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# JEROME FRANK'S CONTRIBUTIONS TO THE PHILOSOPHY OF AMERICAN LEGAL REALISM

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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.*
>
> —JEROME FRANK[1]

Justice Holmes' famous statement that "the life of the law has not been logic: it has been experience"[2] has had a profound effect on contemporary American jurisprudence. Holmes' monumental influence, together with the impact of positivism, American pragmatism, and more recently, psychoanalysis, have all played important roles in shaping the development of the school of American legal realism.

One of the most controversial and provocative members of this school was Jerome Frank, who was not only a prolific writer on matters legal, but also an eminent corporation lawyer, a government counsel, an administrator (a Commissioner and later Chairman of the Securities and Exchange Commission), a law teacher, and a highly respected Judge of the United States Court of Appeals for the Second Circuit from May, 1941, until his death in January, 1957.

Jerome Frank's fundamental idea is concerned with what he calls the "basic legal myth of rule certainty." Frank believes that the worship of legal rules is a carry-over into adult life of father-worship. According to his argument, the law becomes a father-substitute, with a corresponding preservation of childish thought-patterns. Although Frank will admit the necessity and the value of some legal rules, the exaggerated belief that these rules can guarantee legal certainty is for him the worst "sin" of modern jurisprudence. In the development of this idea, Frank is perhaps the first major writer in jurisprudence to draw consciously on a concept of psychoanalysis.

For the psychological basis of his legal theory, Frank leans heavily on the work of Jean Piaget, Bernard Hart, and other psychologists. Frank denounces those whom he regards as believers in legal rule certainty, especially Joseph Beale, Roscoe Pound, John Dickinson,

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1. FRANK, LAW AND THE MODERN MIND 6-7 (1930).
2. HOLMES, THE COMMON LAW 1 (1881).

and the late Justice Benjamin N. Cardozo, for their failure to notice the *contingent* nature of all legal activity. Since the legal order is always in the process of bending to the new and changing needs of the social order, legal certainty is only a relative matter, and should not be regarded as an end in itself.

Legal rules are but *part* of what is commonly called "law." As a devoted follower of the late Justice Holmes, Jerome Frank believes that the data for legal study should be *what courts do in fact,* not what they say they do, or what he would call the "rationalizations" of their actions.

Jerome Frank's critics have consistently accused him of believing in chaos because of his attack on legal rules, but he has staunchly denied these accusations with the argument that criticism of the wishful thinking and childish thought-patterns of the rule-worshippers does not imply a belief in chaos, but on the contrary, is the way to achieve what he calls the "modern mind," the adult and emotionally mature mind, which he feels is best represented by the late Justice Holmes ("our most adult jurist") and Judge Learned Hand ("our wisest judge").

Frank believes that a judge's decisions are but a *part* of his total behavior, and that the process of making decisions is in reality a *gestalt* or composite of the psychological, environmental, and socio-economic factors that go into the development of the personality of the individual judge. Here again he draws heavily on psychology. What appears to be a *rational* decision on the part of the judge is, according to Frank, really a judicial "hunch" based upon the judge's reactions to the "facts" that are brought out in the trial. The judge is a "witness of the witnesses," and as such, he is subject to the frailties of the human mind in attempting to reconstruct the objective "facts" of a situation that took place in the past.

In his view, the trouble with most of the studies of judicial decisions is that they concentrate on upper court opinions (and hence, the legal rules) and not the decisions of the trial courts, where the vital fact-finding process takes place. This is what Frank calls the "upper-court myth," a prevalent legal myth that beclouds the importance of trial court activity, which Frank thinks is the heart of our legal system and of what he calls "court-house government."

For Jerome Frank, the most important part of the judicial process is *fact-finding,* and the impossibility of judges, juries, and laymen alike ever being able to reconstruct a perfectly objective picture of a legal situation that is *ex post facto* in nature. The subjective nature of the fact-finding process will always be one of the weak links in the judicial process. Frank does not have a solution for this inherent

weakness in trial court procedure, but he does believe that more self-awareness and self-limitation on the part of judges (the acknowledgment that judges are also human beings with fallible minds) would reduce the subjective elements in the judicial process of finding what the facts are in a particular case. Since it would be impossible to eliminate all of the subjective factors in the picture, the judicial process will always remain less than perfect. One of Jerome Frank's suggested reforms in this regard is the more general use of special findings of fact by judges at the trial court level.

Frank regards the jury system as outmoded in function and grossly inefficient as an instrument for finding the facts of a case. As in the case of judges, Frank believes that the jury is a poor fact-finder because of its inherent human limitations as "witnesses of the witnesses." Although the judge has special legal training, the jury is for the most part incapable of recognizing perjured evidence, poor memories, and the like. In this area, Frank speaks rather as an administrator or practitioner, appealing to the common sense of experience, not to concepts of psychology.

Jerome Frank suggests a complete overhauling of the jury system, including special courses of study for prospective jurors. But it is his belief that the jury should be dispensed with in most trials. The jury system has outlived its original purpose of protecting the individual against arbitrary authority, and has itself become an arbitrary instrument of ignorant men who are not only miserable fact-finders, but also usurpers of the rule-making function of the judge.

Like any reformer who goes beyond mechanical remedies for the ills he sees, Frank traces the roots of the difficulties he attacks to the educational system in which lawyers are trained. He is severely critical of contemporary American legal education for having followed the principles of Christopher Columbus Langdell, late Dean of the Harvard Law School. According to Frank's assessment, law schools would better perform the function of training intelligent and socially-conscious lawyers if they became *lawyer*-schools and not *law teacher*-schools. He suggests that the majority of the law faculty should consist of men who have had actual legal experience outside of the law library, and he feels that all law students should have "clinical" experience or apprenticeship training in connection with the legal aid clinics that now exist in many American law schools.

The case method of teaching law has some utility, but Frank believes that it concentrates too heavily on upper court opinions and legal rules. Once American law schools can shake off the influence of Langdell, Frank believes that legal education will be more practically suited to the clinical training of future lawyers and judges.

*Elements of Frank's Philosophy of Law*

The major elements of Jerome Frank's philosophy of law have been contained in four of his six 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, 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.

*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 last book, *Not Guilty,* written with the collaboration of his daughter, Barbara Frank, was published posthumously in 1957. In its intense condemnation of the conviction of innocent men, it is perhaps the best example of Judge Frank's life-long passion for criminal justice and the most explicit evidence of his belief in the values of a democratic society.

The controversial *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.[3] 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 mellowed and constructive,[4]

3. A colleague on the bench, Judge Charles E. Clark, confirmed this in a memorial to Frank, where he said: "Judge Frank, although a gladiator of unusual power and adroitness, never seemed to harbor permanent spite of any form whatsoever. Indeed, I doubt if he realized how heavy was the impact of his intellectual blows. He was of a vast kindliness and good humor; so after a morning of almost mortal combat he would appear at lunch with new and lively tales of men and events or reports on the latest philosophical books which he read so voraciously." Clark, *Jerome N. Frank,* 66 YALE L.J. 817, 818 (1957).

4. The following are examples of reviewers who commended the work of Frank: "Judge Frank's book is worth reading by mature persons who can distinguish the grain from the chaff and correct its lack of balance. It should not be recommended to the young and the immature, who may be tempted to swallow its lopsided theories as uncritically as the author himself has swallowed them." Robson, Book Review, *Law and the Modern Mind,* 21 POL. Q.

and at other times, bent on partial or complete demolition of the opponent's arguments.[5]

But Jerome Frank, crusader that he was, was a reformer to the last. He has never flinched from a good fight, and even when he was the center of controversy, he 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 the late 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,[6] the breadth of which amazes even his most ardent critics.

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411, 418 (1950). "I commend the book . . . for the author's willingness to discuss his own shortcomings; for his shorthand attempt to place himself and other writers in the jurisprudential 'schools'; for a psychological approach to judicial action, which though it may be too closely tied to behaviorism, properly emphasizes the 'gestalt' in law; and for his rather canny observations on precedent, legislative interpretation, old axioms." Freeman, Book Review, *Courts on Trial*, 35 CORNELL L. Q. 943, 943-44 (1950). "In our opinion, 'Law and the Modern Mind' constitutes the most effective attack that has been made on legal fundamentalism . . . ." Black, Book Review, *Law and the Modern Mind*, 19 KY. L.J. 349 (1931).

5. Here are some examples of qualified criticism of Frank's writing: "The book is not well organized, the shots are often carelessly fired and wide of the mark, many of the shells are duds and some may act like boomerangs. This friendly criticism of an ally is all the more necessary because these defects are characteristic of our young liberals who, though they talk much about science and the methods of science, woefully neglect the art of close reasoning and seldom trouble to produce logically conclusive evidence for their contentions." M. Cohen, Book Review, *Law and the Modern Mind*, 133 NATION 259 (1931). "It is perhaps unfortunate that so much of the book is devoted to the discussion of psychology of the desire for certainty. This is interesting but unimportant." Bohlen, Book Review, *Law and the Modern Mind*, 79 U. PA. L. REV. 822. "*Law and the Modern Mind* is the most provocative stimulus to thinking on fundamental legal problems that has appeared in the Anglo-American literature of jurisprudence since Dean Pound's *Spirit of the Common Law*. . . . All this is not to suggest that *Law and the Modern Mind* can be swallowed and digested as it comes from the press. It must be washed and peeled, and there are unripe and over-ripe parts to cut out; it must be boiled and mashed and seasoned with a good deal of salt before it can safely be entrusted to a moderately sensitive legal stomach." F. Cohen, Book Review, *Law and the Modern Mind*, 17 A.B.A.J. 111 (1931).

6. Apropos Frank's eclectic perspective and style of writing, the historian Richard Hofstadter had this to say in a review of *Fate and Freedom:* "The product of a learned, cultivated and muscular intellect, it is a first-rate philosophical book for the layman, and will interest anyone who has ever pondered the problem of destiny versus freedom." New York Times, Book Review, July 8, 1945, p. 5. Another reviewer wrote: "This little volume has a notable structural unity. Its perspective of the past is a tribute to the resourcefulness of its author. Its vision is a tribute to his genius." Laube, Book Review, *Fate and Freedom*, 32 CORNELL L.Q. 307, 309 (1946).

> 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.[7]

To the more conservative legal mind, over half of Frank's work that is commonly labelled "legal philosophy" is really nonlegal in nature. 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, did not think that *Courts on Trial* presented anything that was fundamentally new in Frank's writing.[8] He suggests that the lay reader concentrate on Frank's list of legal axioms and suggested reforms in *Courts on Trial.*

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 in this last book.[9] Most of the fundamental assertions contained in *Law and the Modern Mind* remained intact in *Courts on Trial,* despite Frank's previous eight years on the federal bench.[10]

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.[11] I think that a close perusal of the legal axioms

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

8. Roberts, Book Review, 98 U. PA. L. REV. 447 (1950). I agree 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.

9. 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. Edgar H. Wilson, in a book review of *Courts on Trial,* takes Frank to task for his multiple use of the same materials in various articles, sometimes (he claims) as many as four. 1 MERCER L. REV. 333, 335 (1950).

10. "*Courts on Trial* is in the Frank tradition; and it deserves to be regarded as a high point of that tradition. Would it had been the author's first book! For then its main theme could receive that quiet attention which it deserves unobfuscated by boisterous controversies still echoing from *Law and the Modern Mind.* This new contribution to contemporary juristic thought deserves to be freed once and for all from past encumbrances." Stone, Book Review, *Courts on Trial,* 63 HARV. L. REV. 1466 (1950).

11. This would not hold true of one of the most important of Frank's ideas in *Law and the Modern Mind,* the psychological notion of law as a father-

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

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substitute. Time and time again, Frank has qualified his somewhat excessive devotion to this idea, and *Courts on Trial* is certainly evidence of an awareness of the exaggerated claims of his earlier writings. In the preface to the sixth printing of *Law and the Modern Mind,* pp. xiv-xv, Frank made it clear that he had not made the differentiation between trial-court doings and those of upper or appellate courts plain enough in the first edition of 1930. He also pointed out in this 1949 preface that the failure of such writers as Pound, Morris Cohen, Dickinson, Cardozo, and Llewellyn to realize the distinctive operations of trial courts was the *crucial* difference between those thinkers and himself. Edmond Cahn feels that *Courts on Trial* differed markedly from *Law and the Modern Mind,* particularly in the area of Frank's worship of Justice Holmes' "prediction theory" of law: "By 1949 when *Courts on Trial* was published, it began to be apparent that facts skepticism either cancelled the value of Holmes' theory or at least required a drastic reformulation." Cahn, *Jerome Frank's Fact-Skepticism and Our Future,* 66 YALE L.J. 824, 825 (1957). According to Cahn, Frank acknowledged this reformulation in his article, *A Conflict With Oblivion: Some Observations on the Founders of Legal Pragmatism,* 9 RUTGERS L. REV. 425, 447-49 (1954).

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.[12]

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.[13]

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.[14] This is what Frank attempts to do when he suggests that the legal axioms that he

12. COURTS ON TRIAL. 419-20 (1949). *Reverse* all of these axioms and you will get Jerome Frank's legal philosophy. Frank thinks that points 17 and 18 are the "blind spots" in Roscoe Pound, whom he severely criticized in a long appendix to IF MEN WERE ANGELS 332-49 (1942).

13. "Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference. . . . The judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system (although, of course, he has the right, at times, to urge that some of them be modified or abandoned). The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes." FRANK, COURTS ON TRIAL 413 (1949). See also Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking,* 17 CORNELL L.Q. 568 (1932); LAW AND THE MODERN MIND 168 (1930); IF MEN WERE ANGELS 119 (1942); FATE AND FREEDOM; A PHILOSOPHY FOR FREE AMERICANS 39, 141, 216-17 (1945); COURTS ON TRIAL 353-56, 365-73, 414-15 (1949); and his dissenting opinion in Hentschel v Baby Bathinette Corp., 215 F.2d 102, 112 n.20 (2d Cir. 1954). For Frank, the difficult question is *which* of the interests or values is to be preferred over the other possibilities in any particular case.

14. *Cf.* "Jerome Frank has written a penetrating analysis of our legal system as it actually operates, rather than as it is supposed to operate. . . .

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"Judge Frank has given us his critical analysis. His enviable fertility gives promise that his constructive contribution will be forthcoming as well." Bendix, Book Review, *Courts on Trial,* 38 CALIF. L. REV. 782, 784 (1950).

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 courthouse 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 judges 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.[15]

15. COURTS ON TRIAL 422-23 (1949). Number 1 (e) does not include the major privilege rules, especially those relating to self-incrimination and

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.[16] 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.[17]

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.[18]

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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.

16. *Cf.* "Shorn of the excesses of nominalism and psychiatric lore, Judge Frank's *Law and the Modern Mind* did a great deal to awaken students of the law from a state of ivory-towered stupor; it illuminated many unexplored realities behind legal processes. Shorn of the excesses of 'subjectivism,' his *Courts on Trial* does a first-rate job of spotlighting a neglected area surrounding one of our most important institutions of law—the trial court." Cohen, Book Review, *Courts on Trial,* 17 U. CHI. L. REV. 557, 559-60 (1950). See McCarter, *The Jury System: A Twentieth Century View,* 4 KAN. L. REV. 425 (1956); Yankwich, *The Art of Being a Judge,* 105 U. PA. L. REV. 374 (1957).

17. COURTS ON TRIAL 425 (1949). "Philosophic inquiry at its outset is an agitating experience, charged with vertigo and sudden discomforts. Whoever engages in it in the skeptical manner that intellectual honesty compels will appear to be snatching away his neighbors' familiar supports. Hence for some twenty years (since *Law and the Modern Mind)* Jerome Frank's writings have met with two classes of readers: one, those whose disturbance led only to resentment; the other, those whose disturbance prompted them to reassess old assumptions, to grapple with new challenges, and to feel grateful for the light he had let into the dark shop. For the latter group and for anyone hardy enough to join them, the publication of *Courts on Trial* is an important event, because this is his most illuminating work." Cahn, Book Review, *Courts on Trial,* 59 YALE L.J. 809 (1950).

18. COURTS ON TRIAL 425 (1949). Frank adds: "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.'" *Id.* at 245 n.15. *Cf.* "Perhaps the thing most disturbing about the reading of *Law and the Modern Mind* almost two decades after its original publication is the fact that it still contains a message of such pressing urgency . . . .

It is the element of chance, of contingency, and of uncertainty[19] (what Frank earlier called "possibilism") that made 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."[20]

### *Cricitism 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 American 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.[21]

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"One suspects that the thing of continuing value in *Law and the Modern Mind* will be less the author's answers to the particular questions propounded than the forthright manifestation of an attitude of mind and a point of view. To Judge Frank, self-delusion is the fundamental intellectual sin. Maturity of thought demands a constant effort to view the subject of inquiry unflinchingly in its full complexity. If thereby universal absolutes are found to be merely contingent and the security of false certainty is lost, the sacrifice must willingly be made." Allen, Book Review, *Law and the Modern Mind,* 44 ILL. L. REV. 554, 556 (1949).

19. "The author ought not to make the law more certain than it is. It is a bit too much like verity for Mr. Frank to insist that law wears the semblance of certainty because adults demand an infallible authority as a substitute for a discredited all-wise father. . . . It is by no means certain that the intellectual heritage of law—the conceptual attack, the deductive method of theology, the fashion of thinking of truth as an articulation of symmetrical propositions—does not share the responsibility. In any event, in a zestful adventure like this, where inquiry thrives upon uncertainty, the issue ought to be left open." Hamilton, Book Review, *Law and the Modern Mind,* 65 NEW REPUBLIC 277-78 (1931).

20. COURTS ON TRIAL 426 (1949). *Cf.* "The significance of *Law and the Modern Mind* is lost if it is tagged simply as a charter for realistic jurisprudence (in fact Judge Frank later repented use of the word 'realistic'); rather, it constitutes a subtle and learned application of pragmatic philosophy, in advocacy of an experimental, tentative, humanistic, approach to the 'law.' It is a ringing affirmation of the need for humility in the profession in face of the elusiveness and transientness of social fact." Hoffman, Book Review, *Law and the Modern Mind,* 7 FED. B.J. 223-24 (1946).

21. Much of the criticism that has been levelled at Frank would also apply to the so-called school of legal realism; the reverse also holds true, but certainly not in every case. Most of my discussion here assumes that most of the errors of the major American legal realists applied to Frank as well, since he has always been considered an extremist among legal realists. So far as the critics (whether they are called non- or anti-realists) are concerned, the chief ones would be Pound, Dickinson, Fuller, Adler, Morris Cohen, Kennedy, Kantorowicz, Mechem, and Stone. Felix Cohen, who is considered a functionalist by some writers, is critical of certain aspects of legal realism. There are variations of outlook on all sides of the picture; hence, my rather arbitrary categorization should be understood at the outset. See MY PHILOSOPHY OF LAW; CREDOS OF SIXTEEN AMERICAN SCHOLARS (1941), published under the direction of the Julius Rosenthal Foundation of Northwestern University, which includes short statements by such men as Bingham, Cook, Morris Cohen, Dewey, Dickinson, Fuller, Green, Kennedy, Kocourek, Llewellyn, Moore, Paterson, Pound, Powell, Radin, and Wigmore.

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 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.[22]

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.[23]

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22. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1255-56 (1931). See also, *id.* at 1260-64 for the details of Llewellyn's point-by-point answer to Roscoe Pound's earlier article, *The Call for a Realist Jurisprudence*, 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. These two articles by Pound and Llewellyn constitute a significant part of the realist-functionalist controversy. For the views of earlier adherents to legal realism, see Bingham, *What is Law?*, 11 MICH. L. REV. 1, 109 (1912), and Corbin, *The Law and the Judges*, 3 YALE REV. 234 (N.S. 1914). For a superb article on the history of American legal realism, see Llewellyn, *On Reading and Using the New Jurisprudence*, 26 A.B.A.J. 300, 418 (1940), 40 COLUM. L. REV. 581 (1940).

23. FRANK, IF MEN WERE ANGELS 278 (1942). Frank devoted a long appendix V, entitled "Comments on Some Criticism of the So-Called 'Realists,'" (*id.* at 276-315) to a discussion of the attacks made on him and on other "realists."

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*.[24]

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 the "rule-skeptics."

> 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.*[25]

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.[26] But Frank's attack on the myth

24. *Id.* at 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. This I will discuss at the end of this article.

25. *Id.* at 288. See Cardozo's paper, *Jurisprudence*, 55 N.Y.S.B.A. REP. 263 (1932), reprinted in his SELECTED WRITINGS (Hall ed. 1947).

26. On the question of 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

of rule certainty 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.[27]

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.[28]

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 naive 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

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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 202 (Moll transl. 1936). *Cf.* Loevinger, *Jurimetrics—The Next Step Forward,* 33 MINN. L. REV. 455 (1949).

27. Frank, *'Short of Sickness and Death': A Study of Moral Responsibility in Legal Criticism,* 26 N.Y.U.L. REV. 545 (1951). Frank feels that Felix Cohen's neglect of trial courts seriously limited his ethical insights, and he is especially contemptuous of 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 picayunish, critical mood. For the mellower side of Jerome Frank, see Frank, Book Review, 5 J. LEGAL ED. 223 (1952), and his last two articles, *Civil Law Influences on the Common Law—Some Reflections on 'Comparative' and 'Contrastive' Law,* 104 U. PA. L. REV. 887 (1956), and *Some Reflections on Judge Learned Hand,* 24 U. CHI. L. REV. 666 (1957) (published posthumously).

28. Fuller, *American Legal Realism,* 82 U. PA. L. REV. 429, 460 (1934).

> 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.[29]

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.[30]

Felix S. Cohen, whom Frank described as a "rule-skeptic," always concerned himself with the metaphysical aspects of law, especially in his book, *Ethical Systems and Legal Ideals* published in 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.[31]

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 gleaned from voluminous reading, but sometimes without adequate digestion of their con-

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29. *Id.* at 461.

30. *Id.* at 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.

31. F. Cohen, *The Problems of a Functional Jurisprudence,* 1 MODERN L. REV. 5, 7 (1937). 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; AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM 240 (1933).

tents.[32] Elmer Davis, in reviewing Frank's *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.

> The book was written, he says, "in the interstices of an active law practice"; but his interstitial secretions seem to have flowed pretty freely. . . . Mr. Frank has such good ideas to sell that it is a pity he did not do a better job of window-dressing.[33]

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.[34]

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."[35]

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32. *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 Blacktone '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, *A Sketch of an Influence,* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES; ESSAYS IN HONOR OF ROSCOE POUND 228 (Sayre ed. 1947).

33. *Keep the Home Fires Burning,* Sat. Rev. of Lit., 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. HIST. IDEAS 237 (1948).

34. Morgan, Book Review, 2 J. LEGAL ED. 385-86 (1950). 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." [FRANK, COURTS ON TRIAL 27 (1949)]. In discussing the psychological postulates of Frank, especially the notion of the Father-as-Law, Thurman Arnold wrote: "Is this train of thought scientific? Perhaps not, but there is that magic in it which may lead to the casting off of dead concepts. A chisel is a better tool for breaking fetters than a keen-edged razor." Book Review, *Law and the Modern Mind,* 7 SAT. REV. LIT. 644 (1931).

35. Barrett, *Confession and Avoidance—Reflections on Rereading Judge Frank's "Law and the Modern Mind,"* 24 NOTRE DAME LAW 447, 459 (1949). Barrett thinks that the book needs a complete *revision,* not a reprinting, and like Roberts, he feels that Frank hasn't had a new idea since 1930.

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 seem 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 law-suits, 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.[36]

Whereas Roscoe Pound calls the legal realists (or at least some of them) the "give-it-up" philosophers,[37] Professor Philip Mechem calls legal realism the "jurisprudence of despair." This infuriated one of Jerome Frank's 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.[38]

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 extrem-

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36. Loevinger, Book Review, *Courts on Trial*, 8 ETC.: A REV. OF GEN. SEMANTICS 34, 42 (1950). Mr. Loevinger is a practicing lawyer in Minneapolis. See his recent article, *Dogmatism and Skepticism in Law*, 38 MINN. L. REV. 191 (1954).

37. See POUND, CONTEMPORARY JURISTIC THEORY II, "The Give-It-Up Philosophies," 29-56 (1940).

38. Arnold, *The Jurisprudence of Edward S. Robinson*, 46 YALE L.J. 1282, 1288 (1937). 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 the critical eye of Morris Cohen who attacked both Arnold and Robinson in a scathing book review of ROBINSON, LAW AND THE LAWYERS; Cohen, Book Review, 22 CORNELL L.Q. 171 (1936). Thus far, so far as I can determine, Professor Mechem's jurisprudential world is still pretty much intact.

ism, but lies somewhere between Lasswell on the one hand and perhaps Mechem on the other.[39] Some critics felt that the Freudian fetish was a passing fancy of Frank in one state 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.*[40]

While it is true that Frank is a legal pragmatist, he has 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.[41]

Having discovered Aristotle's discussion of equity at such a late stage of his own writing,[42] Frank was prone to believe that he had

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39. Nevertheless, Frank still believed (though less fervently) 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 fitted 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 seems far afield from the historical facts? (The extreme adulation and worship of President Eisenhower as a type of father-substitute might bear out Frank's thesis, and in particular, show the importance of charisma even in a democracy). Perhaps Frank's recent interest in natural law and Thomistic philosophy was 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. See chap. XXVI, "Natural Law," in FRANK, COURTS ON TRIAL 346-74 (1949); Kessler, *In Memoriam—Jerome N. Frank (1889-1957)* in 2 NATURAL LAW FORUM 1 (1957).

40. Gabriel, Book Review, *Fate and Freedom,* 59 HARV. L. REV. 633-34 (1946). Of course, Professor Gabriel might have meant that Frank was *both* an ardent Freudian and a pragmatist in 1946.

41. Frank, *Modern and Ancient Legal Pragmatism—John Dewey & Co. vs. Aristotle,* 25 NOTRE DAME LAW. 207, 460 (1950). In fact, Frank says that Aristotle was more pragmatic than even John Dewey was, especially in his *Rhetoric.* Frank appreciates Aristotle's emphasis on individualization of the law and his concept of the reality of chance. One might add that Frank's "discovery" of the late Charles S. Peirce was also late in coming, 1942 to be exact. *Cf.,* Wormuth, *Aristotle on Law,* in ESSAYS IN POLITICAL THEORY; PRESENTED TO GEORGE H. SABINE 45-61 (Konvitz & Murphy ed. 1948).

42. "Somewhere along the line Judge Frank discovered Aristotle. The effect has been very beneficial." Garlan, Book Review, *Courts on Trial,* 47 J. PHILOS. 704, 708 (1950). On the subject of Aristotle, Frank had this to say: "Since he saw unconquerable unruliness, spontaneous chance and change, as part of reality, his notion of 'natural law' was not likely to be that of an 'absolute standard,' permanent and unchanging. Anti-Platonist, anti-totalitarian, he was an exponent of a point of view which, once more, we today are formulating: That all the legal rules men encounter in actual experience are man-made, but that the ideal of justice is ever at work, demanding that, to meet new circumstances, those rules be constantly adjusted so that, in particular cases, they will respond to the community's sense of fairness. The word 'justice,'

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.[43]

Jerome Frank has stoutly denied the anti-realists' assertions that the legal realists do not believe in legal certainty, ideals,[44] or in reason. Frank has a healthy 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". . . .*[45]

As a legal philosopher, Jerome Frank has never delighted in legal uncertainty; his main purpose throughout his basic writings has been

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too, someone may reply, is vague and has many meanings. But it carries no false connotation of being a gift to mankind, something that men can attain effortlessly." Frank, Book Review, 57 HARV. L. REV. 1120, 1129 (1944).

43. "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." Konvitz, Book Review, *If Men Were Angels*, 56 HARV. L. REV. 1020, 1022 (1943). If Frank *was* once the Jeffers of jurisprudence, might I add the suggestion that he is now the John Masefield of the modern school?

44. 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? Or his trenchant criticism of capital punishment, and his zealous regard for civil rights generally. See JEROME & BARBARA FRANK, NOT GUILTY (1957); Frank, *Today's Problems in the Administration of Criminal Justice*, 15 *Fed. R.D.* 93 (1954). See also Frank's opinion in United States *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955). On the admissibility of evidence, see his concurring opinion in United States v. Costello, 221 F.2d 668, 679-80 (2d Cir. 1955), and his vigorous dissent in United States v. Ford, 237 F.2d 57, 70-75 (2d Cir. 1956). On the problem of self-incrimination see his opinion in United States v. Gordon, 236 F.2d 916, 920 (2d Cir. 1956), especially his statement that "An overzealous prosecutor's heaven may be everyone else's hell"; and his eloquent concurring opinion in United States v. Roth, 237 F.2d 796, 801-27 (2d Cir. 1956), especially the appendix, where he traces the history of American obscenity legislation. This decision was affirmed by the Supreme Court in Roth v. United States 354 U.S. 476 (1957). 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." Holcombe, Book Review, *Fate and Freedom*, 40 AM. POL. SCI. REV. 356, 357 (1946). "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." Hofstadter, Book Review, *Fate and Freedom*, New York Times, July 8, 1945, p. 5.

45. FRANK, IF MEN WERE ANGELS 305 (1942). Frank regards his deep respect for Justice Holmes as positive proof of his regard for syllogistic reasoning. Adler and F. S. Cohen strongly dissent.

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 realties of court-house doings, essential reforms of those doings will not soon arrive.[46]

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.[47]

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.[48] They have evoked criticism from the most

46. Preface to the sixth printing of *Law and the Modern Mind* xvii (1949). "To me, it seems that man's legal philosophy—so far as it is his own and not merely borrowed verbiage—usually is somewhat in step with his general world-outlook; and that outlook, in turn, usually more or less reflects his personality. His legal philosophy, then, to the extent that it is original and articulate, derives from the clash of his personality with the governmental problems of his times and with the ideas of other legal philosophers with which he is acquainted. To neglect either the individual or the social context of any vital legal philosophizing is to depersonalize it—and thus to deform it. Comprehension of another calls for empathy. . . ." Frank, Book Review, 25 IND. L.J. 231, 235 (1950).

47. Frank, *Lawlessness,* in 9 ENCYC. SOC. SCI. 277, 278 (1935). Social control, of which law is only one part, would then consist of bringing the legal norms into closer proximity with the ethical and psychological norms of human existence. Although Frank has been mainly concerned with specific court decisions rather than with law as a constructive social force, he has always believed in the need for reducing civil strife through various means of social control and mediation. *E.g.,* his article, Frank, *Realistic Reflections on Law as a Constructive Social Force,* in PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK 326-32 (Detroit, Michigan, 1933).

48. The following reviewers evidence the same belief: "Few judges are articulate, for all the opinions they write. Judge Frank is not only articulate but concerned, and he dignifies himself in showing how the profession can dignify itself by improving its means of inquiry. This should never be called reform: it is a worthy exercise in discovery and maturity, and a contribution to honest legal thinking." Judge Curtis Bok of Philadelphia in a Book Review

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.[49]

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.[50]

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,* 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 the 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.*[51]

The reaction to this statement by Llewellyn was as vigorous in 1930 as the criticism that was forthcoming when Frank published *Law and the*

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of *Courts on Trial,* in 268 ANNALS 219 (Mar., 1950). Marshall H. Fitzpatrick wrote: "Laymen and members of the profession alike will learn much from this book. The layman will certainly have a better idea of what trial courts do and what they should do. Many lawyers will be aided in dispelling the unsuspected 'mote' of legal wizardry from their eyes. Activists seeking improvement in our legal system will do well to ponder the tentatively suggested reforms which evolve from the matters discussed in the book." Fitzpatrick, Book Review, *Courts on Trial,* 2 ALA. L. REV. 181, 184 (1949). Or Alfred L. Scanlan in a Book Review of *Courts on Trial:* "We can say that this book strips away the robe of awe and mystery which some of our chicken-hearted legalists like to surround the law, that supposedly dehumanized concept to which we all pay homage. . . ." Scanlan, Book Review, 25 NOTRE DAME LAW. 396, 399 (1950).

49. "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. Arnold, Book Review, *Fate and Freedom, Sat. Rev. of Lit.* June 23, 1954, p. 10. Arnold always did like a good fighter. *Cf.* the remarks of E. Blythe Stason: "Also, it is unfortunate that the author has attacked Dean Pound so vigorously. Doubtless there is a fundamental disagreement between the two, but there is still room in America for honest and healthy difference of opinion. Each man has made and is making an important contribution to American jurisprudence. I believe it would be more dignified to minimize personalities." Stason, Book Review, *If Men Were Angels,* 41 MICH. L. REV. 269, 275 (1942).

50. *Symposium on Law and the Modern Mind,* 31 COLUM. L. REV. 82, 88 (1931).

51. LLEWELLYN, THE BRAMBLE BUSH 12 (1951).

*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 exalt 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. . . .[52]

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 court will 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. . . .[53]

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 realistic 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

52. *Id.* at 10.

53. SCUGLE, THE HISTORY OF LAW 17-18 (1946). Originally published under the title, *The Quest for Law.*

> of law as a command or pronouncement of a sovereign judge. Both views throw little light on the essential character of the law. . . .[54]

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 realists' 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."[55]

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.

Herman 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 *justi-*

54. BODENHEIMER, JURISPRUDENCE 314 (1940). Casting a "plague on both your houses" still leaves Bodenheimer with the problem of finding a better definition of law.

55. *Id.* at 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." See Frank's preface to the sixth printing of FRANK, LAW AND THE MODERN MIND xxiii (1949); FRANK, IF MEN WERE ANGELS 3-9, 190-211 (1942); FRANK, COURTS ON TRIAL 405-06 (1949); Frank, *Modern and Ancient Legal Pragmatism—John Dewey & Co. vs. Aristotle*, 25 NOTRE DAME LAW. 207, 460, 490-92 (1950); PEKELIS, LAW AND SOCIAL ACTION 87-90 (1950).

*fication; law* and *ethics;* realities and their *meaning;* a *concept* and the *elements* that comprise that concept; and *cases* and *case law.*[56]

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.[57]

And this is where the real 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 idea, 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

56. Kantorowicz, *Some Rationalism About Realism,* 43 YALE L.J. 1240, 1248-50 (1934). This article is still considered to be one of the best short critiques of American legal realism. One of the most penetrating assessments of Frank's legal philosophy can be found in McWhinney, *Judge Jerome Frank and Legal Realism: An Appraisal,* 3 N.Y.L. FORUM 113 (1957). Also, see *Jerome N. Frank, 1889-1957,* which contains the memorials delivered at the special meeting of the New York County Lawyers' Association and The Association of the Bar of the City of New York, May 23, 1957.

57. 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; PAPERS FROM THE CONFERENCES ON THE SCIENTIFIC SPIRIT AND DEMOCRATIC FAITH 19 (Nathanson ed. 1946). While the economists bear the brunt of Frank's attack, his thesis would probably apply to all of the social sciences, including law.

> 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.[58]

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.[59] Fact and value are an *inseparable* part of all legal activity. The disregard or the minimization 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. . . .[60]

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 not sufficiently studied it. Other writers on legal realism take a somewhat different view.[61]

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58. STONE, THE PROVINCE AND FUNCTION OF LAW 382-83 (1946).

59. *Cf.*, "The human animal has always desired something beyond himself. He has expressed that desire in symbols—'magic'—to complement his rational equations. Justice, even through human courts and more human juries, is still one aspect of a search for an eternal value, which outruns attainable reason." Berle, Book Review, *Courts on Trial,* 86 SURVEY 90 (1950).

60. STONE, *op. cit. supra* note 57, at 383. See EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 202 (1936).

61. *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." Aumann, *Some Changing Patterns in the Legal Order,* 24 KY. L.J. 38, 41 (1935). (Inserted quotation from Sabine, *The Pragmatic Approach to Politics,* 24 AM. POL. SCI. REV. 865, 875 (1930)).

The methodological problem would be simple indeed if Llewellyn's naive notion of what the problem entails were 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. . . .[62]

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.[63]

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.[64]

Value-free judgments about the legal order would necessitate complete neutrality. But this is not easy to accomplish in law or in any

62. Llewellyn, *Legal Tradition and Social Science Method—A Realist's Critique*, in ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES 101 (Brookings Institution, Committee on Training 1931). This is an almost unbelievable oversimplication, 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*. . . ." Bridgman, *The Prospect For Intelligence*, 34 YALE REV. 444, 450 (1945). (Emphasis added).

63. M. COHEN & NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD 157 (1934).

64. Cohen, Book Review, 22 CORNELL L.Q. 171, 176 (1936). *Cf.* Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568 (1932), where Frank decries the confusion over the "Is" and the "Ought."

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 fully 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.[65]

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.[66]

One of the weaknesses of the school of legal realism was not only their zeal for facts, but also their over-emphasis of *facts in themselves,* without a correspondingly acute appreciation of 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 a completed, but 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 be-

65. On the question of functional jurisprudence and the problem of legal certainty, see the following: Lopez de Onate, LA CERTEZZA DEL DIRITTO (Rome, 1950); Norberto Bobbio, *La certezza del diritto è un mito?* RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO (Italy, fasc. 1, 1951); MARIO LINS, SEARCH FOR THE FUNCTIONAL INVARIANTS OF LAW (1955). Also, AUMANN, THE INSTRUMENTALITIES OF JUSTICE: THEIR FORMS, FUNCTIONS, AND LIMITATIONS (1956).

66. "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." M. COHEN, REASON AND NATURE; AN ESSAY ON THE MEANING OF SCIENTIFIC METHOD 77-78 (1931). See FRANK, IF MEN WERE ANGELS 294 (1942); FRANK, FATE AND FREEDOM c. 14, "Hard Facts," 174-87 (1945); FRANK, COURTS ON TRIAL 211-12, 316-17, 320, 324 (1949); Frank, *Modern and Ancient Legal Pragmatism—John Dewey & Co. vs. Aristotle,* 25 NOTRE DAME LAW. 207, 233-34 (1950); Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism,* 26 N.Y.U.L. REV. 545, 579-81, 586-87, 592-95 (1951).

> tween universals and particulars, principles and actual decisions. But from universals alone we cannot determine particulars, and the latter obviously cannot completely determine the former.[67]

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. 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.[68]

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

> 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 finding of other schools cannot be ignored.[69]

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 posed for men of ideas: the problem of justice? To this accusation, Frank and the legal realists would plead "not guilty," for in their zeal for improvement of the legal system, they have always concerned themselves with the problem of justice. Frank explained this in his statement that:

> Actually, these so-called realists have but one common bond, a negative characteristic already noted: skepticism as to some of the conventional legal theories, a skepticism stimulated by a zeal to reform, in the interest of justice, some court-house ways. . . .[70]

Even under Paton's definition, Frank's work would apparently be lacking, since he is not concerned with social interests, but in how the legal order *operates* in the protection of these interests.

But here the semantics of jurisprudence becomes confusing and de-

67. M. Cohen, *On Absolutisms in Legal Thought,* 84 U. PA. L. REV. 681, 691-92 (1936).

68. REUSCHLEIN, JURISPRUDENCE—ITS AMERICAN PROPHETS v (1951).

69. PATON, A TEXT-BOOK OF JURISPRUDENCE 31-32 (1st ed. 1946).

70. FRANK, LAW AND THE MODERN MIND viii (1949). Although this does not represent a definition of justice, it is at least a recognition that justice exists or *ought* to exist. For an excellent example of how the unattainability of complete legal certainty affects the moral dilemmas that face judges, see Judge Frank's dissenting opinion in Repouille v. United States, 165 F.2d 152, 154-155 (2d Cir. 1947).

ceptive. "Values," "social interests," "justice," "ends of law," are not missing from Frank's legal philosophy if we carefully examine the foundations of his philosophy. His skepticism and eclecticism were not evidences of a disbelief in values, but in a distaste for any *absolute system* of values or social ends. His pragmatic bent could enable him to choose the "best" that he could find in any area of life. Certainly, his life-long concern for the operation of the legal system, particularly in the area of criminal justice, clearly evidenced his fervent belief in the value of the democratic system and its ever-widening possibilities for enhancing human personality and development. "There—in the dignity of individual human beings—was the very core of Jerome Frank's religion . . ."[71]

The question of whether legal values (or any values) are relative or absolute was not really the basic question for Frank. The heart of the matter was the *process* by which we reassessed, clarified, and expanded these values, and kept open the avenues for discovering new values. What Frank vehemently decried was not the belief in values, but the belief in superstition and dogma and the almost fanatical attempts by some people to superimpose their values on others.

By any standard or definition of jurisprudence, Jerome Frank's role as a supreme *provocateur* on the American legal scene has been of immeasurable value to the growth of our ideas on the function of law in society. While his was not a systematic or definitive philosophy of law, it had the virtue of being broad in its scope and its inherent iconoclasm. Professor Edmond N. Cahn summed it up in this way:

> I believe that Jerome Frank's fact-skepticism represents an epoch-making contribution not only to legal theory and procedural reform, but also to the understanding of the entire human condition. The history of our time will record whether we profited by the challenges he bequeathed to us.[72]

This was indeed a fitting tribute to a truly creative legal mind, a mind that was constantly aware of the ambiguities of man's existential situation while at the same time passionately reaffirming its

71. Cahn, *Jerome Frank's Fact-Skepticism And Our Future,* 66 YALE L.J. 824, 832 (1957). Dean Eugene V. Rostow of the Yale Law School said: "He was an optimist and an enthusiast. Knowing sin, he believed in virtue. He found the good in all men, and cheered it with conviction. No one of us will ever forget the sincerity of his faith that we all possessed at least a peppercorn of man's transitory potential for the divine." Rostow, *Jerome N. Frank,* 66 YALE L.J. 819 (1957).

72. Cahn, *supra* note 71 at 824. For a recent and more definitive treatment of Frank's work, see Cahn, *Fact-Skepticism and Fundamental Law,* 33 N.Y.U.L. REV. 1 (1958); also, the superb memorial issue, 24 U. CHI. L. REV. 625-803 (1957); and McWhinney, Book Review, *Not Guilty,* 33 IND. L.J. 111 (1957).

faith in the power of human reason. Jerome Frank deserves a well-earned place in the history of the liberal tradition.[73]

73. For a more exhaustive examination of Frank's philosophy of law, see PAUL, THE LEGAL THINKING OF JEROME FRANK: A STUDY IN CONTEMPORARY AMERICAN LEGAL REALISM (unpublished doctoral dissertation in the Ohio State University Library 1954).