Nebraska Law Review

Volume 36 | Issue 4 Article 3

1957

Jerome Frank's Attack on the "Myth" of Legal Certainty

Julius Paul
Southern Illinois University

Jerome Frank's Attack on the "Myth" of Legal Certainty

Julius Paul*

> We may now venture a rough definition of law from the point of view of the average man: For any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on these facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law but only a guess as to what a court will decide.—JEROME FRANK[1]

One of the significant contributions of contemporary American legal realism has been the discussion of the origins, purpose, and efficacy of legal rules. Some writers have been extremely critical of the worship of legal rules and of the feeling by the lay public that rules can provide exactness and certainty in the law. Jerome Frank has been the most noteworthy exponent of this view, particularly in his pioneer book, *Law and the Modern Mind,* published in 1930.

Frank would be the last person to deny the existence and the utility of legal rules.[2] Yet, his attack on those writers who see only the legal rules and nothing else as law (especially the late Professor Joseph Beale) has led some writers to believe that Frank wanted a legal system that operated on a purely pragmatic basis. Frank fervently denies this accusation and says that men like Gray, Wigmore, and Judge Cuthbert Pound expressed similar doubts about the prediction-value of legal rules and precedents.

* A.B. 1947, University of Minnesota; Ph.D. 1954, The Ohio State University; presently Assistant Professor of Government, Southern Illinois University, Carbondale, Illinois.

[1] Frank, Law and the Modern Mind, at 46 (1930). In the next paragraph, Frank adds: "Law, then, as to any given situation is either (a) actual law, i.e., a specific past decision, as to that situation, or (b) probable law, i.e., a guess as to a specific future decision." Also, see his note (†) at the bottom of the same page.

[2] In answering Morris Cohen, who had criticized the legal skeptics (realists) for what he called extreme "nominalism" because they denied the existence of legal rules, Frank wrote: "The sceptics insist that legal rules exist and must be studied. But they say that knowledge of the rules is but a small part of what lawyers and judges use in their work and that a definition of law as rules does an injury to clear thinking about law." Frank, Are Judges Human?, 80 U. Pa. L. Rev. 17, 44-45 (1931).

> *On these points, as to uncertainty in the legal rules, the so-called "realists" have but followed in the footsteps of their predecessors.* The difference between the "realists" and those other writers has been, in this respect, chiefly one of emphasis and shading. *And it is simply not true that most of the "realists" (and the writer in particular), to any greater extent than many of the "non-realists" above cited, have expressed or implied a belief that imprecision in the legal rules is desirable.*[3]

The basis for Frank's attack on the "myth" of rule certainty is his notion of law as a father-substitute, an application of a theory that he borrowed from child psychologists such as Jean Piaget. From the outset, Frank regarded this psychological explanation as only a "partial explanation" of why men (lawyers, judges, as well as the lay public) believe in legal rule certainty. But without Frank's "partial explanation" of childish thinking, no analysis of this kind could be made.

> The genealogy of legal myth-making may be traced as follows: Childish dread of uncertainty and unwillingness to face legal realities produce a basic legal myth that law is completely settled and defined. Thence springs the subsidiary myth that judges never make law. That myth, in turn, is the progenitor of a large brood of troublesome semi-myths. . . .[4]

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

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

[3] Frank, If Men Were Angels, at 304 (1942). The "non-realists" that Frank refers to are Cardozo, Dickinson, Fuller, M. R. Cohen, and Pound.

[4] Frank, Law and the Modern Mind, at 41.

[5] Frank's attack on legal logic created a furor among students of legal philosophy, among them Mortimer J. Adler, who, like Morris Cohen and Lon Fuller, regards Frank as an extreme nominalist. Adler wrote: "If Frank and others of his persuasion had stopped to analyze the logical problem of certainty and probability in the law instead of completely eschewing formal logic as a diseased thing because it is associated in their minds with the middle ages and scholasticism, there would be greater clarification and less confusion of the issues between realistic jurisprudence and its opponents...." Legal Certainty, in the symposium on Law and the Modern Mind, 31 Col. L. Rev. 82, 102 (1931). Frank criticized Adler and

tied to our use of legal logic[5] and legal language. Word deception is the indispensable tool of the rule-fetichists.

> . . .Verbalism and word-magic; fatuous insistence on illusory certainty, continuity and uniformity; wishful intellection which ignores, or tries to obliterate from cognizance, unpleasant circumstances—these are the marks of childish thought and often affect legal thinking.[6]

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

> . . . Whoever studies that process unhampered by subjective commitments which deflect accurate observation must note that, while rules enter into the making of law, they are not the whole of it. That process of judging (which is law) is not to be confined within the compass of mere rules. The rules play only a subordinate role.[7]

Rules can help us to predict future decisions. They can also

Morris Cohen for their criticism of Holmes' logic and especially for what he called "their lack of experience in the actual legal world.... When these philosophers become practicing lawyers they will understand what Holmes meant." Frank, Are Judges Human?, 80 U. Pa. L. Rev. 17, 48, n.73 (1931). Adler also felt that Frank had failed to distinguish what Adler called "Law as official action" from "Law in discourse." In his later works, especially *Courts on Trial* and the new preface to the 1949 printing of *Law and the Modern Mind,* Frank recanted his attack on what he called "scholasticism" and devoted a chapter of his last book to a discussion of natural law and the value of Thomistic thought. See chap. XXVI in Courts on Trial, especially pp. 353-56, 360, 365-73 (1949). However, Adler would still find the body of Frank's writing antithetical to his own legal philosophy, even though the *Notre Dame Lawyer* has temporarily taken Frank to its bosom.

[6] Frank, Law and the Modern Mind, at 82.

[7] Id. at 274. Frank defines "law" in this fashion: "From the point of view of the practical work of the lawyer, law may fairly be said to be past decisions (as to past events which have been judged) and predictions as to future decisions. From the point of view of the judge, the law may fairly be said to be the judging process or the power to pass judgment." Ibid. From the point of view of legal semantics, Frank has grave doubts about the use of the word, "law": "Of course, any one can define 'law' as he pleases. The word 'law' is ambiguous and it might be well if we could abolish it. But until a substitute is invented, it seems not improper to apply it to that which is central in the work of the practicing lawyer. *This book is primarily concerned with 'law' as it affects the work of the practising lawyer and the needs of the clients who retain him.*" Id. at 47, note. Rather than define the troublesome word "law" each time it was used, Frank would prefer to omit the word and clearly state what he was talking about, i.e., what courts do, are expected to do, can do, and ought to do. This is the method he followed in *Courts on Trial.*

serve as guides to future action, but beyond that, their efficacy is seriously doubted by Frank, who writes:

> . . . A rule tells something about law, but is not law.
>
> For, to repeat, law is what happened or what will happen in concrete cases. Past decisions are experimental guides to prognostications of future decisions. And legal rules are mental devices for assembling, in convenient form, information about past cases to aid in making such prognostications. Or they may be defined as generalized statements of how courts will decide questions, of the considerations which will weigh with courts in the decisions of cases to which the rules are applicable.[8]

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

> . . . *There are excellent grounds for the contention that "direct specific rules of law" provoke more litigation than they prevent. . . .*[9]

Another name for "legal absolutism" is what Frank calls "Bealism" after the late Harvard professor of law, Joseph H. Beale.[10] While Christopher Columbus Langdell later received the cutting edge of Frank's attack because he laid the "wrong" foundations for modern American legal education, Beale became the focal-point for Frank's attack on legal fundamentalism and rule-fetichism.

> "The Law," then, is extra-experiential. It is "the breath of God, the harmony of the world," as Hooker put it; it is "invested with a halo," a "brooding omnipresence in the sky," to use Holmes' derisive phrase. Such, in effect, are the views expressed by Beale. We may, for convenience, refer to this attitude as legal Absolutism or "Bealism."[11]

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

> We can see now why there is so much talk about the certainty of law. That talk is not descriptive of facts; it is made up of

[8] Id. at 276.

[9] Are Judges Human?, 80 U. Pa. L. Rev. 233, 238 (1931).

[10] ". . . The extreme position taken in Jerome Frank's early writings denying altogether the existence of rules in advance of decision, seems to have been in reaction to extremism of the more traditional kind which pretended that a rule always did exist in advance. Mr. Frank's Law and the Modern Mind had Professor Beale's conceptualism for its *bete noire.*" Stone, The Province and Function of Law, n. 207 at 745 (1945).

[11] Frank, Law and the Modern Mind, at 54-55. Frank added a note saying that "Beale, it is fair to say, is not a consistent Bealist. But in his more didactic and philosophic writings he expresses so pronounced an absolutist point of view that the term Bealism is justifiable as a label." Id., at 55.

> magical phrases. Law being so largely lacking in the certainty which is desired, resort is had to those twangings of the vocal cords which will yield compensatory satisfaction.[12]

Indeed, the word-magic that so deludes the legal fundamentalists has a "narcotic" effect upon its listeners.

> . . . It is not, then, the clouding of the critical faculties through the power of words that betrays us lawyers; it is rather that, confronted by the law, men tend to be baffled by feelings stimulated by the father-substitute which law represents, and therefore use narcotizing and paralyzing words to pursue what are relatively childish aims.[13]

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

> . . . The law of any case is what the judge decides.[14]

Along with Roscoe Pound and Joseph Beale, Frank has centered a large share of his criticism on Professor John Dickinson for his addiction to "rule-fetichism."[15]

To follow Beale and those who believe in the theory that rules are the law would lead us into the wasteland in which much

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

[13] Id. at 91. See Frank, A Lawyer Looks at Language, in S. I. Hayakawa's Language in Action, at 322-36 (1941 ed.); Word-Consciousness, chap. X in Law and the Modern Mind, at 84-92; The "Realists" and Language, app. V, pt. 13, in If Men Were Angels, at 312-14; Courts on Trial, at 349-50; What Courts Do In Fact, 26 Ill. L. Rev. 761, 778-80 (1932). Also, chap. VII, The Extension and Intension of Terms, in Clarence Morris, How Lawyers Think, at 95-106 (1937). For a lengthy discussion of the problems of legal language, see Charles B. Daly, General Semantics and the Rule of Stare Decisis as Regards the Supreme Court of the United States Since 1937. (unpublished Doctoral dissertation, New York University, 1953); and a paper, "Language and the Law," which I delivered at the Second Conference of the International Society For General Semantics at Washington University of St. Louis, June 11, 1954.

[14] Frank, Law and the Modern Mind, at 126.

[15] ". . . Dickinson represents the older tradition in its most sophisticated and seductive form. . . ." Id. at 264. See app. II, Notes on Rule-Fetichism and Realism in this book, at 264-84, where Frank discusses Dickinson and Dean Leon Green. Frank is not alone in this criticism of Dickinson. Cf.: "On a realistic view, law consists of decisions in the past and predictions of decisions in the future. The decisions have authority for the parties to

of current legal thinking still remains. Hence, Jerome Frank, being a bona fide legal realist, must reaffirm Justice Holmes.

> ...Rules, whether stated by judges or others, whether in statutes, opinions or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go in making the law of the cases tried before them....
>
> ...The law, therefore, consists of *decisions*, not of rules. If so, then *whenever a judge decides a case he is making law*....[16]

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

> Again the hope of attaining a large measure of legal certainty by codification proved vain. It produced not certainty, but sterile logic-chopping.
>
> ...Belief in a man-made code, which shall be exhaustive and final, is essentially the same dream in another form, but a form which hides from superficial study the nature of the dream. But a dream it is, nevertheless. For only a dream-code can anticipate all possible legal disputes and regulate them in advance.[17]

The urge for legal finality and exactitude cannot be found in codification of the law, any more than it could be found in legal rules, for after all, what is a legal code, if not merely an elaboration of these legal rules?[18]

In all of these attacks by Jerome Frank, the essential element under scrutiny has been the urge to find legal certainty and hence

the cases in which they were rendered, and the predictions have a lesser authority for possible parties to future cases, whose actions may be governed by them. But rules themselves cannot be authoritative, for as Mr. Justice Holmes remarked, 'general propositions do not decide concrete cases'; judges decide and judges can always choose among competing rules. Moreover, rule-making is not a prerogative of judges; administrators and textbook writers can make them too, and sometimes better ones than judges. The ideal of generality in law, which Dickinson stresses, is in fact a will-of-the-wisp. He connects it with the quest for certainty and predictability, but in common observation the outcome of a lawsuit is among the most uncertain of human events. Jerome Frank has taken Dickinson specifically to task for his definition of law in terms of rules.... In the writer's opinion Frank's criticisms are unanswerable...." Harvey C. Mansfield, An Appraisal of John Dickinson's Administrative Justice and the Supremacy of Law, Committee on Appraisal of Research, Social Science Research Council, N.Y., at 73 (1940).

[16] Frank, Law and the Modern Mind, at 127, 128. By "decisions," Frank also means *predictions* as to future decisions. Note, 128.

[17] Id. at 188, 189.

[18] "The childish belief in legal finality is not to be realized by codification. It is and will ever be based upon illusion." Id. at 193.

security and stability. Not only does Frank think that this is humanly impossible, but it is highly doubtful if a changing legal order could allow for such a paradox: change and fixity. Yet, every society must have some fixity and some flexibility by its very definition.[19]

In addition, Frank argues that legal certitude is loathsome because it takes away from life that which he calls "if-y" and "chancy." Without the element of contingency, would men want to struggle to improve their lot? The will to believe, and the will to believe *with certainty* have been written in the records of human history, and Frank would not deny this fact. But should men continue to think and behave in this manner? Since most of this uncertainty is "of immense social value,"[20] Frank would answer with an emphatic "no."

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

> ... On this basis it is arguable that in law, as everywhere else, this religious impulse is operative; it drives men to postulate a legal

[19] "... Our common phrase 'law and order' inverts the true order of priority, both historically and logically. Law never creates order; the most it can do is to help to sustain order when that has once been firmly established, for it sometimes acquires a prestige of its own which enables it to foster an atmosphere favourable to the continuance of orderly social relations when these are called upon to stand a strain. But always there has to be order before law can ever begin to take root and grow. When the circumstances are propitious, the law is the sequel, but it is never the instrument, of the establishment of order." J. L. Brierly, The Outlook For International Law, at 74 (1944). If we accept Brierly's assertion that law comes *after* social order has been established, then we can also assume that this stability must be maintained at least minimally by some kind of system of rules, which is where law (or taboo or mores or some other set of standards) enters the picture. If social solidarity and stability are the prerequisites of law, then certainly the purpose of law would not be the creation of chaos, but the preservation of social order. Hence, some degree of fixity is assumed in this definition of the role of law. Cf.: "To secure a good society, whether it is good because it is characterized by an abstractly derived justice or by an ideal taken from experience, cannot be the purpose of law for the simple reason that it is the purpose of the entire mechanism of political and social organization...." Radin, Law as Logic and Experience, at 145 (1940).

[20] Frank, Law and the Modern Mind, at 7.

> system touched with the divine spirit and therefore free of the indefinite, the arbitrary and the capricious.[21]

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

> ...Finally, as in our times, the longing for a father-who-lays-down-the-law (for the Father-as-Judge) can "short-circuit" the Heavenly Father. No longer, mediately as a derivative of religion, but now immediately, the Law is looked to as a substitute for the infallible Father-Judge of childhood. The law is "paternalized," not "divinified."[22]

Thus, it is not the religious, universalistic element in law, but the basic legal myth, its perpetuation, consciously or otherwise, and the state of what Frank calls "the value of lay ignorance" that enables the myth of legal rule certainty to flourish and grow.

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

> ...The judge is trying to decide what is just; his judgment is a "value judgment" and most value judgments rest upon obscure antecedents. We cannot, if we would, get rid of emotions in the field of justice. The best we can hope for is that the emotions of the judge will become more sensitive, more nicely balanced, more subject to his own scrutiny, more capable of detailed articulation.[23]

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

> But the systematic, deliberate and openly disclosed use of the unique facts of a case will not be of much service until the judges develop the notion of law as a portion of the science of human nature. And that development cannot come to fruition until the

[21] Id. at 197.

[22] Id. at 203.

[23] Id. at 143. Cf., Finkelstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338 (1924). Finkelstein, Further Notes on Judicial Self-Limitation, 39 Harv. L. Rev. 221 (1925).

judges come to grips with the human nature operative in themselves.*

*What this implies is that the judge should be not a mere thinking-machine but well trained, not only in rules of law, but also in the best available methods of psychology. And among the most important objects which would be subject to his scrutiny as a psychologist would be his own personality so that he might become keenly aware of his own prejudices, biases, antipathies, and the like, not only in connection with attitudes political, economic, and moral but with respect to more minute and less easily discoverable preferences and disinclinations.[24]

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

...That is the paradox of wisdom: In so far as we become mindful that life is more dangerous than we had naively supposed in childhood, we help ourselves to approach nearer to actual security....

... By abandoning an infantile hope of absolute legal certainty we may augment markedly the amount of actual legal certainty.[25]

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

Increasing constructive doubt is the sign of advancing civilization. We must put question marks alongside many of our inherited legal dogmas, since they are dangerously out of line with social facts.[26]

To Jerome Frank, this struggle is not exclusively in the domain of jurisprudence: it is the battle of modern science, the search for empirical truth amidst dogma, the age-old struggle to free men's minds from the shackles of past emotion and sentimentality; but above all, it is a liberation from authority. This freedom to doubt, to search for the facts, to question preconceived

[24] Frank, Law and the Modern Mind, at 147 and note at bottom of page.
[25] Id. at 159.
[26] Id. at 245.

dogma, is the touchstone of Jerome Frank's legal realism and his search for a new approach to legal history and legal action.

> ...Humanity increases its chances of survival and of progress to the extent that it becomes able to question—neither blindly to accept nor violently to defy—the father's guesses, and to discontinue calling them self-evident truths....[27]

The most that we can find will not always be satisfying, namely, *probabilities;* but we must be content with the inherent limitations of human reason.[28] If we constantly probe further, we can increase the realm of our knowledge about the legal order until we reach the point where some temporary generalizations can be made.

> ...We must be content with modest probabilities, as Dewey puts it, and not foolishly pretend that our legal abstractions are mathematically accurate, for that pretense obstructs the will to modify and adjust these abstractions in the light of careful observation of their working results.[29]

This crusade against legal ignorance, through the use of self-awareness, was Jerome Frank's major purpose in *Law and the Modern Mind,* and in one fashion or another, he has carried on this crusade for over twenty-five years.

[27] Id. at 248. To the degree that Frank's description of the scientific method and its function is accurate, I would agree with his assessment. But the line between the *method* as such and its possible *uses* is not always clear in Frank's mind, just as the line between the New Deal "experimentalist" lawyers and New Deal social reformers was not clearly distinguished in one of his speeches reprinted under the title, "Experimental Jurisprudence and the New Deal," 78 Cong. Rec. 12412 (1934).

[28] "Most men, most of the time, crave certainty. It is none too easy, therefore, for students of politics and economics, or the rest of us, to acknowledge that, as those subjects are but applied anthropology and never can be exact sciences, the amount of certainty they can yield must always be limited. But if we adhere to the scientific spirit, which means unflinching honesty, we must thus acknowledge the inherent limitations of our attainable knowledge. Such knowledge has this paradoxical recompense; although the acceptance of ineradicable uncertainties discloses life as more precarious than we may like it to be, nevertheless courageous facing of that fact enables us to approach nearer to actual security. For by conceding that we do not and cannot fully comprehend and control our environment, we grow more alert in detecting detectable dangers, less likely to become the victims of those hazards which are foreseeable, the better able to reduce avoidable uncertainties and to augment the amount of achievable certainty." Frank, The Scientific Spirit and Economic Dogmatism, in Jerome Nathanson (ed.), Science For Democracy, Papers from the Conferences on the Scientific Spirit and Democratic Faith, at 21 (1946). This is one of the best statements of Jerome Frank's philosophy of life.

[29] Frank, Law and the Modern Mind, at 247. I am reminded of another favorite statement of O. W. Holmes: "General propositions do not decide concrete cases." Frank assents.

> It is time that we gave up the notion that indirection and evasion are necessary to legal technique and that in law we shall better achieve our ends if lawyers and judges remain half-ignorant, not only of these ends, but of the means of achieving them.
>
> No, the pretense that judges are without the power to exercise an immense amount of discretion and to individualize controversies, does not relieve us of those evils which result from the abuse of that judicial power. On the contrary, it increases the evils. The honest, well-trained judge with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses is the best guaranty of justice. Efforts to eliminate the personality of the judge are doomed to failure. The correct course is to recognize the necessary existence of this personal element and to act accordingly.[30]

Although Jerome Frank clearly distinguished his efforts to *describe* the legal rule myth from his desire for the *eradication* (or at least amelioration) of the bad traces of this myth, many of his critics are still not certain that this distinction is a clear one, especially Morris Cohen, Kennedy, and Dickinson.

Frank feels that once men are freed of childish notions about legal certainty, they will be free to find the kind of legal axioms that will best serve them.[31] This, he continues, does not lead to anarchy

[30] Id. at 138. Frank regards Judge Learned Hand as the best living example of this type of jurist. What Frank means by the statement "... and to act accordingly" is still unclear to me. The psychoanalyst may free a patient from his illusions, but that in itself is not a prescription for future action. In an age of anxiety, self-awareness does not make anxiety vanish, or at least the preconditions of that anxiety. And so it is with the judge. Granted, he understands himself, where does he go from there? For a discussion of these problems, see Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281 (1952); and Felix Frankfurter, Some Observations on the Nature of the Judicial Process of Supreme Court Litigation, 98 Proc. Am. Philos. Soc'y 233 (Aug. 16, 1954), repr. in adaptation form as "The Job of a Supreme Court Justice," The New York Times Magazine, November 28, 1954, at 14. Part of Justice Frankfurter's final paragraph is very fitting: "...But judges cannot leave such contradiction between two conflicting 'truths' as 'part of the mystery of things.' They have to adjudicate. If the conflict cannot be resolved, the task of the Court is to arrive at an accommodation of the contending claims. This is the core of the difficulties and misunderstandings about the judicial process. This, for any conscientious judge, is the agony of his duty." 98 Proc. Am. Philos. Soc'y, at 239.

[31] "The most important fact about matters legal is that they exist or can exist. Consequently, *legal axioms or postulates must relate to the (present or potentially) existent. The legal thinker should never let himself believe that he is dealing with pure mathematics. Logical deductions from legal postulates must square with observable phenomena—else the postulates are wrong.*" Frank, Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 Cornell L. Q. 568, 578 (1932).

in the law, but, on the contrary, to an intelligent, balanced attitude toward constructive legal change.

According to Frank's analysis, there will be so-called "temporary absolutes" open to change and further discussion. But this need not be a legal system without rules. The only things missing in Frank's analysis are the inherent fixity and immutability of legal rules. The anarchic reign of legal rule certainty will have ended, and the process of constant reappraisal of our basic assumptions begun.

> If such sentiments disclose a delight in legal uncertainty, then the writer is a one-eyed Eskimo.[32]

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

> Three persistent problems recurring in different forms in all stages of legal development may well be termed fundamental in jurisprudence: the problem of rule and discretion; the problem of the valuing of interests; and the limits of effective legal action.
>
> Analytical jurists have assumed an antithesis between law and administration, holding that justice according to law is necessarily judicial justice according to formula ("a government of laws and not of men"). The doctrine of separation of powers, in which the judicial power is carefully segregated from the executive and the legislative, was taken over from political theorists and became a cardinal tenet in the juristic faith of the nineteenth century. The trend today is to recognize that reliance must be placed both upon men and upon rules in any effective fulfilment of the ends of law. The problem is not rigidly to exclude the one or the other but to effect a proper adjustment between judicial justice and administrative justice, and between a judicial justice held down to an application of authoritative legal precepts by an authoritative technique and a necessary measure of individualization to be achieved only by free judicial action. Experience seems to show that in large part rule must be assigned to one portion of the domain of the legal order and discretion to another. . . .[33]

Pound does not assume that the desire for executive justice is the direct result of the work of the legal realists. Yet, the real-

[32] Frank, If Men Were Angels, at 307. This statement requires no further comment.

[33] "Jurisprudence," 8 Encyc. of the Soc. Sci. 477, 488-89 (1932). Pound also says that nineteenth century jurisprudence considered three questions: the nature of law; the relations of law and morals; and the interpretation of legal history. An answer to the first question presupposed an answer to the second question.

ists' well-meaning assault on many of the myths of contemporary American jurisprudence (especially that of legal rule certainty) might have opened the way, intellectually at least, to a worship of uncertainty and instability for its own sake. While most of the legal realists, including Frank, have suggested positive reforms of the legal system, and in all sincerity have criticized their predecessors of the analytical school for failing to see legal realities, they are nonetheless responsible for many of the exaggerated attacks on the non- and anti-realists who felt that without legal rules there could be no viable legal order.

However, the *consequences* of a man's thinking, whether intended or not, are certainly, in this writer's opinion, as important as the ideas themselves.[34] "Ideas are weapons," wrote the political historian Max Lerner, and he was not the first writer to recognize this truism of intellectual history.

Smashing the mechanistic legal idols of the cave is one thing, but doing it in a manner that convinces the students of jurisprudence is quite another matter. If Frank is merely waging battle, he has succeeded many times over since 1930. But it seems to this writer that some of the contributions of the psychological legal realists (Jerome Frank, Harold D. Lasswell, Edward S. Robinson, and Ranyard West) have been tendentious at their best, and that their ablest work has not always shown the accuracy and care that the non- and anti-realists are accused of lacking. If psychology and psychiatry are to be useful tools in jurisprudence, the empirical method that Frank has described so well must prevail, not the "fight theory" of the court room, or of the law journal.[35]

Jerome Frank has been a *provocateur* in American jurisprudence. This, in itself, is a contribution of note, but debunking by itself cannot upset the work of Pound, Cardozo, and Morris Cohen, or the wisdom of many other legal minds down through the ages.

The debunking of a Mencken or a Steffens had its social and even intellectual value, but in an age of science, Frank must find

[34] "Intellectual humility on the part of those who seek the truth is not only a grace but a necessity; and it is well that legal scholars in this country should show a willingness to learn from all possible sources. But it is also necessary to be on guard against the easy assumption that any proposition becomes true when someone labels it natural science. Science should surely not be another name for Credulity." Morris R. Cohen, Book Review of Robinson's Law and the Lawyers, 22 Cornell L. Q. 171, 177-78 (1936).

[35] On the problems and the dangers of empirical study in the social sciences, see Barrington Moore, Jr., The New Scholasticism and the Study of Politics, 6 World Politics 122 (1953).

more precise tools of analysis if he expects to make jurisprudence a more exact "art," as he puts it.[36] Even if we accept his assertion that jurisprudence is an art and not a science, the instruments that are used in the study of legal phenomena must be exact and time-tested.[37]

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

The shock that Jerome Frank gave to the world of American jurisprudence was a needed one, but the manner in which he did it left much to be desired. His was not the first analysis of legal behavior, nor was it the most unique one. By 1930, the pragmatic tradition in American jurisprudence was pretty much a settled matter, insofar as legal realism was concerned. But Jerome Frank wanted to go one step further. Whereas the realist could look behind the legal rules to official behavior, Frank wanted to look behind the official behavior of judges and juries to find what he considered to be the *real* bases of their actions. The *reductio ad*

[36] "... The torch that Holmes had lit was being carried by the younger school of 'realists' in jurisprudence—the names of Jerome Frank, Leon Green, and Karl Llewellyn come first to mind—and its flame was used at times rather in the spirit of Mohammedan conquest than of Olympian inquiry . . . ." Harvey C. Mansfield, op. cit. supra note 15, at 12.

[37] "... Certainty is an ideal that law must never cease to aim at, but it is also one that it can never realize at all completely; for the main cause of uncertainty in any kind of law is the uncertainty of the facts to which it has to be applied. Law has necessarily to be stated in the form of general principles, but facts are never general; they are always particular, they are often obscure or disputed, and they were very likely not foreseen, and therefore not expressly provided for, at the time when the rule of law received its formulation. It is this intractability of facts that prevents the practice of law from ever becoming a science; it is and always will be an art." Brierly, op. cit. supra note 19, at 16. Of course, the fact that exact instruments for studying and measuring the hidden elements of legal behavior are lacking does not mean that these factors in the judicial process are non-existent. It does, however, mean that the observer has a greater responsibility in becoming aware of these deficiencies in his methodology and his tools of analysis.

absurdum of his case was his reliance on the tenets of child psychology. His somewhat arbitrary selection of the work of Piaget and Rignano did not convince most legal philosophers that his conclusions were valid ones.

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

The final assessment of American legal realism is far from completed, but when that appraisal is made by future students of American legal philosophy, the admonitions of M. Cohen, Cardozo, Fuller, Pound, Rheinstein and others will not escape examination.

The man of ideas ultimately bears responsibility for what he has said and written, even though his presence has long since passed. Although this is not always fair to the intentions of the writer, it is still the case.

Jerome Frank will bear the brunt of much future haggling over what he meant at the time he wrote his major works.[38] His ideas will have to bear the test of historical judgment. But today, in an era that has witnessed almost cataclysmic social and scientific changes, this writer is wont to believe that an attack on legal certainty and an urge for flexibility in the legal order does not always lead to the desired results.

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

The use of psychological techniques as the *sine qua non* of Frank's legal theory was ingenious and perhaps even unique in approach, but it was not necessarily convincing in the amount of or the kind of evidence that was marshalled against the basic legal myth.[39] Perhaps new evidence and experimentation in the field of psychology and law will lead to a refinement of these techniques.[40] But until reliable and empirical evidence is found by the psychological legal realists, Frank's notion of Law as a Father-substitute will be suspect and at the most merely an interesting hypothesis.[41] Even as a "partial explanation," most

[39] "Unfortunately, the fruitful results attained by the realists have been somewhat obscured. The realists, in recognizing the underlying bias of the characteristic traditional emphasis in law, often overreached in seeking arguments and illustrations which would bring into the sharpest focus possible the weakness of the more usual approach. Not always content with a factual and operational approach to their own problems, nor satisfied with providing evidence of the irrelevance of most of the prevailing philosophies to the pressing needs of law, and proceeding cautiously to state the realists' own method and perspective, some realists brought confusion into their arguments by attitudes and analyses which are misleading if not erroneous...." Garlan, Legal Realism and Justice, at 11 (1941). Though not specifically mentioned, I think that Frank fits this description.

[40] A good example of Frank's use of psychological materials is his Appendix VIII in Law and the Modern Mind, at 323-24, entitled, "For Readers Who Dislike References To 'Unconscious Mental Processes.'" Here, in order to "mollify" his critics, Frank refers to Hart and Northridge, and quotes from the work of Rignano. Perhaps these men are good authorities on man's unconscious thought processes, but how is the reader to judge their work? For a man, who in my opinion, bases an entire book and a good share of the rest of his writings on a fundamental concept from the field of psychology, I would feel that a two-page appendix that merely repeats what has already been said in the body of his book is not sufficient evidence to convince the unbelieving reader. To my mind, this is not mollification.

[41] When I discussed this question with a practicing psychiatrist, he said that the "validity" of Frank's ideas on the psychology of law depended not upon what psychologists or psychiatrists said, but on how the members of the legal fraternity accepted such evidence. In essence, he was saying that the psychiatrist and the legal philosopher might use similar techniques, but with entirely different criteria of judgment, and with different purposes in mind. Jerome Frank took his first step out of line: he went to the psychologists for their conclusions, without any positive evidence that these conclusions could apply to legal analysis. Piaget, Hart, West, and Rignano may be reputable men in their own field, but until American writers on law accept their ideas as applicable to the study of legal behavior, they are merely Frank's assertions and nothing more. Of course, the "truth" of such assertions will still be in doubt, whether they are accepted by psychologists, psychiatrists, legal writers, or anyone. Let it suffice at this moment to say that the legal philosopher is under no obligation to accept the findings of psychology, psychoanalysis, or psychiatry, any more than

American legal writers would not accept it today. And, it seems to this writer, until American jurisprudence accepts psychological evidence at face-value for its own purposes, the use of such data will be of value only to those who already believe in its efficacy.[42]

the members of these professions are under obligation to accept Frank's use (or Lasswell and others) of their findings. The validity of such work is independent of what any of the professions think of each other. But Jerome Frank still bears the burden of convincing his own brethren. And, in my opinion, the major problem still remains unanswered: how can students of jurisprudence judge a man (e.g., Frank) who uses materials from a field that is alien to their thought, and that requires professional judgment by persons other than themselves? I confess that I still do not know the answer.

[42] Since the publication of *Law and the Modern Mind* in 1930, Frank has insisted on a qualified use of psychological materials in the study of legal behavior. See the preface to the sixth printing of Law and the Modern Mind, at xxi-xxii (1949); Courts on Trial, at 157-65 (1949); If Men Were Angels, at 295-97 (1942). In spite of his insistence that the notion of law as a father-substitute is a "partial explanation," *Law and the Modern Mind* has remained his pioneer work and in many respects his most seminal work. While it is true that Frank is not addicted to many of the ideas that he presented in his first book, it still remains the book that placed him at the forefront of the psychological wing of American legal realism and for that reason deserves special attention.