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## PSYCHOLOGICAL MATERIALS IN THE LEGAL PHILOSOPHY OF JEROME FRANK\*

JULIUS PAUL†

### Introduction

American jurisprudence in the twentieth century has felt the impact of many new approaches to the study of legal institutions and behavior. The positivistic "revolution" in American jurisprudence has been a motley brew, consisting of such varied ingredients as the legal positivism of Justice Holmes, the sociological jurisprudence of Dean Pound, and the legal realism of the late Judge Jerome Frank — together with all of the varied effects of pragmatism, functionalism, instrumentalism, experimentalism, and the use of materials from the fields of economics, sociology, anthropology, psychology, and the social sciences generally.

#### *Frank's Attack on the Law-as-Father*

The publication of Jerome Frank's first book, *Law and the Modern Mind*, in 1930, marked a new departure in the history of American legal realism. While it was not the first attempt to use psychological materials in the study of legal behavior, it was a pioneer effort to smite the myth that legal certainty could be obtained through the use of legal rules.

For Jerome Frank, the vital question was why lawyers, judges, and the general public believe in (and rely on) the myth of certainty and exactness in the legal rules? The answer to this dilemma is relatively simple, if we can accept Frank's major thesis, *viz.*, our childish ways of thinking as evidenced in the craving (or what the psychoanalysts

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Lawyers and judges must constantly act as psychologists or psychiatrists. The lawyer in his office often serves as an amateur psychiatrist to his clients. Our legal vocabulary shows that courts cope daily with such psychological matters, as, for instance, "motive," "intention," "malice," "mental cruelty," "delusions" and "undue influence." — JUDGE JEROME FRANK<sup>1</sup>

1. "*Judicial Fact-Finding and Psychology*," 59 *Case and Com.* 22 (Jan.-Feb. 1954), p. 22. Printed initially in 14 *Ohio St. L. J.* 183 (1953), based upon remarks delivered before a meeting of a special committee on law and psychology of the Association of American Law Schools, Columbia University, November 28, 1952.

would call "wish-fulfillment") for a fixed, stable and immutable set of mechanical legal rules. From the works of child psychologists, especially Jean Piaget, Frank fashioned an elaborate description of this process of childish illusion and its counterpart in man's desire for legal certainty.<sup>2</sup>

Although this explanation sounds simple, and may be unique insofar as modern American jurisprudence is concerned, the *logic* of his argument left much to be desired. For why should we look to *childhood*? Why not examine our prenatal existence as well? In my opinion, most of Frank's assertions about the childhood basis of adult illusion are not easily defended. Only if you accept the basic tenets of Freudian psychology can such assertions be even superficially acceptable.

Why does Frank emphasize childhood?<sup>3</sup> Why not carefully examine our social institutions? Or our social mores? Or even our national literature? For Jerome Frank, the answer was again quite simple: because modern psychologists like Jean Piaget<sup>4</sup> have shown

2. "We are on the trail of a stubborn illusion. Where better, then, to look for clues than in the direction of childhood? For in children's problems, and in children's modes of meeting their problems, are to be found the sources of most of the confirmed illusions of later years." Frank, *Law and the Modern Mind*. N. Y.: Brentano's, Inc., 1930, p. 13. Most writers on law would not accept the last statement as proved truth without more evidence and less reliance on psychological dogma. Cf. the following statement by a non-legal writer: "Jerome Frank, in *Law and the Modern Mind* (Tudor, 1936), has argued that those who seek to repudiate all authorities are often unable to do so. There is a sense of security which an unquestioning dependence upon authority brings with it, and a heightening of certain satisfactions. So in the absence of trustworthy human authorities, fictitious authorities are invented, taking the form of abstract principles, half-anthropomorphically conceived. By this means Frank endeavors to explain the 'basic legal myth' of a system of law that exists beyond the law of the statutes, which legislators are expected to 'discover,' rather than 'create.' He might have extended his theory to account for all conceptions of objective values. Although Frank's theory is of a speculative nature that must inevitably be controversial, it is of great interest, and well supported by knowledge of legal practice and legal theory." Charles L. Stevenson, *Ethics and Language*. New Haven: Yale Univ. Press, 1944, n. 8, p. 92.

3. Cf.: "The psychological function of law for the child is well analyzed in Jerome Frank, *Law and the Modern Mind*. . . pp. 13-21. Frank deviates from the above analysis in that he concludes that the law is a substitute for the father, whereas it is maintained here that law becomes not a symbolic person but the prohibitions of a symbolic person. As the child progresses through school grades, he becomes acquainted with the Constitution and its framers. Here, the part of the founding fathers is clear — they made the law. In their position as defenders of the Constitution, the Supreme Court justices have received analogous roles, roles made more complete by their age qualifications and their specific sphere of the highest law of the land. . . ." Sebastian de Grazia, *The Political Community; A Study of Anomie*. Chicago: Univ. of Chicago Press, 1948, n. 15, pp. 203-4.

4. The major books by Jean Piaget that Frank uses the most frequently are: *The Language and Thoughts of the Child*. N. Y.: Harcourt, Brace, 1926; *Judgment and Reasoning in the Child*. N. Y.: Harcourt, Brace, 1928; *The*

us that this is where illusion begins, and if this is the case, then this is the place to start hunting down Frank's so-called basic legal myth, the illusion of exactitude and certitude in the law.

This psychological explanation was, in this writer's opinion, the *ignoratio elenchi* of Jerome Frank's philosophy of law. The fallacy of Frank's argument about the origins of the so-called basic legal myth lies in the fact that he proves his point by resorting to the childish illusion argument, which in turn served as proof of childish behavior-patterns, which, insofar as modern jurisprudence is concerned, is not the point at issue. In short, the argument is circular.

The child's use of his father is pre-eminent in Frank's theory of legal illusion,<sup>5</sup> for sooner or later the child will have to shake off the bonds of father-authority, and then the search for a father-substitute begins; the father-substitute the child later adopts is the Law.

The Law can easily be made to play an important part in the attempted rediscovery of the father. For, functionally, the law apparently resembles the Father-as-Judge.<sup>6</sup>

Jerome Frank believes that the consequences of such an illusion have their effects on many additional areas of the law, *e. g.*, the area of judicial law-making. Here again, the basis of the myth that

*Child's Conception of Causality*. N. Y.: Harcourt, Brace, 1930. Other books in the field of psychology that Frank refers to include Bernard Hart's *Psychopathology; Its Development and Its Place in Medicine*. N. Y.: Macmillan, 1927; and *The Psychology of Insanity*. N. Y.: Macmillan, 1931; Eugenio Rignano's *The Psychology of Reasoning*. N. Y.: Harcourt, Brace, 1923; and William L. Northridge, *Modern Theories of the Unconscious*. London: K. Paul, Trench, and Trubner, 1924. ". . . The 'child,' as described by Piaget, is not a constant. Nor are all children identical; there are developmental periods in the growth of children; for convenience, I have not here differentiated the periods." Frank, *Courts on Trial; Myth and Reality in American Justice*. Princeton: Princeton Univ. Press, 1949, n. 15, p. 72. Even before Piaget and Freud, the courts were aware of the effects of "unconscious" factors on witnesses. See Frank's opinion in *United States ex rel. Accardi v. Shaughnessy*, 219 F.2d 77, 81 (2nd Cir. 1955).

5. ". . . And so, in the childish appraisal of the parents, the mother tends to become the embodiment of all that is protectively tender while the father personifies all that is certain, secure, infallible, and embodies exact law-making, law-pronouncing and law-enforcing. The child, in his struggle for existence, makes vital use of his belief in an omniscient and omnipotent father, a father who lays down infallible rules of conduct." Frank, *Law and the Modern Mind*, p. 15.

6. *Ibid.*, p. 19. Frank does not regard this explanation of the legal myth of rule certainty as anything other than a *partial* explanation. "This book, then, from now on, reads as if unconscious 'father-substitution' were the explanation of the oddities it discusses. But, we repeat, we are consciously using a partial explanation. It is employed to further the chief aim of this book: the development of that 'realistic' movement in law which seeks to overcome an astonishingly prevalent blindness to legal realities." *Ibid.*, p. 21, note. Of course, what Frank regards as legal "realities" are for other writers in the field of American legal philosophy, sheer nonsense. For Morris Cohen, or even Karl Llewellyn, this psychological explanation, humble as it may sound, borders on quackery.

judges do not make law is the childish illusion that certainty can be achieved. Frank believes that this myth that judges cannot make law nor have the power to change existing law is the direct outgrowth of a deep personal need for believing that a stable (in effect, unalterable) legal world can provide exact legal predictability.<sup>7</sup>

To a legal realist who regards actual specific past decisions and guesses as to actual specific future decisions as *the* law, the illusion that judges cannot and do not make law is outlandish, and is, of course, vigorously denied. Thus, the judges, as well as the lawyers, deceive the lay public about the nature of the judicial process. Again the question of "why?" is raised, and Frank promptly comes forth with his usual answer: childish thought-ways and the legal certainty myth.<sup>8</sup>

Does the psychological argument really prove that law is a father-substitute, or further, that law is *worshipped* by Americans? If so, why do we find so many evidences in America of attempts at avoiding or evading the rigors of the law? Can this be explained psychologically as a symptom of the "split personality" of Americans in their attitudes toward the law (analagous to those found by Myrdal in *The American Dilemma* and in the Kinsey Reports), or perhaps as a repudiation of their own real fathers? Or, are these evidences of a lack of respect or even contempt for the law (and sometimes the lawmakers) merely exceptions to the thesis advanced by Frank in *Law and the Modern Mind*? In the opinion of this writer, the psychological explanation begs far more than it can explain.

#### *Frank's "War of Liberation"*

With the lawyer, the judge, and the lay public all deceived, this leaves only the wise student of legal reality (*e. g.*, Frank) able to break through the "sound barrier" of legal illusion and muddled thinking. "Frank's war is a war of liberation."<sup>9</sup> With the psychologist on his right, and the court room on his left, the left-wing legal realist is thus able to see clearly what the law "actually" does. But without Frank's "partial explanation" of childish thinking and its

7. *Ibid.*, p. 35.

8. ". . . The no judge-made law doctrine, it seems, is not, fundamentally, a response to practical needs. It appears rather to be due to a hunger and a craving for a non-existent and unattainable legal finality — which, in turn, may be ascribed to a concealed but potent striving to recapture in the law the child's conception of the fatherly attributes." *Ibid.*, p. 36.

9. ". . . The law must be liberated from the enslaving forces engendered by faith in the 'Basic Myth' because harmful consequences stem from the illusion or dogma of legal certainty. . . ." Harold G. Reuschlein, *Jurisprudence — Its American Prophets*. Indianapolis: Bobbs-Merrill Co., Inc., 1951, p. 213.

implication, no analysis of this kind could be made. For Frank, any belief in mechanical certainty was intolerable. “. . . To say of a man's thinking that it is scholastic or platonistic, is to say that it is tinged with childish emotions.”<sup>10</sup>

Since the scientific mind, according to Frank, is the adult and emotionally mature mind, what the modern legal order needs is more adult minds and less childish thinking. This brings us to the core of Frank's solution of the basic legal myth in *Law and the Modern Mind*, namely, what he calls “the modern mind,” a mind free of father-authority and childish ways of thinking.<sup>11</sup> It is, as Dr. Harry Overstreet has said, the *mature mind*.

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

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

### *The Use of Psychology in the Study of Legal Behavior*

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

10. Frank, *Law and the Modern Mind*, p. 75. Cf.: “Apparently Frank regards any jurist as ‘classical’ who does not accept the gospel according to St. Jerome.” George W. Paton, *A Text-Book of Jurisprudence*, rev. ed., 1951, n. 50, p. 19. Paton underestimates Frank's use of sophisticated swear-words.

11. Cf., “The Role of the Fatherhood Symbolism” in Joseph Rosenfarb, *Freedom and The Administrative State*. N. Y.: Harper and Brothers, 1948, pp. 209-11.

. . . My experience in government leads me to believe that a very considerable part of the friction between government departments, if one peered behind the rationalizations, could be traced to personality difficulties of one or more of the disputants. Under severe pressure, the best of men at times become the creatures of inner drives and obsessions of which they have no awareness. An occasional chat by an overworked official with a government psychiatrist would make government run more smoothly. I do not suggest that psychiatry is or can be an exact science. At best, it is but an art, still in its infancy or adolescence. . . .<sup>12</sup>

This is *therapy*, not psychological theory, but nevertheless Frank has his doubts about psychiatry, which he feels is still not a true science.

If, according to Morris Cohen, psychology is but a "mushroom science," where does that leave psychiatry (or psychotherapy), which at least has an empirical medical foundation? At times, those who use psychiatry in connection with law, even though they are professional psychiatrists, are equally unclear about its aims.<sup>13</sup>

Karl Llewellyn, one of the more careful and moderate legal realists, says that we cannot deny the existence of the behavioral aspects in the relations between law and society.<sup>14</sup> "Behavior," in the Llewellyn

12. "The Scientific Spirit and Economic Dogmatism," in Jerome Nathanson (ed.), *Science For Democracy; Papers From the Conferences on the Scientific Spirit and Democratic Faith*. N. Y.: King's Crown Press, 1946, p. 21. See *Courts on Trial*, p. 250 and n. 7; and "Short of Sickness and Death: A Study of Moral Responsibility in Legal Criticism," 26 *N. Y. U. L. Rev.* 545 (1951), pp. 611-12.

13. *E. g.*, Dr. Ranyard West, a British psychiatrist who is highly respected by Frank, but unmentioned in the writings of other legal realists, wrote: "Equally, no 'debunking' of law or lawyers, no precarious 'psychoanalysis' with a flourishing of Freudian terminology need disturb the well-grounded law or the wise lawyer. The core of the very process that shows us all as irrational human beings, we doctors who dodge the scientific issue in pursuit of the possible as well as we lawyers who yearn for rules and guidance firmer than either history or science can give us, has shown us a function for law to fulfill so firm and clear as to give the legal profession the thrill of all modern thrills." "The Importance of Modern Psychiatry to the Lawyer," 14 *Ohio St. L. J.* 136 (1953), p. 141. One might be tempted to cry, Hallelujah! But where does this leave the innocent layman? Also, see his essay, "A Psychological Theory of Law," chap. XXXVI in Paul Sayre (ed.), *Interpretations of Modern Legal Philosophies* (1947), pp. 767-87; David Riesman, "Tensions, Optimism, and the Social Scientist," 13 *Psychiatry* 518 (1950) and his article, "Some Observations on Law and Psychology," 19 *U. Chi. L. Rev.* 30 (1951); A. J. Levin, "Maine, McLennan, and Freud," 11 *Psychiatry* 177 (1948).

14. "A Realistic Jurisprudence — The Next Step," 30 *Col. L. Rev.* 431 (1930), p. 443. Llewellyn goes on to say that we should study judges' and officials' behavior as judges and as officials, not as children, or as immature adults. *Official behavior* as such is the core of his psychological technique. While Llewellyn was quite scornful of Frank's use of the notion of father-

sense, is what officials *do*, not their unconscious or subconscious motives or explanations of their inner drives. In my opinion, this is a far more realistic (and I might add, scientific and pragmatic) approach to the study of legal behavior than Frank has proposed because Llewellyn, as legal philosopher, has the necessary tools for an evaluation of the kind of legal "behavior" he examines. In short, Llewellyn does not venture into areas in which he is inexpert.

In the hands of *experts*, psychology and psychiatry can be of real value to the lawyer, the judge, and the student of law.<sup>15</sup> This, in all fairness, I would not deny, but the problem is really one of *who* uses these special tools and *in what fashion?*<sup>16</sup> When Jerome Hall, the Gluecks or the late George H. Dession use psychological techniques in criminology, or courts call on competent psychiatric experts in the treatment of certain types of criminal behavior, this is a far different and more expert use of psychological tools than was Jerome Frank's exposure of the myth of legal certainty.<sup>17</sup> In any case, professional and amateur are trying to understand what they call "behavior" at the level of judicial action. There are many examples of significant contributions of this kind.<sup>18</sup>

authority in *Law and the Modern Mind*, he recognized that much of the book was independent of that idea. See Frank, *Courts on Trial*, pp. 75-78, 159-61; "Short of Sickness and Death': A Study of Moral Responsibility in Legal Criticism," 26 *N. Y. U. L. Rev.* 545 (1951), pp. 609-10.

15. There are many good examples of co-operation between medical and psychiatric personnel and lawyers that have resulted in legal reforms, new state laws, or proposed model state laws for the future, *e. g.*, State of Michigan, *Report of the Governor's Commission on the Deviated Sex Offender*, Detroit, Michigan, 1951; also, the report by Dean Roscoe L. Barrow of the University of Cincinnati College of Law and a joint committee of psychiatrists and neurologists on the need for modernization and improvement of state laws concerning the treatment of epileptics, Barrow and Fabing, *Epilepsy and the Law* (N. Y.: Hoeber, 1956). Another area of fruitful exploration between the lawyer and the psychiatrist, as well as the social worker, has been divorce law reform. It seems to me that these inter-disciplinary efforts have been far more valuable than the proposed psychoanalysis of individual judicial behavior.

16. *Cf.*: "Shall we not do more by a less rigidly behaviorist psychological method, tempered by the consideration that we need to take account of the restraints upon non-rational individual judicial behavior and that judges are not likely to do better than we expect them to do. There was a psychological efficacy in the nineteenth-century ideal." Pound, "Fifty Years of Jurisprudence," (IV — Realist Schools), 51 *Harv. L. Rev.* 777 (1938), p. 790. Pound says that the legal realists do good work, but realism is not the whole story of what law is and how it functions.

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

18. See Manfred S. Guttmacher and Henry Weihofen, *Psychiatry and the Law*. N. Y.: W. W. Norton, 1952, p. 11. This is an extremely useful textbook on the various uses of psychiatry in trials, hearings, and legal procedure in general. For critical comments on this book, see Alfred L. Gausewitz, "A Lawyer Looks at Psychiatry and the Law," 3 *Buffalo L. Rev.* 25 (1953) and

Professor Jerome Hall, in a penetrating article that discusses the relations between law and psychiatry, says that

. . . psychiatry has much to offer in the improvement of the law and its administration. The problem is to establish a sound theoretical basis on which psychiatry and legal science can work harmoniously together. That this is a difficult problem is witnessed by the current polemics. But that it is not insuperable should be apparent if we view it as essentially a problem of inter-disciplinary knowledge. Considerable progress has been made in some inter-disciplinary areas, biochemistry for example, and very promising results have been attained in others, such as anthropology, institutional economics, and certain socio-legal studies. There is no extraordinary obstacle to similar progress in interrelating psychiatry and law.<sup>19</sup>

Even the most confirmed critics of Jerome Frank's use of psychology can still see the value of some psychological techniques, as long as the focus is on the *overt* and not the hidden behavior of judges and juries.

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Frederic Wertham, "A Psychiatrist Looks at Psychiatry and the Law," 3 *Buffalo L. Rev.* 41 (1953). Aside from the numerous periodical writings of the Gluecks, J. Hall, Sutherland, Davidson, and Dession, I would also recommend these recent volumes: Winfred Overholser, *The Psychiatrist and the Law* (N. Y.: Harcourt, Brace, 1953); Gregory Zilboorg, *The Psychology of the Criminal Act and Punishment* (N. Y.: Harcourt, Brace, 1954); John Biggs, Jr., *The Guilty Mind: Psychiatry and the Law of Homicide* (N. Y.: Harcourt, Brace, 1955); Paul H. Hoch and Joseph Zubin (eds.), *Psychiatry and the Law* (N. Y.: Grune and Stratton, Inc., 1955); and the following recent articles: George H. Dession, "The Technique of Public Order: Evolving Concepts of Criminal Law," 5 *Buffalo L. Rev.* 22 (1955) and "Psychiatry and Public Policy," 5 *id.* 48 (1955), both of which were part of a memorial volume devoted to the work of the late Professor Dession; Jerome Hall, "Psychiatry and Criminal Responsibility," 65 *Yale L. J.* 761 (1956); and William O. Douglas, "The Durham Rule: A Meeting Ground For Lawyers and Psychiatrists," 41 *Iowa L. Rev.* 485 (1956).

19. "Psychiatry and Criminal Responsibility," 65 *Yale L. J.* 761 (1956), p. 763. After a long discussion of the M'Naghten and Durham Rules and a suggested substitute for the former, Professor Hall concludes: "Still, disagreement concerning legal and psychiatric definitions of insanity remains, and until the issue is resolved, it is difficult to see how forensic psychiatry can make important progress. That it cannot proceed upon the supposition that the medical question and the legal question exist in separate compartments is clear. Many clinical psychiatrists have not studied psychotic behavior in life situations that are legally important, and have not formulated apt definitions to express the pertinent knowledge; but this does not imply that knowledge is outside the realm of their competence or that it is peculiarly legal. To the extent that they study abnormal conduct in social contexts they will contribute to the kind of knowledge that is directly significant in both psychiatry and law. They have emphasized the volitional and emotional phases of mental disease; they should give more study to concomitant impairment of the cognitive functions. The progress of forensic psychiatry depends upon a sound synthesis of existing knowledge and an appreciation of legal values and methods." *Id.*, p. 785.

Roscoe Pound, like Karl Llewellyn, has a much more modest view of the role that psychological analysis should play in studying the behavior of judges. For Pound, it is the *courts* and the legal tradition that supports them that deserves psychological attention, not the individual unconscious behavior of judges.<sup>20</sup> Frank would answer Pound by saying that this is much too modest a view of psychology. Pound's view leaves out what Frank considers to be the crucial element in the picture, namely, the *hidden elements* in the judge's actions.

Among the legal realists, the argument ranges far and wide over this precise issue: what, if any, are the hidden or covert elements of judicial behavior, and if there are such phenomena, how should students of law proceed to examine them? Lasswell would use the free-phantasy method and Frank the teachings of modern child psychology; Oliphant, Schroeder and Malan, the findings of behavioristic psychology.

Even if there is some common agreement on the fact that legal behavior should be studied with care, where does this take the argument that psychology is the best or the most accurate tool for studying this type of behavior? Again, I will turn to Ranyard West, who bases his answer to this question on the *humanness* of legal behavior. Dr. West argues that it is the potential criminal in every man that justifies the use of psychology.<sup>21</sup> Why not be more direct and say that it is the very fact that *man is man* and that his behavior is human behavior (whether we choose to call it "rational" or "irrational," or a mixture of both, or neither) that makes legal activity conducive to psychological explanation? One of Jerome Frank's strongest supporters had this to say about Frank's use of psychology in *Law and the Modern Mind*:

. . . The psychology of this book must be regarded as a weapon of attack upon a cumbersome set of judicial inhibitions, not an instrument of precision. . . .<sup>22</sup>

20. Pound, "Fifty Years of Jurisprudence," (IV — Realist Schools), 51 *Harv. L. Rev.* 777 (1938), p. 789. The fact that overt legal behavior is more prone to study does not necessarily mean that the "hidden" elements in the judicial process should be ignored. The fact that we are unable at this stage of legal knowledge to study the unconscious factors of legal behavior with any degree of accuracy or precision does not mean that these factors are non-existent, but it does place a heavy responsibility on the observer, a responsibility, in this author's view, that some of the legal realists have not clearly understood. See Felix Frankfurter, "Mr. Justice Holmes and the Constitution," 41 *Harv. L. Rev.* 121, 132-33 ns. 33-34 (1927), and Mr. Justice Frankfurter's concurring opinion in *Public Utilities Commission v. Pollak*, 343 U. S. 451, 466-67 (1951).

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

22. Thurman W. Arnold, Book Review of *Law and the Modern Mind*, "Law

Yet, if Thurman Arnold is correct in saying that Frank is using a "weapon of attack," how can we judge its accuracy, validity, or even its effectiveness, if it is not a *precise* instrument of analysis? Is it the "attack" that counts the most, the debunking of the basic legal myth, that counts more than the evidence presented?<sup>23</sup> If, as Frank said in so much of his writing, jurisprudence must be scientifically sound and pragmatic to the best of its ability, how can Arnold's explanation be justified? Although *Law and the Modern Mind* was a classic in the history of American legal realism, even as confirmed a legal realist as Karl Llewellyn could not swallow whole-hog the tenets of psychoanalysis, the fetish, the father-image, and the hallowed free-phantasy technique.

Other writers, *e. g.*, Pound, Morris Cohen, Fuller and Gurvitch, were equally appalled at the failure of the psychological results to prove their assertions and to keep a sense of balance once they emerged from their sacred couch. Pound was gracious enough to accept the good works of the psychological realists in spite of their careless use of psychological dogma, but Cohen was not nearly so kindly in his criticism of Frank. In a rather harsh attack on the use of psychoanalytical tools (*e. g.*, the Law as a father-substitute), Cohen argued that the age-old myth of a completely certain legal system "cannot be overthrown by an admitted fiction from the mushroom science of psychoanalysis. . . ."<sup>24</sup>

and Men," 7 *Sat. Rev. of Lit.* 644 (March 7, 1931), p. 644. Arnold also says that the book is intelligible to the layman, a view that I cannot accept.

23. *Cf.*: "Mr. Frank, however, has no clear idea as to what he is thus committing himself to; and elsewhere, especially in the footnotes, he explicitly recognizes the existence and need of some rules and certainty in the law. This admission, however, still leaves his fundamental thesis rather vague and inconsequential, and his polemics pointless, if not unfair. For obviously, if the law contains both rules and discretion, both certainty and uncertainty, the significant issue is precisely the one that Dean Pound faces and that Mr. Frank dodges, viz., where to draw the line between legal rule and judicial discretion.

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. . . There can be no doubt that the desire for complete certainty — the craving for absolute truth — is a trait of all creatures born of woman. . . ." Morris R. Cohen, "Jerome Frank," in *Law and the Social Order*, N. Y.: Harcourt, Brace and Co., 1933, pp. 359, 360.

24. *Ibid.*, p. 361. One should, however, take note of Frank's fourteen other possible explanations of the basic legal myth in app. I of *Law and the Modern Mind*, p. 263, as well as his later criticism of Freud in *Save America First*, pp. 198-201 and *Fate and Freedom*, pp. 64-69, 351-52. See Albert Ellis, "An Introduction to the Principles of Scientific Psychoanalysis," 41 *Genetic Psychology Monographs* 149 (1950), and Harold D. Lasswell, "Impact of Psychoanalytic Thinking on the Social Sciences," in Leonard D. White (ed.), *The State of the Social Sciences* (Chicago: Univ. of Chicago Press, 1956, pp. 84-115.) Also, Percival Bailey, "The Great Psychiatric Revolution," 113 *Am. J. Psychiatry* 387 (1956); Hyman Smollar, "A Lawyer Looks at Psychiatry and the Law," editorial note in 17 *Psychiatry* 391 (1954); and "Witnesses and Testimony at Trials and Hearings," 13 *Journal of Social Issues*, No. 2, 1957 (entire issue).

Dean Pound, who has borne the brunt of much of Frank's invective, contended that the psychological realists were themselves not free from another form of a *priori* dogmatism.<sup>25</sup> For Georges Gurvitch, the serious deficiency in the psychological approach to law is methodological;<sup>26</sup> whereas Lon L. Fuller, who is considered one of the leading non-realists, finds at least a dubious value in philosophical exorcism. With his usual cutting philosophical tang, Professor Fuller wrote:

The realist movement has done an immense service to American legal science in inculcating in it a healthy fear of such very real demons as Reified Abstractions, Omnibus Concepts, and Metaphors Masquerading as Facts.<sup>27</sup>

Even the late Felix S. Cohen, who was classified as a legal realist, was a staunch critic of Frank and the psychological realists. His book, *Ethical Systems and Legal Ideals*,<sup>28</sup> clearly describes the role and importance of values in relation to the legal order, for he was always critical of those who felt that empirical analysis automatically eliminated values from the realm of objective reality.<sup>29</sup>

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

26. ". . . Some turn toward a sociology of law based exclusively on reality judgments and free from dependence on jurisprudence of which the sole task is reduced to applying the results of reality judgments without any consideration for ends and values (Llewellyn, Arnold). Others would eliminate jurisprudence in general, to replace it not by sociology, but by a naturalistic psychology which describes the minds of lawyers (Robinson) or even by psychoanalysis of lawyers (Frank) . . . .  
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. . . Here it suffices to note that no kind of individual psychology can generally lead to a contact with the problems of law as phenomenon essentially constituted by collective experience and linked to the social whole. . . ." *Sociology of Law*. N. Y.: Philosophical Library and Alliance Book Corp., 1942, pp. 172, 175-76.

27. "American Legal Realism," 82 *U. Pa. L. Rev.* 429 (1934), p. 443. See his *The Law in Quest of Itself*. Chicago: The Foundation Press, 1940.

28. *An Essay on the Foundations of Legal Criticism*. N. Y.: Falcon Press, 1933.

29. *Cf.*: "It is one of the serious dangers of the functional approach that those who invoke it for the purpose of description may without further thought utilize it as a criterion of value. It is important for the jurist to remember that when he has described the human significance of a rule he has not thereby justified its existence." F. S. Cohen, 1 *Mod. L. Rev.* 5 (1937), pp. 24-5. Also, see his excellent article, "Transcendental Nonsense and the Functional Approach," 35 *Col. L. Rev.* 809 (1935), repr. in 2 *Etc.: A Rev. of Gen. Semantics* 82 (winter 1944-45). For a penetrating analysis of the problems encountered in studying values, see Arnold M. Rose, "Sociology and the Study of Values," 7 *British Journal of Sociology* 1 (1956).

In spite of the fact that Jerome Frank on many occasions, both in his speeches and his writings, strongly denied an addiction to the psychological approach to the study of legal behavior,<sup>30</sup> many important questions still justified examination, and among those questions that still lurked in the minds of some legal writers were the following:

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

### *Conclusions*

The unexpected death of Judge Frank ended over a quarter of a century of fruitful contributions to the study of government, law, and the broad interrelationships between law and the social sciences. He was, as Professor Fred Rodell once wrote,<sup>31</sup> the twentieth century counterpart of the "compleat man." His mind was unparochial and omnivorous in its appetite for the broadest possible comprehension of legal problems and their possible solutions.

30. Frank expressed grave doubts about the excessive and at times reckless use of psychological materials by other writers and consistently qualified his own use of psychological theory. See his extremely critical book review of F. R. Bienenfeld's *Rediscovery of Justice*, 38 *Calif. L. Rev.* 351 (1950), and his contribution to "The Lawyer's Role in Modern Society: A Round Table," 4 *J. Pub. L.* 8 (1955), pp. 23-24.

31. "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

Although desirous of cutting across the artificial boundaries between law and the social sciences ("arts" for him), Judge Frank always recognized the necessity for refinement of the techniques of psychoanalysis and psychiatry. This is clearly evidenced in the fact that many of the assertions of *Law and the Modern Mind* were considerably altered and revised in his later writings.

Irrespective of how well-accepted his ideas on the law may be, Jerome Frank's writing always produced an immediate flow of critical discussion in the law journals. In his pioneer use of psychological tools of analysis, Frank was a crusading legal realist, ready and willing to take on all of his critics with vigor and a good sense of humor. His contribution as the country's leading *provocateur* in the study of legal problems is immeasurable.

Whatever categories we employ, or definitions of jurisprudence we agree upon, Jerome Frank's ideas on the law are an important segment of modern American legal thinking. Regardless of their acceptance or rejection, they deserve to be regarded as an integral part of American jurisprudence. For the creative iconoclast within jurisprudence has an important role to play and ought, in all fairness, to be given a place in the long and varied history of the sources, nature, and ends of law that we call jurisprudence.<sup>32</sup>

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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. . . ." Book Review of *Courts on Trial*, 25 *Ind. L. J.* 114 (1949), p. 115.

32. For a more thorough discussion of the subject of this article, see Julius Paul, "The Legal Thinking of Jerome Frank: A Study in Contemporary American Legal Realism" (Unpublished Ph.D. dissertation, Department of Political Science, The Ohio State University, 1954), "The Role of the Judge in Jerome Frank's Philosophy of Law," 10 *Okla. L. Rev.* 143 (1947) and "Jerome Frank's Attack on the 'Myth' of Legal Certainty," 36 *Neb. L. Rev.* 547 (1957), pp. 562-63: "Jerome Frank's Ideas on the Relation of Legal Education to the Judicial Process," 9 *J. Legal Ed.* 177 (1956), pp. 180-82.