopher can offer at this stage of human knowledge. Yet Bodenheimer, Pound, Morris Cohen, and many other writers felt that the legal realist's attack on rule certainty has led to some dangerous consequences.

...There is a certain danger that the skepticism of realistic jurisprudence may, perhaps very much against the intents and wishes of its representatives, prepare
the intellectual ground for a tendency toward totalitarianism. If realistic jurisprudence is interested in the preservation of the law, it must supplement its analysis and criticism of the present legal order by a constructive program of legal change which leaves undisturbed the essential features of a "government by law."\footnote{Bodenheimer, \textit{op. cit.}, p. 316. The realists would be extremely hurt by the above statement, for they conceive of themselves as thorough-going democrats and not totalitarians. But "executive justice" sounds like and is very much akin to the "totalitarian liberalism" of a decade ago. For Jerome Frank, this entire discussion would be labelled "verbomania."} But Bodenheimer's admonitions fall on deaf ears, since his proposals would, of course, be impossible from Frank's point of view. If rule certainty and the Law-as-Father are the basic legal myths, how can "constructive" legal change leave these myths intact? The whole temper of Frank's legal philosophy (or at least his program of reform) is to expose legal myths to public scrutiny, and then proceed to bring the legal system into proximity with contemporary social ideals (however defined). And a "government of (or by) law" is not a part of Frank's program, if this means government by absolute rules of law, or exaggerated worship of legal rule certainty, or a crass rejection of the part that judicial fact-finding plays in the judicial process.

Hermann Kantorowicz takes a somewhat different view
of the legal realists, based mainly on their methodology and their confusion over what he considers to be the basic rules of philosophical inquiry. So far as he can detect, the basic "sins" of the realists are their confusion of the natural as against the cultural sciences; explanation and justification; law and ethics; realities and their meaning; a concept and the elements that comprise that concept; and cases and case law.\textsuperscript{42}

\textsuperscript{42} "Some Rationalism About Realism" \textsuperscript{45} \textit{Yale L.J.} 1240 (1934), especially pp. 1248-50. This article is still considered to be one of the best short critiques of American legal realism.

Much of the confusion amidst the realists' and anti-realists' discussion of legal philosophy is caused by the troublesome "is" and "ought" of the judicial process. The non- and anti-realists say that the legal realists deny the existence of rules and therefore do not believe in values. The realists emphatically deny this accusation, but advance the notion that the "is" and the "ought" must be clearly separated, at least for purposes of analysis.\textsuperscript{43}

\textsuperscript{43} It is interesting to note that Frank accuses the economists of an indifference to values: "Scientific method, in the most exact sciences, entails awareness, so far as may be, of the "personal equation" so that due allowance can be
made for it. Most economists have not borrowed that wisdom from the natural scientists. By pretending to themselves and to others that their alleged science rests on a complete indifference to ethical values and ideals, many economists have concealed the ever-present activity, in their thinking and observations, of their own social ideals. Their suppressed ethical attitudes and assumptions thereby become the more pronounced in their effects. Asserting that they were dispassionate, the economists became particularly passionate...." "The Scientific Spirit and Economic Dogmatism," in *Science For Democracy*, p. 19.

And this is where the trouble begins. Pound, for example, argues that if values are left out of the picture (even for analytical purposes), then the judicial process is examined in a distorted and unrealistic light. Frank and Llewellyn argue that this is not the case, but even realists such as Felix Cohen (even if he is called a right-wing "rule-skeptic" by Frank) think that the legal realists must face up to the fact that such a separation poses many dangers which some realists have been unable to avoid. Across the troubled waters of this legal controversy, one is reminded of the Biblical proverb, "...as ye sow, so...."

Julius Stone is one of the more brilliant of the modern legal writers who has written extensively on the problem of the "is" and the "ought" of the jural order. He says:

At the outset it is well to make the distinction, oversight of which, in the present writer's opinion, may have made much of the Pound-Llewellyn disputation unreal. A court's view of what ought to be --- the social ideal, or the theory of justice, or "policy," with which it approaches a case before it, may undoubtedly
in many instances affect the result. Now from the point of view of the court itself its decision was influenced by a conception of what ought to be. From the point of view, however, of a historian or a research worker, who is seeking to understand the decision, that "ought" becomes an "is" -- for him it is not the validity of the "ought" which is important, but the fact that the court accepted that "ought" and thereby allowed its decision to be affected. So in this latter sense, Professor Pound has repeatedly insisted that the "received ideals" of the common law are a part of our legal materials, just as much as are particular precepts. In other words, his point is that the ideals of the actors as to what the law ought to do are a vital part of the observable facts....

44 The Province and Function of Law, pp. 382-33.

I would agree with Stone that the ideals that men live by and act upon are as much a part of what Frank regards as the "facts" (legal reality) as are the actions of courts or judges or juries. This fact was brought home long ago by Eugen Ehrlich, and later by Max Weber, Roscoe Pound, and others. Fact and value are an inseparable part of all legal activity. Disregard of this element in the judicial process is, in my opinion, one of the major weaknesses of Jerome Frank's philosophy of law.

If Professor Llewellyn's call for divorce of the "is" from the "ought" were read to mean that the observer should ignore that part of the facts (for instance, of judicial decision) which consists of the ideals which actually move or are likely to move the actor (that is, the court), what A.D. Lindsay terms "the operative
ideals," it would clearly be unsound. It is not believed that he intends to go so far. For the most part it is clear that he is asking not for the observer to ignore the actor's ideals, but for the observer to put aside his own so that the accuracy of his observation and description shall not be interfered with. ...To summarize, then, inquiries into the ideals of justice, to which men feel impelled to conform, "what these ideals are, whence they come, and whither they lead," are part of the data of sociological jurisprudence above defined. . . .45


Can a judge's actions be separated from the values upon which he bases his decisions? This is a crucial question for modern jurisprudence, and it is this writer's opinion that most legal realists, including Jerome Frank, have evaded it. Other writers on legal realism take a somewhat different view.46

46 E.g., Francis R. Aumann: "In emphasizing the factor of control the realists do not deny that 'purpose has always been an inescapable factor in determining what shall be enforced as law' but stress the point that the adaptation of means to an end ought to be self-conscious and methodical, a recognized part of the jurists' problem." "Some Changing Patterns in the Legal Order" 24 Ky. L.J. 38 (1935), p. 41. (Inserted quotation from George H. Sabine, "The Pragmatic Approach to Politics," p. 875).
The methodological problem would be simple indeed if Llewellyn's naïve notion of what the problem entails was accepted:

Meantime, the fusion and confusion of Is and Ought is so unnecessary. All that the social scientist need do is, in his writing, as in his thinking, to mark off for the reader's observation and for his own the place where his science ends and his prudence begins. We all recognize the difference between a statement of established facts based on a thorough investigation and a statement of the probable or suggested facts based on a fragmentary canvass....

47 "Legal Tradition and Social Science Method -- A Realist's Critique," in Brookings Institution, Committee on Training, Essays on Research in the Social Sciences. Washington: The Brookings Institution, 1931, p. 101. This is an almost unbelievable over-simplification, and astonishing from a legal realist who is considered "moderate." If the problem were as simple as Llewellyn paints it, social scientists wouldn't argue about either their methods or their results. "Prudence," even of the Llewellynian variety, is a very rare commodity, certainly among many legal philosophers of realistic persuasion. Cf. the interesting and novel definition of the scientific method made by the famous physicist, Percy W. Bridgman: "...I am not one of those who hold that there is a scientific method as such. The scientific method, as far as it is a method, is nothing more than doing one's damnedest with one's mind, no holds barred. What primarily distinguishes science from other intellectual enterprises in which the right answer has to be obtained is not the method but the subject matter...." "The Prospect For Intelligence" 34 Yale Rev. 444 (1945), p. 450 (underlining mine).

Even if the pragmatic, contingent nature of legal realism is advanced as a defense of their position, this
does not adequately answer the critics who raise metaphysical questions. For troublesome value-judgments always seem to enter, and not only in the cases where mere "probabilities" are involved.

Questions of probability, like questions of validity, are to be decided entirely on objective considerations, not on the basis of whether we feel an impulse to accept a conclusion or not.48


These "feelings" about the facts nearly always tend to color investigations of factual phenomena, especially when the observer is both the fact-gatherer and the fact-assessor. And in the field of jurisprudence, where fact and value are so closely intertwined, the problem of unravelment is exceedingly difficult.

The real issue is not whether factual knowledge is necessary for a moral judgment but whether it is sufficient without a distinctly ethical premise. Can we from a number of premises which describe what is, deduce a conclusion which prescribes what ought to be? Reflection shows this to be logically impossible and morally confusing.49
Value-free judgments about the legal order would necessitate complete neutrality. But this is not easy to accomplish in law or in any other social science. Perhaps the legal realists, in their zeal to get at the roots of legal behavior, at the facts (whether they be subjective or objective), have failed to see the element of flux in the legal order. In their desire for legal actuality and reality, they have not always been able to distinguish the variegated elements that comprise the judicial process.

Nor have the legal realists always appreciated the interactive elements within that process. Having lost their sense of historical tradition and continuity, they had only facts to rely on, but facts can never establish a system of relationships without being ordered by an observer. Facts by themselves are meaningless.50

50 "It is easy for those who have not reflected on actual scientific procedure to say: Begin with the facts. But an even more fundamental difficulty faces us. What are the facts? To determine them is the very object of the scientist's investigations, and if that were but the beginning or first stage of science, the other stages might be dispensed with. To determine the facts scientifically, however, is a long and baffling enterprise, not only because the facts are
so often inaccessible, but because what we ordinarily take for fact is so often full of illusion. Our expectations and prepossessions make us see things which do not in fact happen, and without the proper previous reflection we fail to notice many obvious things which do happen. The problem of how to get rid of illusion and see what truly goes on in nature requires that persistent and arduous use of reason which we call scientific method." Morris R. Cohen, Reason and Nature, pp. 77-78.

One of the weaknesses of the school of legal realism was not only their zeal for facts, but also their overemphasis of facts in themselves, without a correspondingly acute appreciation for the relations between fact and value. Morris Cohen thought that this approach was itself an absolutist one, and he constantly warned the legal realists about their blind reliance on the one segment of the legal order that they thought vital, namely, the area of legal action.

The law is not in fact completed, but is a growing and self-correcting system. It grows not of itself but by the interaction between social usage and the work of legislatures, courts, and administrative officials and even legal text writers. In this growth the ideas which people have of what the law is and how it ought to grow are not without influence, though obviously inadequate for complete control of all future decisions. The logical error of absolutism is the same in the revolutionary as in the conservative camp -- the love of undue simplicity. Metaphysically this shows itself in the assumption of absolute linearity of determination between universals and particulars, principles and actual decisions. But from universals alone we cannot determine particulars, and the latter cannot completely determine the former.51
Perhaps this entire discussion of fact and value in jurisprudence is out of order, since no definition of the scope of jurisprudence has been advanced in this paper. I said at the outset that this would be a "philosopher's quest" because the nature of the materials being studied demanded a broad view of the writing of Jerome Frank on law and related problems.

But is Jerome Frank a legal philosopher, and can his work be subsumed under the label, "jurisprudence"? What exactly do we mean when we use this term?

...Though the term "Jurisprudence" may conceivably and with justification be employed to denote much else, in this study the term is taken to mean recorded thinking about the source, nature, end and efficacy of law, substantive and adjective, and of legal institutions.52


George W. Paton uses a somewhat different definition of the term "jurisprudence":

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It is absurd to suggest that there is only one useful path for jurisprudence to tread....In short, jurisprudence is a functional study of the concepts which legal systems develop, and of the social interests which law protects. This seems to the writer the most useful approach, though the findings of other schools cannot be ignored.53


If we accept Reuschlein's definition of jurisprudence, then Jerome Frank's writing is deficient in one respect, viz., his lack of conscious concern for the ends of law. Can Frank be classified as a legal philosopher if he leaves out the problem that law has always presented to men of ideas: the problem of justice? Even under Paton's definition, Frank's work would be lacking, since he is not concerned with social interests, but in how the legal order operates in the protection of these interests.

Whatever categories we employ, or definitions of jurisprudence we agree upon, Jerome Frank's writing on law is an important segment of modern American legal thinking. Whatever its deficiencies, or errors of judgment, or exaggerated claims, it deserves to be regarded as an integral part of American jurisprudence. For even the iconoclast within jurisprudence has a role to play and ought, in all fairness, to be given a place in the long and varied history
of the sources, nature, and ends of law that we call jurisprudence.
APPENDICES

I  --  A SHORT BIOGRAPHY OF JEROME FRANK

II  --  SOME SELECTED DECISIONS OF JUDGE JEROME FRANK

III  --  A GLOSSARY OF WORDS AND PHRASES USED IN THIS PAPER
APPENDIX I

A SHORT BIOGRAPHY OF JEROME FRANK

Jerome New Frank was born in New York City on September 10, 1889, the son of a lawyer, Herman Frank. He attended Hyde Park High School in Chicago and received the degree Ph.B. from the University of Chicago in 1909. In 1912, Frank received the degree Doctor of Jurisprudence from the University of Chicago Law School, where he was elected to Phi Beta Kappa. He was admitted to the Illinois bar in the same year and joined the Chicago law firm of Levinson, Becker, Schwartz and Frank, specialists in corporation law. Frank married Florence Kiper, a well-known poet and playwright, in 1914.

While practicing law in Chicago, Frank was a member of Mayor William E. Dever's "kitchen cabinet." During the period from 1921-25, Frank helped to negotiate a traction settlement for the city of Chicago that was later defeated by Samuel Insull, and also did extensive corporate reorganization work. In a little over a decade, Frank established himself as a highly successful corporation lawyer of liberal tendencies and a reputation for hard work.
In 1929, Frank joined the New York City firm of Chadbourne, Stanchfield, and Levy. Following the publication of *Law and the Modern Mind* in 1930, Frank lectured at the New School For Social Research, and in 1932 he was appointed a research associate at the Yale Law School.

Jerome Frank entered the national picture in 1933, when the then Professor Felix Frankfurter recommended him to the legal staff of the Department of Agriculture, but the appointment was blocked by James A. Farley. In the same year, Henry A. Wallace, who was then the Secretary of Agriculture, appointed Frank general counsel for the Agricultural Adjustment Administration, and he later took on the duties of general counsel for the Federal Surplus Relief Corporation. In February, 1935, Frank resigned from the A.A.A., but he returned to Washington as special counsel for the R.F.C. in railway reorganization matters, and for the P.W.A.

Following his return to private practice in 1936, Frank earned $38,000. for helping to reorganize the Union Pacific railroad. In December, 1937, President Roosevelt appointed Frank a commissioner on the Securities and Exchange Commission. In May, 1939, Frank became chairman of the S.E.C. when William O. Douglas was appointed Associate Justice of the United States Supreme Court.

After four years on the S.E.C., Frank was appointed by President Roosevelt to the post of Judge of the United
States Circuit Court of Appeals for the second circuit, a post that he has held since May, 1941. In addition to his duties as a federal judge, Jerome Frank has served as a Visiting Lecturer in Law at the Yale Law School since 1946, and was a Visiting Lecturer at the New School For Social Research in 1946-47.

Thus, the career of Judge Jerome Frank has been an extremely varied one. In a little over forty years (1912-54), Frank has been a practicing lawyer, a law school teacher, writer, government counsel, administrator, and is now a federal judge. Today, at the professionally "youthful" age of 65, Jerome Frank still has many more years ahead as a jurist and legal publicist. ¹

¹ Most of this information was found in Current Biography (1941), pp. 301-3, and in 28 Who's Who in America 915 (1954-55 ed.).
APPENDIX II

SOME SELECTED DECISIONS OF JUDGE JEROME FRANK

In attempting to systematize and critically evaluate the legal thinking of Jerome Frank, I deliberately ignored the decisions that he has issued since he became a federal judge in 1941. Since I was interested in his legal philosophy as it emerged from his published works, I did not concern myself with his role as a judge. Had I been interested in a genuine study in the sociology of law, it would have been necessary to compare Frank's philosophy of law with the cases he had decided. However, since he is an appellate judge, Judge Frank's decisions do not reflect for the most part the important fact-determinations that take place at the trial court level. Hence, I did not feel that a fair or even comprehensive assessment of his decisions could be made without a full knowledge of the facts of each case.

Another reason for ignoring his decisions is that while they sometimes reflect many of the ideas that have been discussed in this paper, they do not have the importance for modern realistic legal thinking that his published writings have had, particularly since he has been on the Federal Bench for only thirteen years as compared to the forty-two
years of his famous colleague, Judge Learned Hand, who re­
tired in 1951.

It is significant, however, that in many cases, Judge
Frank uses his case notes for citing philosophical and his­
torical works (as well as his own and other realistic writ­
ings). As would be expected, the subjects that interest
Judge Frank the most in the cases that I have selected are
trial court fact-finding, precedents, judicial legislation,
judicial impartiality, judicial interpretation and discre­
tion, trial-by-combat, jury trials, judicial psychology,
legal fictions, legal rules, legal semantics, and proced­
ural reforms. Except where these subjects are directly
related to his decisions, Judge Frank's comments are for
the most part the obiter dicta in these cases. It is my
opinion that much of Jerome Frank's philosophy of law can
be found in his voluminous case notes and especially in
the obiter dicta of his opinions.

On Precedents

In re Barnett, 124 F.2d 1005, 1011 (2nd Cir. 1942).
Aero Spark Plug Co. v. B.G. Corporation, 130 F.2d 290,
294-99, 298 n. 26 (2nd Cir. 1942).

On Trial Court Fact-Finding

Wabash Corp. v. Ross Electric Corp., 187 F.2d 577, 586,
581-4 (2nd Cir. 1951).
On Legal Rules and Legal Certainty

*Guiseppe v. Walling*, 144 F.2d 608, 621-2 n. 38 (2nd Cir. 1944).
*In re Fried et al.*, 161 F.2d 453, 462 n. 21, 464 (2nd Cir. 1947).

On Legal History, "Periodization," and Zeitgeist

*United States v. Forness et al.*, 125 F.2d 928, 935, 942 (2nd Cir. 1942). Also deals with the problem of judicial fact-finding.
*Hume v. Moore-McCormack Lines*, 121 F.2d 336 (2nd Cir. 1941). This case deals primarily with maritime legal history.

On the Role of the Trial Judge

*United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 642, 655 (2nd Cir. 1946). Dissenting opinion which dealt with the problem of finding grounds for upsetting trial or lower court decisions.
*McAllister v. Commissioner of Internal Revenue*, 157 F.2d 235, 237, 240 n. 6 (2nd Cir. 1946). Dissenting opinion which discussed the problem of judicial discretion, especially extrapolation and interpolation.
*Commissioner of Internal Revenue v. Beck's Estate et al.*, 129 F.2d 243, 245 n. 4, 246 (2nd Cir. 1942).
In re J.P. Linahan, Inc., 138 F.2d 650, 651-4 (2nd Cir. 1943). On judicial bias and the problem of impartiality.

On the Problem of Trial by Jury

United States v. Liss, 137 F.2d 995, 1001-5 (2nd Cir. 1943). Dissenting opinion.


Skidmore v. Baltimore & O.R. Co., 167 F.2d 54 (2nd Cir. 1948). This entire opinion discusses the problem of general verdicts and special or fact verdicts.


On Gestalt Factors in the Judicial Process & Psychology


Roth v. Goldman, 172 F.2d 788, 790-93 (2nd Cir. 1949). On psychological studies relating to law.

On Legal Fictions and Natural Law


On Legal Terminology and Legal Semantics

**Hoffman v. Palmer et al.**, 129 F.2d 976, 986 (2nd Cir. 1942).

**Andrews v. Commissioner of Internal Revenue**, 135 F.2d 314, 317 (2nd Cir. 1943). On the meaning of the word "value."

APPENDIX III

A GLOSSARY OF WORDS AND PHRASES USED IN THIS PAPER

Throughout this paper, I have used numerous words and phrases that might seem novel to those who are unfamiliar with Jerome Frank's writings and the writings of other legal realists. Many of the terms used by Frank are of his own invention, while others bear the mark of his tampering or interpretation. I have omitted those terms that were defined in the body of this paper.

"legal realism" or "realistic jurisprudence" -- This refers not only to a school of modern legal thinking, but to a general point of view toward the study of law, principally skeptical and distrustful of a reliance on legal rules, with its main emphasis on the study of law in action.

"jurisprudence" -- I did not hazard a definition of this term, but when used, it refers to any writing on legal ideals, institutions, or history that bears a philosophical imprint. For the most part, this term is used synonymously with "legal philosophy" or "legal thinking" in this paper.

"legal rule certainty" or "rule certainty" -- The slavish reliance on rules and the belief that legal rules can provide a complete basis for predicting future legal action.

"upper-court myth" -- The myth that upper courts (or appellate courts) are the most important courts that decide cases, whereas the major legal activity, according to Frank, takes place at the trial court and trial by jury levels.

"court-house government" -- A common term that Frank uses, referring to the action of trial courts, which he considers the heart of our legal system, and which includes not only
trial court decisions, but the work of juries, the attitudes of trial lawyers, and everything connected with cases that are tried in courts of initial jurisdiction.

"judicial hunch" or "legal hunch" — The idea, as expressed in the writings of Frank, Hutcheson and others, that the decision of a judge is in reality the result of a "hunch" or guess.

"analytical jurisprudence" — Refers to the school of legal thought that followed the teachings of John Austin. It is more accurately referred to as the "imperative" or "command" theory of jurisprudence.

"functional jurisprudence" — This term is used to broadly denote the school of legal thinkers who followed Holmes and the pragmatic philosophers (especially Dewey) and which includes the sociological jurisprudence of Pound as well as the various branches of American legal realism.

"sociological jurisprudence" — Roscoe Pound's theory of law as the institutional means for satisfying and protecting the social interests or ideals of a particular community at a particular time.

"behavioristic jurisprudence" — Refers to those extremists who, like Malan and Schroeder, believed that law was exclusively a function of psychological predispositions of the individual judge.

"action approach" — Refers to those legal realists who stress legal action (i.e., decisions) as against legal ideals or values in their methodology.

"free phantasy technique" — Refers to Lasswell's method, borrowed from Freudian psychoanalysis, of allowing a person to speak freely of his past memories in order to throw light on his present behavior.

"psychological jurisprudence" or "psychological realists" — Refers to Frank, Lasswell, Robinson, West, and others who rely on a psychological analysis of law. While Frank would utilize for the most part the work of child psychology, while Lasswell would stress psychoanalysis. West would capitalize on his psychiatric training. Robinson was a psychologist by profession.

"father authority" or "father-substitution" — Frank's notion that the father is a judge whose authority passes over to the Law after childhood ends, i.e., the Father-as-Judge becomes the Law-as-Father. This is part of Frank's description of the basic legal myth of legal rule certainty.
"legal actualism," "legal observationism," "experimental jurisprudence," "pragmatic jurisprudence," "possibilism," "legal modesty" -- These are all synonyms for Frank's description of the legal realist approach.

"basic legal myth" -- The myth that legal rules can provide certainty and exactness in the law.

"legal fundamentalism," "legal absolutism," "traditionalism," "Bealism" -- Frank's terms of reference for the theory that the law consists only of rules.

"legal codification" -- The attempt to systematically organize legal rules, principles, precedents, etc. into codes that judges can use when making decisions.

"the value of lay ignorance" -- Frank's description of one of the ways in which the rule-worshippers preserve the basic legal myth, namely, by keeping the lay public unaware of legal reality and the true nature of the judicial process.

"judge-made law" -- Law made by the judges in their opinions in the sense of interpretation, expansion, or clarification of statutes, administrative decrees, and the like.

"jury-made law" -- According to Frank, law that is "made" by a jury as a result of its finding of the facts in a specific case.

"judicial self-awareness," "judicial self-limitation," and "conscious jurist" -- The qualities that Frank believes every judge should possess if he is to understand himself, human nature, and the judicial process. Synonymous with the "mature" or "adult" jurist, as exemplified in Holmes and Learned Hand.

"rule fetishism" or "rule worship" -- Undue worship of the legal rules as constituting the fundamental source of law.

"certainty seeking" -- The search for absolute certainty in the law through the use of legal rules or other guides, a view which Frank finds dangerous and reprehensible.

"trial-by-combat" -- The game that adversaries play in the court room in their attempt to win cases for their clients.

"fight theory" -- The attempts of lawyers to win cases by swaying the judge and the jury, not by trying to find the "objective" facts of a case.

"truth theory" -- The opposite of "fight theory," what Frank would regard as the ideal basis for court room behav-
ior, namely, the attempt to ascertain the "objective" facts of the case, irrespective of who wins.

"temporary absolutes" -- Provisional or contingent rules, principles, ideals, or assumptions that must constantly bear the test of experience and critical evaluation.

"executive justice" -- Law that is made, expanded, interpreted, or altered by the action of administrative tribunals or by government officials outside of the traditional courts and the results herein that are sometimes characterized by this term of opprobrium.

"judicial fact-finding" -- The process of "discovering" or finding the facts of a particular case by the judge, the jury, lawyers, and the other participants in a trial.

"objective facts," "real" or "actual facts," "OF" -- What took place prior to, but is never accurately or completely reconstructed in a trial.

"subjective facts," "SF" -- The facts that are brought out at a trial and which are less than objective because of the element of human memory and human fallibility.

"correct" or "just decision" -- According to Frank, a decision that results from the application of the right rule (R) to the most objective facts of the case (OF) in order to give D (decision).

"rule-skeptics" -- According to Frank, these are the right-wing legal realists who are skeptical of the legal rules, but not the facts as found in particular cases, e.g., Llewellyn.

"fact-skeptics" -- These are the legal realists who peer not only behind the paper rules but behind the facts of a case, e.g., Frank and Arnold; sometimes called "three dimensional" legal thinking.

"paper rules" -- The recorded legal rules, precedents, and principles that guide judges in making their decisions.

"legal magic" -- The traditional conception of a mechanical application of \( R \times F \) gives \( D \), which fails to approximate the realities of the judicial process. The notion that this formula will produce legal certainty is, according to Frank, the equivalent of a primitive reliance on supernatural magic.

"trial court" -- Any court of original jurisdiction where the facts are initially investigated in a specific case. For Frank, the trial court is the heart of what he calls "court-house government."
"legal functionary" — A term applied to judges who serve as the value-creators and value-interpreters for the community. Sociologically-oriented writers on law, e.g., Pound, Rheinstein, and Ehrlich, use this term or similar terms in the sense of a judge whose job it is to find the best possible means for adjusting law to the social interests and aspirations of the community he serves.

"black-letter law" — Law in books and books only. Another phase of what Frank would regard as traditional legal rule certainty.

"pre-trial fact-finding" — Frank's suggestion, borrowed from the S.E.C. and other administrative agencies, for gathering the facts prior to a trial or administrative hearing.

"Cadi" or "Cadi-justice" — A term borrowed from Islamic practice referring to a specially chosen and presumably objective judge of the law and of the facts. Frank applies this term to the jury, which, in his opinion, acts as both the fact-finder and witness-audience.

"case book method" — Refers to the technique used in American law schools of teaching law through the use of books containing selected cases on a particular branch of the law, e.g., contracts, torts, or property law. This method was first used on an organized basis at the Harvard Law School under the sponsorship of the late Dean Christopher Columbus Langdell.

"library-law" — Frank's reference to Langdell's emphasis on the written materials of legal study (especially the legal rules), as against the study of the law in action.

"law-teacher schools" — According to Frank, these are the law schools that have men on their faculty who have had no practical legal experience and whose major interest is the training of law teachers and not lawyers. In contrast to "lawyer-schools," or schools with men of wide legal experience on their faculty who have the necessary background for the training of practicing lawyers.

"legal axioms," "wish assumptions," "is assumptions" — This is Frank's distinction between those statements about the law that are purely descriptive and those that prescribe what ought to be, or between the "ought" and the "is."

"inherent inexactitude" — Frank's view of the law as it is and not as we would like it to be regards this element in the picture as the fundamental reason for failing to achieve certainty. Consequently, without certainty and predictability, no science of the law is possible according to his view.
"nominalist" -- A term of opprobrium used by the non- and anti-realists to describe Frank and others who presumably do not believe in the existence or efficacy of legal rules.

"conceptualist" -- A term used by the legal realists to describe those who believe in legal rules.

"non-absolute" -- A term used by Barrett to describe the position of Jerome Frank, and one that he would accept without qualification.

"government of laws" -- For Frank, this term is the counterpart of the worship of rules in the political realm and therefore a myth without foundation in reality.

"government of men" -- Frank's definition of what actually exists, as against the belief that a government is law and not a group of men who make and interpret the law.

"Wousins" or "Wousining" -- A term created by Frank and used in Law and the Modern Mind (p. 57) to illustrate the word-magic and excessive verbalism of the legal fundamentalists, especially Beale.

"word-magic," or "verbomania" -- The use of legal language in the perpetuation of lay ignorance about the law and especially the perpetuation of the basic legal myth of rule certainty. Synonomous with "Wousining."

"legal logic-chopping" -- Frank's derogatory reference to the use of syllogistic reasoning in jurisprudence, especially by people such as Beale and Adler.

"scholasticism" and "platonism" -- When used by Frank, these terms are synonomous with "Bealism," "legal fundamentalism," and "legal absolutism."

"gestalt," "composite," and "contrapuntal" -- These are all terms that Frank uses to describe the complex psychological and environmental factors that operate in the mind and personality of an individual judge when he makes a decision.

"jural order," "legal order," "legal system," or "judicial system" -- These are all terms that refer to the administration of justice in the United States and to the over-all Anglo-American tradition of trial by jury, due process of law, the right to appeal, etc.

"procedural reformers" -- This term refers to those who believe that procedural reforms will make legal certainty and stability a part of the judicial process and who are regarded by Frank as another breed of rule-fetichists.
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"Fifty Years of Jurisprudence." (IV ---


I, Julius Paul, was born in Cleveland, Ohio, May 25, 1926. I received my secondary school education in the public schools of the city of Lakewood, Ohio. My undergraduate training was obtained at the University of Minnesota, from which I received the degree Bachelor of Arts in 1947. I studied in the Graduate School of the University of Minnesota during the summer of 1947, and during the year 1947-48 I served as a Teaching Assistant in the Department of History of the University of Hawaii. In 1948-49, I attended the Harvard Law School. I came to the Ohio State University in the fall of 1949 and was appointed a University Scholar during the winter and spring quarters of 1950. During the summer of 1950, I was a fellow at the University of Denver Russian Institute. From 1950-51, I served as a Graduate Assistant, and from 1951-52, as an Assistant in the Department of Political Science. During the summer and fall quarters of 1952, I was a Graduate Assistant in this department. In the fall of 1953, I received an appointment as a University Fellow, which I held for the remainder of the year 1953-54 while completing the requirements for the degree Doctor of Philosophy.