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Jerome Frank and the Modern Mind

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Abstract

The author of this dissertation attempted to write a reasonable, systematic proposal about Jerome Frank and his modern mind through a review of Frank’s works and judicial opinions. These opinions were based on the philosophies of pragmatism and humanism, which are influenced by Professor F. C. S. Schiller. Based on the preliminary work, the dissertation author attempted to review the judicial opinions, democratic political views, judicial proposals, and judicial practices on the key concept of the modern mind, and point out Frank’s struggle for defending democracy and freedom, which are believed to be the core values of America.

This dissertation author looked back to the personal experience, historical background, and origin of thought of Jerome Frank, factors which played a key role in the formation of Frank’s thoughts, and pointed out that such factors are close to the psychoanalysis used by Frank. Frank builds up a constructive skepticism of classical legal theory through the concepts of the modern mind and the humanism in pragmatism. Frank points out that legal uncertainty is rooted in the subjective factors of the human being, and that traditional legal formalism cannot justify itself at this point. So Frank puts forward a constructive skepticism, which is composed of absolute truth skepticism, absolute causality skepticism, and fact-skepticism. Such constructive skepticism shows that legal uncertainty can be justified in philosophy and legal research should not be confined to inflexible formal logics and refuse the subjective factors. Instead, people should be open to a multi-perspective approach and re-examine the influence of subjective factors in the judicial process and, at the same time, realize that strategies that avoid subjective factors may cause damage to democracy in America. So, only by
correctly understanding subjective factors can people evaluate the adversarial systems, jury systems, and legal education systems in America, and put forward a reform program. Thus, not only does the modern mind mean taking a particular philosophical perspective, but also awaken subjective consciousness to defend democracy in politics and discretion in the judiciary. Such constructive skepticism and the modern mind are succeeded by the critical legal studies movement and neo-legal realism, and the clinical legal education system becomes the mainstream model in contemporary America. Last but not least, the author of this dissertation attempted to point out that this theory might inspire judicial reform and legal research in China.

Key words: Jerome Frank; the modern mind; American Legal Realism.
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Chapter 1 Introduction

1.1 Purpose and Thesis

Along with the transition from the laissez-faire capitalism to state monopoly capitalism, there was a huge revolution in American society during the period of the end of the 19th century and the early 20th century. Monopoly capitalism had made a tremendous impact on the traditional political and social systems. For example, in public services, the public called on the government to strengthen the interference in economic activities and implement a more competitive environment for small businesses. In industrial areas, labor conflict intensified, while the workers’ living conditions worsened. In civil rights, progressivism was becoming the consensus of the community, which meant that the muckraking movement, striving after universal franchise, and the municipal reform movement, spread throughout the United States. After the Spanish-American War (1848), the United States became more and more influential in world affairs, as opposed to the traditional conservatism. Finally, the United States became one of the great powers of the world after the triumph of World War I. After that, in order to resist the influence of fascism and communism, the United States attempted to advocate for the spread of American democracy around the world.

At the same time, there were also remarkable shifts in humanistic and sociological research fields. With the influence and contemporary development of natural sciences and the general acceptance of social darwinism, American pragmatic philosophy became the mainstream. Introduced by Oliver Wendell Holmes, Jr. and Roscoe Pound, this trend also was felt in jurisprudence, and one school of native American jurisprudence, American legal realism, was born. American legal realism did not have a
unified principle or program. The reason why it was called American legal realism was because of its in-depth criticism of traditional legal theory in a period of social transformation. In the American legal history, American legal realism is regarded as the product of Oliver Wendell Holmes, Jr., and had a profound impact on the critical legal studies, neo-American legal realism, and economics of law in the 20th century.

Jerome Frank is a representative of American legal realism. Later scholars nicknamed American legal realism as Frankism. Though it sounds extreme and farfetched, it does fully show the important influence that Frank and his legal thought had in the American legal history. His influence comes from several aspects. First, Frank, as well as Karl Llewellyn, jointly launched American legal realism and attacked legal formalism. Second, Frank’s legal theory is more challenging than the traditional legal theory. For example, Frank leveled an in-depth criticism of legal certainty. In Frank’s opinion, legal certainty is nothing but a “basic legal myth,” and it means a psychological need for safety and stability in order to have a flexible life. This kind of psychological need is similar to childish thinking of a father-substitute of authority, unity, and certainty. Frank is proficient at the latest research in psychology research methods, such as psychoanalysis, child psychology, and gestalt psychology, to analyze the influence of human factors in trial court, in order to query the predictability of the judicial process and effectively avoid unreasonable risks. Third, Frank’s abundant legal experience contributed to people’s understanding of the relationship between American legal realism and the New Deal. Frank served as a partner in a famous legal firm on Wall Street, a judge on the Federal Circuit Courts of Appeals, and a politician in the period of the New Deal, including the General Legal Counsel of the Agricultural Adjustment Administration and the chairman of the Securities and Exchange
Commission. In addition, Frank spread his reform suggestions about trial court and legal education while working and teaching at Yale University as a visiting lecturer. Hence, these factors play a positive role in the transformation period of the scholarship and political reality of China. These can be summarized as follows.

First, it is commonly believed that Frank’s thoughts are so multifarious and disorderly that there are many contradictions between Frank’s case opinions and his works. However, after reading all his works and case opinions, the author of this dissertation believes that there is a principal line through his works and it is possible to demonstrate Frank’s thoughts via a systematic framework. The author of this dissertation believes that Frank’s thoughts stem primarily from pragmatism, especially the humanism espoused by Professor Ferdinand Canning Scott Schiller. Thus, based on this judgment, this dissertation author attempted to take *Law and the Modern Mind* as the core of Frank’s humanistic works and to assemble a constructive skepticism. Under this framework, this dissertation author endeavored to interpret Frank’s legal thoughts, political thoughts, and judicial suggestions, in order to call attention to Franks’ contributions to defending the core values of American democracy, rather than fractional discussions.

This author sought to illuminate Frank’s contribution to the American national consciousness. The author may realize that Frank’s contributions are more than his criticisms of the formal logics. Actually, Frank’s theoretical contributions include various explorations of native American political and legal theories. As a former British colony, America inherited some of its colonial legal systems and judicial methods. Besides, American legal science and formal logics are influenced by the strict German legal science. In politics, at least before World War I, the United States did not belong to the world supremacy. In Frank’s opinion, some legal and political relationships cannot be
separated. American democracy is the firm foundation of the "tripartite" political system. A powerful country needs a systematic legal theory. However, the judicial systems and the legal theories adhere to the tradition of case law and system, rather than developing and innovating. In his time, Frank believed that America needed some development and innovating in legal theory to match the national strengths and status. Then Frank found that the role of human factors, especially the positive effects and characteristics in judicial adjudications, were key to promoting the judicial and legal educational reformations, which may add vigor to the American political system.

Last, but not least, the author of this dissertation tried to learn something useful from Frank and his constructive skepticism. This author believes that people could make introspection about the Chinese legal system and the foundation of such a legal system. Compared to the American legal system, could this dissertation author find something similar to a surrogate father, someone in authority in modern China? Is there any kind of legal myth in contemporary China and should researchers unveil it? This is an interesting question that warrants an answer.

1.2 Internal literature overview

With many American classic works of law introduced to China in recent times, there are volumes of papers on American legal realism and Frank’s legal thoughts. All these papers and works make a great contribution to the current study. However, as the research continues, the author of this dissertation believed that it was necessary to holistically review and critique these works.

The literature could be roughly divided into the following four categories. The first
category contains dissertations or works on Frank’s legal thoughts. There are two systematic dissertations on this theme: one is *An inquiry into the Fundamental Appeals of Frank’s Legal Realism*, written by Dr. Yu Xiaoyi, and the other is *Comparative Research on the Legal Thoughts of Jerome Frank and Karl Llewellyn*, written by Dr. Zhang Juan. The second category contains papers on specific topics. Among these papers, Dr. Yu Xiaoyi wrote series of papers, including *On Frank and the Law and the Modern Mind, a Critique of a Critique of the Structural Transformation of the Public Sphere, the Falsification of the Frank’s Proposition*, and *Frank’s View of Justice from His Legal Realism*. The rest include *What is Legal Realism: the Debate among Pound, Llewellyn and Frank* and *On Frank’s Legal Realism*. The third category contains legal works that referred to Frank and his legal thoughts, including *The Modern Western Jurisprudence, Research on the Western Legal Philosophy in 20th Century, Legal Pragmatism in America*, and *Legal Realism*. The fourth category is a translation of Frank’s work. It appears that only one of Frank’s works, *Court on Trial: Myth and Reality in American Justice*, has been translated, and done so by Dr. Zhao Chengshou.

In *An inquiry into the Fundamental Appeals of Frank’s Legal Realism*, Dr. Yu Xiaoyi argues that Frank’s legal thoughts could be regarded as two parts of skepticisms: rule skepticism and fact skepticism. Dr. Yu investigated the fundamental appeals from the transformation of rule skepticism to fact skepticism. Yu pointed out that there are dimensions in Frank’s work, including the pragmatism on philosophy view, perspectivism on historical view, democracy on political view, and psychoanalysis on methodology view. Yu’s conclusions came primaril from the Frank’s *Law and the Modern Mind*. Yu believes that Frank’s major objective was the basic legal myth, which is a
critique on legal certainty. She finds out that Frank denies the legal certainty existing in
the individual case. People could speculate about the law and the decision rather than
follow the law. For example, in trial court, the judge makes a decision based on judges
characteristics rather than on the law expressed in *stare decisis*. Traditional legal
formalism ignores the importance of fact finding, which plays a key role in the judge’s
decision. Dr. Yu points out that the greatest contribution Frank made is criticizing the
*stare decisis*, the essence of common law, by saying it is nothing but a legal myth.
Therefore, people should re-consider the role of fact finding in a decision. Yu believed
that the transformation of Frank reflects Frank’s determination to defend the value of
democracy and realizing individual happiness. As the earliest dissertation on Frank and
his legal thought, Dr. Yu provides a preliminary framework. However, there are still many
opinions to be discussed. For example, is it possible to make an explicit transformation
from Frank’s works? Dr. Zhang Juan queries and criticizes it. The writer believes that Dr.
Zhang Juan’s opinion sounds reasonable. Actually, fact skepticism is the only main line in
*Law and the Modern Mind* and *Courts on Trial, Myth and Reality in American Justice*. So
it sounds far-fetched that there is some transformation in Frank. Besides, one might
ignore the process of Frank’s legal thought if one paid much attention to the
transformation. In this situation, one might misunderstand Frank’s influence in American
legal history. Moreover, Dr. Yu misunderstands some sources of Frank’s philosophical
view, historical view, and methodology. For example, Yu ignores the impact of the
humanistic influence of pragmatism on Frank, the critical attitudes of Frank toward
psychoanalysis, and the integration of psychoanalysis, child psychology, and gestalt
psychology. Researchers believe that these misunderstandings might originate from Yu’s
neglect of continuity of Frank’s legal thoughts, which are based on humanism.
Emphasizing the human factor is the key to Frank’s thoughts.

On the basis of Dr. Yu’s dissertation, Dr. Zhang Juan further researched this topic. In *Comparative Research on the Legal Thoughts of Jerome Frank and Karl Llewellyn*, Zhang compared Frank and Llewellyn from resources, personal experience, ideological systems, legal practice, and the influences of American legal history. Legal researchers could benefit substantially from these comparisons. First, one gets a clear profile of Frank’s political opinions and stances. Zhang points out that one should take Frank as an outstanding politician rather than a legal ideologist. Frank’s democracy restates and defends the foundation of America. Second, Zhang collected decisions made by Frank. Finally, Zhang made a reasonable comment about Frank’s influence. However, there are shortages in Zhang’s dissertations. Zhang overemphasizes Frank’s political opinions to the extent that she underestimates his legal thoughts and influence on American law history. Zhang ignored the influence of the humanism of pragmatism on Frank. In addition, because of Zhang’s comparative research, it is hard for researchers to get a panorama of Frank’s thoughts from her dissertation.

1.3 English literature overview

Jerome Frank had published six works, including *Law and the Modern Mind*, *Courts on Trial: Myth and Reality in American Justice*, *Save America First: How to Make Our Democracy Work*, *If Men Were Angels: Some Aspects of Government in a Democracy*, *Fate and Freedom: A Philosophy for Free Americans*, and *Not Guilty*. Generally speaking, because of numerous inconsistencies in these works, it is not easy to summarize a clear main line from them. Compared to Karl Llewellyn, another representative of American legal realism, there are fewer works on Jerome Frank’s thoughts. Julius Paul published
Chapter 1 Introduction

The Legal Realism of Jerome N. Frank: A Study of Fact-Skepticism and the Judicial Process in 1959. Robert J. Glennon, a biographer, published The Iconoclast as Reformer: Jerome Frank’s Impact on American Law in 1985. These works make comments from different angles, such as fact skepticism, Frank’s critiques of traditional legal theories, and his impact on American history. As Paul says, “[t]herefore, the main purpose of this study will be to systematically examine Jerome Frank’s philosophy of law and its role in modern society…so that my second purpose in writing on Jerome Frank will be to attempt a critical evaluation of his ideas and their place in recent American legal thinking.”

(Julius Paul, 1959: 6)

In other papers or works, people prefer to discuss Frank and his thoughts in the context of American legal realism. Even some radical scholars take Franklism as a label of American legal realism. All of these papers could be placed in one of the following four categories. The first agrees with Frank’s thinking. Jerome Frank and the Modern Mind, published in Buff. Law Review, is representative of these. In this paper, Prof. Charles L. Barzun makes a re-interpretation of Law and the Modern Mind, and argues that there are differences between Frank’s theories and the general understanding of American legal realism and pragmatism. Frank’s purpose for criticizing traditional legal judicial theories was to introduce virtue theory into the judicial theories, and to awaken people’s attention to a judge’s characteristics, which can be improved by a judge’s introspections. After that, modern people could lead a virtuous life in the modern time. Hence, Barzun argues that people should take Frank’s thinking as virtue jurisprudence. The second takes a sympathetic attitude toward Frank’s thinking. Professor Brain Leiter is representative of these. Professor Leiter points out that people should take Frank and
his legal thoughts as naturalized jurisprudence. This kind of jurisprudence tries to describe the judicial process in a neutral and objective way, so that the subjective factors, such as individual evaluating standards and values, could be demonstrated. This theory holds a positive attitude to a judge’s discretion and tries to rationalize human factors in the judicial process. (Brian Leiter, 1997) Meanwhile, Professor Stewart Macaulay, a representative of neo-legal realism, shares the same attitude as Jerome Frank. Professor Macaulay believes that Jerome Frank, as well as the other realists, pays attention to the connection of law and the society. They try to promote some reformation of legal education and remodel a modern legal idea by criticizing the formal logics in the judicial process and emphasizing the human factors. However, they wrongly take the law as the center of society, and ignore some rule systems and judging systems stemming from the society themselves, which should be considered as the key to social development. (Stewart Macaulay, 2006) The third takes a critical attitude toward Jerome Frank. Professor Brian Tamanaha, who put forward an idea of balanced realism, is a representative of these. Professor Tamanaha believes that there is no essential distinction between legal realism and legal formalism, though they have different theoretical appearances and preoccupations. For example, legal formalism does not completely deny the judge’s discretions, whereas legal realism just criticizes the extreme formal logic, rather than negates it. So Professor Tamanaha calls his theory “balanced realism.” However, it seems that Professor Tamanaha dislikes Jerome Frank, particularly for the agitative language used by Frank and his platitudinous opinions of the judicial process. (Brian Z. Tamanaha, 2010:69-70)The fourth takes a hostile attitude toward Frank and legal realists, as they believe that Frank and Legal Realists “explain nothing,” but create nihilism and deconstructivism. (D’Amato A., 2009)
1.4 Framework

A. Expounds personal experience and historical background of Jerome Frank. Although many scholars have discussed the importance of Frank’s background, there seems to be a neglect of the fascist trend at that time and the influence of his family. Without these discussions, it is difficult to understand Frank’s hostility toward formalism and totalitarianism, and his preference for psychoanalysis. In this chapter, the author attempted to explain the relationship between his theory and his experience.

B. Explains the role of “modern mind” in Frank’s theory system. Modern mind is a key to Frank’s legal theory throughout his legal practice and his theory. Regrettfully, it seems to be ignored by many scholars. Not only does the phrase “modern mind” mean the reform in theories and practice, but also an attempt to awaken the consciousness of American legal scholars and defend the value of American democracy.

C. Constructs a cognitive explanation of Jerome Frank through his constructive skepticism. It is commonly believed that there is not a theory system of Jerome Frank. However, this dissertation author questions this opinion and believes it does, in fact, exist. Frank’s constructive skepticism, which was based on questioning absolute truth, declared that absolute causality does not exist in legal practice, and then pointed out the uncertainty of fact in the judicial process. Such a system comes from pragmatist F. C. S. Schiller, rather than William James or Charles Sanders Peirce, and particularly emphasizes the human factors in a rational judicial system. In this framework, it is reasonable to understand why Frank chose psychoanalysis to analyze the judge in the judicial process.
D. Concludes with Frank’s contribution to judicial theory. Instead of the usual manner for discussing Frank’s theory via concept of legal myths, this dissertation author attempted to restate Frank’s contribution of constructive skepticism and modern mind. In this manner, one might easily and effectively understand Frank’s reformation of judicial theory, and then understand Frank’s influence on later academic trends.

E. Restates Frank’s reformation theories comprehensively. Frank pays much attention to legal education, which is an important part of the traditional judicial theory. In this chapter, the author points out the relationships between traditional theories and legal education, and the innovation of clinical legal education.

F. Restates Frank’s democracy in politics. Democracy in politics plays a key role in Frank’s judicial and political practice, and it is also an important perspective from which to understand his constructive skepticism theory.

G. Evaluates Frank’s theory on American jurisprudence and what could be learned from the theory.
Chapter 2 Background of Modern Mind

In this chapter, the author attempted to demonstrate Frank’s personal experience and influence on his theoretical choice.

2.1 Personal Profile of Jerome Frank

Jerome Frank was born into a German Jewish immigrant family in New York City on September 10, 1889. At age seven, Frank moved to Chicago to live with his parents. His father was a smart, respectable, and humorous lawyer; his mother was a talented, attractive, kind, gentle, and accomplished musician with concert potential. Although Frank had two older sisters, Jerome was treated much better than them. Frank’s mother encouraged him to develop his musical talent. However, Frank’s father had been strict with him since he was a child. Then, when Frank was going to attend the University of Michigan and develop his legal career, he had to change his mind and go to the University of Chicago, under his parents’ will that he should stay close to home. Influenced by his mother, Frank majored in literature, philosophy, and social science. After three years studying, Frank earned a Ph. B in 1909.

After graduation, Frank received a chance to work as a secretary for Alderman Merriam, who was famous for his reformation, for almost one year. During this period, Frank was deeply influenced by Alderman Merriam and deeply agreed with Merriam’s belief that “these reforms could not operate automatically but depended on unreliable human beings for their administration.” (Robert J. Glennon, 1985) Then Frank returned to Law School, University of Chicago in 1910, and graduated in 1912 with the highest grades ever achieved at Law School, University of Chicago. After Frank restarted as a
member of the Illinois bar, he joined the law firm of Levinson, Becker, Cleveland & Schwartz, whose specialty was corporate finance and reorganizations.

When everything settled down, Frank married his wife in 1914. Frank’s wife was five years younger than him. They met during Frank’s last year of college and became engaged after six weeks, but they married when Frank could support their family. Influenced by his wife, Frank became interested in literature and kept the dream of becoming a novelist, even after becoming a lawyer at his father’s insistence.

After his marriage, Frank moved to a village north of Chicago, where he took a job of trustee. During this period, Frank took part in improving the Chicago public transportation system, and tried to convert it from the private to the public. Frank’s suggestions were taken by William E. Dever, the reform mayor of Chicago. As a result, Frank devoted almost all of his spare time to the issue until 1926.

In 1919, Frank became a partner in his law firm, which was renamed Levinson, Becker, Schwarz & Frank. Unfortunately, the law firm was dissolved in 1929. After that, Frank moved to New York in 1929. However, Frank’s personality and capacities as an excellent lawyer, including possessing a probing and creative legal mind, dissecting legal problems, unraveling subtle aspects, and identifying countless problems and details, impressed his clients and colleagues very much. Because of his lack of business experience, Frank’s colleagues appraised him highly on his legal analyses, which indicated that he was highly suitable for a position as a professor or judge, rather than a lawyer.

In 1924, misfortune happened to Frank. He was suspected in a ruthless case that shocked the country because of his lack of an alibi and a similar macroscopic feature of the suspect. Fortunately, Frank was released after the confession of the real criminal.
After that, Frank admitted he was fortunate because he probably would have admitted guilt for something he had not done after being tortured by police officers.

Frank came to his life’s turning point in 1928. Frank brought his families back to New York for his daughter’s medical treatment. At that time, Frank began to make self-examination of his mental distresses, and took a six-month course of psychotherapy, which was not so mature or perfect at that time, due to the fact that psychology could not be deemed a systematic discipline. Even so, Frank recovered after the course and realized the importance of mental factors playing in the affairs. Frank was convinced that the psychoanalysis would work in analyzing of law, as well as human physical needs. So, it is understandable that Frank became an advocate of psychoanalysis. Besides, from this case, one finds out that Frank’s adventures were not limited to his theories, but they also affected his daily life.

Meanwhile, Frank continued his legal practice in a new firm, which was quite different from the one on Wall Street. Benefitting from this change, Frank began to write on legal thoughts during his time in traffic each day. In 1930, Frank published his first book, *Law and the Modern Mind*, in which he questioned the legal certainty and predictability of law and declared that non-rationality and ambiguity exist in the law. Because of the challenge of the orthodox legal opinions, this work became popular and drew the attention of legal practitioners and legal scholars. It is commonly accepted that it marked Frank’s transformation from legal practitioner to legal theorist.

In the times of economic crisis during the 1930s, Frank was recruited to the Agriculture Adjustment Administration (AAA) as the General Counsel, where he was responsible for drafting bills on agriculture, lobbying the Congress, and stipulating market standards. However, Frank was fired for his ideas of protecting the consumer...
and the peasant from the AAA policies.

After a two-year period of legal practice in New York, and as a result of his early legal practice in corporate law, Frank was recommended to the Securities and Exchange Commission (SEC) as an administrator, and was appointed to be the seat of Chairman of the Commission. In 1938, Frank published *Save America First: How to Make Our Democracy Work*. In this book, Frank argued that the SEC should operate as a conservative organization and work for profits. Meanwhile, the government and the body of regulations and policies led to a steady economic and enhanced market confidence. Furthermore, Frank suggested that for the purpose of democracy and prosperity, America should adopt the policy isolationism during World War II.

In 1941, Frank finally got his commitment and became a judge on the Second Circuit Court of Appeals, where, because of his Judaism, he had a tough time at that position until his death in 1957. However, no matter how bad the situation was, frank never changed his political ideals or beliefs.

Although was under pressure as a Judge, Frank kept writing until 1949. Frank published his third work, *If Men Were Angels*. In this book, Frank attempted to act as a protector of the people and argued that the administrative should defend democracy as the leader of Americans. However, it is believed that Frank could have done much more if he had been tolerant toward his opponents.

Three years later, Frank published his fourth book, *Fate and Freedom: A Philosophy of Free Americans*. It was believed that Frank had returned to his usual standard. As a firm skeptic, in this book, Frank clearly explained his skepticism of history, philosophy, economics, and science. That is the reason why the author of my dissertation takes this as his philosophy foundation book among all Frank’s works.
In 1949, Frank published his last work, *Court on trial: Myth and Reality in American Justice*, which was believed to be a concentrated reflection on his late judicial thoughts. In this book, Frank stated that the subjective factors in trials should be given more attention, for they were the origins of legal uncertainty. The best strategy was turning the eyes to the courts on trial rather than on the courts of appeals. As a visiting lecturer at Yale University Law School at 1946, Frank taught courses on fact-finding and emphasized that these opinions came from judicial practice.

In January, 1957, Frank died of heart disease at the age of 67. After his death, Frank’s daughter collected his articles and her own articles, and published *Not Guilty*, as a coauthor.

From these brief personal comments, one may say that Frank’s personal experience had a strong influence on his choice of theories. Frank’s family, which included a stern father and a benevolent mother, played the crucial role. It is no doubt that Frank inherited his father’s character of scintillating wit, which could be supported by Frank’s abundant legal experience in politics, academics, and law, and his vast readings in his works. Frank’s father’s influence on his choice of studies and career made him doubt about and fight against certainty and authority, although Frank did not fight against his father’s will or express his resentfulness in his works. However, it is obvious that he was dissatisfied with this interference from his family. Frank asserted that, “[m]odern civilization demands a mind free of father-governance. To remain father-governed in adult years is peculiarly the modern sin. The modern mind is a mind free of childish emotional drags, a mature mind. And law, if it is to meet the needs of modern civilization must adapt itself to the modern mind. It must cease to embody a philosophy opposed to change. It must become avowedly pragmatic.”(Jerome Frank, 1930: 252)
Frank’s two dimensions with which he was dissatisfied included how his father had influenced him, which he accepted obediently, and could, therefore, explain his pragmatism attitudes. To some extent, this could explain the criticisms of Frank’s contradictions between theory and practice, which were made by Posner and other scholars.

On the other hand, Frank’s mother played an important role in his career. It was a pity that Frank did not explore his musical talents that he inherited from his mother, but the familiarity of musicians and musical theories benefited from his thinking and the citations. Above all, Frank’s musical talent impacted his emotional thinking. Many critics have pointed out that Frank’s thinking characteristics of non-rationality and divergent thinking came from his early musical education. It is no doubt that the creativity and divergent thinking are the indispensable factors of musical creativities. Frank deeply believed this and applied the same to the legal field. (Jerome Frank, 1949: 392-404) Second, the creative musical thinking influenced Frank’s attitude toward the interpretations of law. For example, Frank admired and encouraged taking the open attitude and understanding the judicial interpretations and judicial discretions. He adored modern composer Krenek’s thoughts very much, and believed judges should create new laws when they made a decision by the verbal ambiguity, as conductors make improvisations in performances. (Jerome Frank, 1949) (Jerome Frank, 1927). In addition, from Frank’s perspective, the legal thinking indicated the male authorities, including authority, obedience, and certainty, which could be supported from the usual attitudes toward law. (Jerome Frank, 1949) (Jerome Frank, 1927). However, in a mature society, since women have played an important role in social lives, it is not enough. In this case, the female characters should be reflected on the legal processes and the
applying and understanding of laws. For example, not only must lawyers pursue legal certainty and legal unity, but also pursue substantial justice, though it might be at the cost of legal stability and legal certainty. (Jerome Frank, 1949: 386-405)

Finally, Frank had the most direct impressions on how that uncertainty works in judicial decision making when he was mistaken as a suspect in a criminal case. Therefore, Frank called attention to the testimony and the subjective factors working in the judicial process. Moreover, Frank’s introspection on his mental status and the experience of accepting psychological treatment contributed to his basic strategy and analytical paths.

2.2 Thoughts and Origins

Since the citations in Frank’s work are hard, numerous, and jumbled, it is hard to grasp the origins of his thoughts. However, there is no doubt that Frank’s political, philosophical, and legal thoughts stemmed from humanism, which is a school of pragmatism. The author of this dissertation believes that it became the cornerstone of Frank and his modern mind.

2.2.1. The Philosophy Thoughts Origins

The relationship between legal realism and pragmatism could be traced back to the most respectable Justice Holmes. When he was young, Justice Holmes kept close private relationships with William James and Charles Sanders Peirce, who were important figures in pragmatism. Moreover, they had founded a philosophy club to engage in some academic discussion together. Pragmatism describes the process of thinking, which includes raising questions, analyzing, and arriving at a conclusion. In
traditional opinions, people would think before they made a decision by some established principles or axioms. However, the thinking process has no certain relationship with the outcome. That means thinking is independent of the conclusion, which is why in daily life, many ordinary people will not dig into the relevant factors hinted at behind behaviors. The pragmatist tries to call attention to the process of thinking and its role in daily life. To some extent, the pragmatists call it a “new age” in modern life. John Dewey, the famous pragmatist, once declared that, “If people could be completely frank and widely acknowledge the influence of personal elements playing in the process of making a decision, then, a new philosophical age would certainly come.” (Louis Menand, 2006:291-301)

As the leader of legal realism, Frank appropriated the doctrines of pragmatism. However, since there are several schools of thought in pragmatism, what one should pay attention to is which doctrine(s) of pragmatism Frank appropriated. For example, William James and John Dewey took different academic routes with their doctrines. John Dewey claimed that, “if a philosophy gives up defending certain substances, values and ideals, then it will look for a new business for itself. However, this abandon is a condition for a more energetic responsibility.” (John Macquarrie, 1980:217) Meanwhile, Charles Sanders Peirce showed strong interest in semiology. Peirce tried to demonstrate the logical thinking process in people’s minds by the symbols or the pictures. William James put particular emphasis on the meaning of ethical and religious items and the effects in the personal practice. John Dewey analyzed value judgments playing in the practice. (Charles W. Morris, 2003)

Among pragmatists, Frank was mainly influenced by Ferdinand Canning Scott Schiller and his humanism. Professor Schiller was an English pragmatist. Schiller was
born in 1864 in Switzerland. Educated at Rugby and Balliol, Schiller graduated in the first class of Literae Humaniores, later winning the Taylorian scholarship for German in 1887. In 1891, Schiller used a pseudonym to publish his first book, *Riddles of the Sphinx*, which was an immediate success. Between 1893 and 1897, Schiller was a philosophy instructor at Cornell University. Schiller later returned to Oxford and became a fellow and tutor of corpus for more than 30 years. In 1921, Schiller became the president of the Aristotelian Society and treasurer of the Mind Association for many years. Schiller was elected a fellow of the British Academy in 1926, and three years later, became a visiting professor at the University of Southern California, where he spent half of each year in the United States and half in England. In 1937, Schiller died in Los Angeles.¹ His published works include *Riddles of the Sphinx* (1891), *Axioms as Postulates* (1902), *Humanism* (1903), *Studies in Humanism* (1907), and *Plato or Protagoras?* (1908), *Formal Logic* (1912), *Problems of Belief* (1924, second edition) and *Logic for Use* (1929). Once at Cornell University, Schiller worked with and was deeply influenced by James. However, Schiller did further research, eventually surpassing James in pragmatism. “Meta-philosophy” could be used to generalize his two core propositions: First, Schiller used concrete-metaphysics to replace the pseudo-metaphysics in formalism. That is to say, the facts exist before the truth, and the truth is nothing but another name for a “higher” existence. Second, Schiller suggested an “understanding from a nature perspective.” That is to say, one should understand the world based on one’s life experiences rather than the abstract logical deduction. Schiller highly respected the famous ancient Greek philosopher Protagoras, and proposed that, “man is the measure of all things” as the foundation of philosophy. In this philosophy,
humanism is the core of pragmatism. Humanism holds that the world is based on the human sensible experience, all the transcendent propositions come from the human experience, and formal logic has no exception. In Schiller’s mind:

But now, we may ask, how are these 'consequences' to test the 'truth' claimed by the assertion? Only by satisfying or thwarting that purpose, by forwarding or baffling that interest. If they do the one, the assertion is 'good' and pro tanto 'true'; if they do the other, 'bad' and 'false'. Its 'consequences,' therefore, when investigated, always turn out to involve the 'practical' predicates 'good' or 'bad,' and to contain a reference to 'practice' in the sense in which we have used that term. So soon as therefore we go beyond an abstract statement of the narrower pragmatism, and ask what in the concrete, and in actual knowing, 'having consequences' may mean, we develop inevitably the full blown pragmatism in the wider sense. (F. C. S. Schiller, 1905236-237)

The objectivity of human sensible experience, human intuitions, human eikasia, and human delusion are objective. Furthermore, there is no evidence of formal logic, which is nothing but the tools for interest balancing. Therefore, one must replace formal logic with humanistic logic in interpreting Frank’s thoughts. Comparing Frank’s and Schiller’s works, one could conclude that some of Frank’s main academic perspectives, which include “basic legal myths,” “the decisions come out before reasoning,” and “father worship,” originated with Schiller’s work. In Fate and Freedom, Frank cited Schiller several times to discuss the certainty, determination, and objectivity in law and democracy in America, which could be seen as an effort to humanism to the jurisprudence. In Law and the Modern Mind and Courts on Trial, Frank incorporated the epistemology and methodology of humanism into legal studies and legal research.

2.2.2. The Psychological Thoughts and Origins

Because of the same theoretical concerns for the human elements in reasoning, the burgeoning research methods in psychology and Frank’s philosophical thoughts meshed well. Consequently, Freud’s psychoanalysis and Piaget’s theory of cognitive development (sometimes called child psychology) were absorbed in abundance by
Frank. In the view of Freud’s psychoanalysis, the human being’s mentation could be divided into three categories: the conscious, the preconscious, and the unconscious. The conscious is the direct reflection of external stimulation. Human beings could be aware of this kind of mentation. In practice, it could be interpreted in the thinking process by reasoning. The preconscious is a sort of depressed mentation by consciousness. Usually it hints deeply at the consciousness, and could not be felt by humans under normal conditions. It is believed that because of certain relationships with the most primitive instincts, which are mostly the sexual instincts, the preconscious is depressed by the social reasons and the social norms. However, in daily life, human behaviors are deeply determined by the preconscious, which plays a key role in changing the normal orders. In addition, the unconscious plays the role of regulatory mechanism in the transformation process, maintaining the balance between the conscious and the preconscious. (Ye haosheng, 1998: 453-502) Because of the emphases on the role the unconscious plays in daily life, Freud’s psychoanalysis met Frank’s personal experience and special theoretical needs. Due to Frank’s early experience of undergoing a successful psychoanalytic treatment and Charles Merriam’s influence, Frank firmly believed in the functions and effects of psychoanalysis. Therefore, due to the psychoanalysis, Frank pointed out that numerous subjective elements were hiding in the judicial process. Whether one admits or not, in the fact-finding or the testimony of the judicial process, the parties, witnesses, and the judge are influenced by their subjective judgments. Professor Herman Oliphant, a professor of law of Columbia University, proved Frank’s theories from another perspective in 1928. Oliphant asserted that “each case is a record of judicial behavior,” which means the decision is nothing, but the reaction of the stimulation of facts. One could even predict the judicial decisions
by the “non-vocal behavior” rather than the “vocal behavior” in their opinions of judicial decisions, because “the decisions were nothing but the judge’s responses ‘to the stimuli of facts.’” (Jerome Frank, 1949:171)

On the other hand, thanks to the research of Jean Piaget, Frank could make his famous thesis of “basic legal myths.” As for what Freud had done before, Piaget traced the thinking modes of adults back to their childhood, even to the embryo stage. However, different from Freud, Piaget paid much attention to the cognitive developments and formations. Piaget declares that one could find out the answers to the adults’ behavior by observing the children’s early behavior models. For example, with the help of parents, children get in touch with the world. On the other hand, in order to help the kids to face the kaleidoscope world, parents have gradually been setting up a mechanism to deal with all the children’s needs, such as hunger and safety. The mechanism is called a father-authority. From the perspective of children, father means authority, certainty, and a security that could handle everything. However, the father-authority seems gradually to decline as the children grow up and the uncertainties they face increase with the same pace. So the children have to find other father-substitutes, since they have formed the path of dependence in their mind. In the real world, the best substitute for the father seems to be the law, for the law has some similarities to a father, including authority, stability, and certainty. Consequently, the law replaces the role of a father plays in the children’s childhood years. This theory benefits Frank a lot, and it is believed that the origin of Frank’s legal certainty myths is the father-substitute theory. Frank indicated straightforwardly in *Law and the Modern Mind* that his descriptions of childish thought-ways were based on the Piaget’s child psychology research, (Jerome Frank, 1930:75) for the developmental track of society
and the developmental track of adults are similar.

Furthermore, Frank clarifies the differences between trial courts and the appeals courts by using gestalt psychology. From the view of gestalt psychology, people’s stimulations to the environments are integral stimulations rather than the aggregation of fragmentary elements of concepts, rules, hearings, and visions. That means the integrities are composed of reasons and emotions in the forms of systematical expressions rather than the simple sums of elements. It could be much easier to understand if one took the example of the composition of songs. A single musical symbol could not be called a composition, and the melody could only be generated from a systematic combination of musical symbols. The same situation goes for the judicial process. The traditional judicial theories focuses on the opinions of the appeals decisions, omitting the other elements playing in the decisions made by the trial court. That is to say, one cannot get a satisfactory picture using traditional theories, for they have omitted the integrity of decisions. (Jerome Frank, 1949: 183-195)

Frank made a decision on jurisprudence, just “like a bomb on the legal world.” However, what one must pay attention to is that Frank just took the research and methods of psychology as an analysis to the judicial process rather than analyzing the theories. In Frank’s opinion, there were many useful and effective tools in social science research. One could take the effective method as long as they could be effective in the analysis of judicial practice. In Courts on Trials, Frank pointed out that the reason why he took the method of psychology was to introduce how the subjective elements played in the judicial process, rather than the effectiveness of psychology analyses. (Jerome Frank, 1949: 169)

2.2.3. The Judicial Ideal Judges
Frank’s humanism philosophy also impacted his choice in selecting the ideal judicial judges. What is interesting is that his two ideal judges graduated from Harvard University, of which Langdellism is attacked fiercely by Frank. These two judges were Justice Oliver Wendell Holmes, Jr. and Judge Learned Hand. As for what Frank believed in humanism, he claimed that the measurement of a good judge was his attitude toward the experiences of daily life. Both Justice Oliver Wendell Holmes, Jr. and Judge Learned Hand met the criterion and were considered the practical judicial ideal models for judges.

Justice Oliver Wendell Holmes, Jr., was born in 1841, into a renowned family of Boston, Massachusetts. His father was not only the prominent writer and physician Oliver Wendell Holmes, Sr., but also a leading figure in Boston’s intellectual and literary circles. His mother was an abolitionist. His grandfather was a well-known lawyer in Boston, even a judge on the Supreme Court of Massachusetts. Many celebrities, such as Ralph Waldo Emerson, Henry James, Sr., and other philosophers were family friends. Growing up in an atmosphere of intellectuals prompted his work, "The Brahmin Caste of New England", (Bernard Schwartz, 2005:208) Holmes nurtured the ambition to be a man of letters like Emerson. However, after his graduation from Harvard in 1860, Holmes enlisted in the fourth battalion, Massachusetts militia, and then got a commission as first lieutenant in the Twentieth Regiment of Massachusetts Volunteer Infantry. Three years later, Holmes was appointed to a brevet (honorary) promotion as a colonel in recognition of his services in the war. Then he went back to Law School, Harvard University. Two years later, he graduated from Harvard and began practicing law as a Boston lawyer for 15 years. After this period, he was appointed as the judge of the Supreme Court of Massachusetts. Thanks to a speech about his
experience in the American Civil War, Holmes became President Theodore Roosevelt’s friend and was appointed by the latter as a Supreme Court of Justice of the United States in 1902. Because of Justice Holmes’s experience and great contribution to the American judicial system, Frank adored Justice Holmes very much. Even in his work *Law and the Modern Mind*, Frank named a chapter, *Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist*, to express his admiration for Justice Holmes’s skepticism of the traditions and courage of reformations. In Frank’s opinion, Justice Holmes was the first adult judge who “has abandoned legal mysticism”, breaking the fetters of basic legal myths of certainties and challenging the traditional legal logics and theories. “He has often weighed and considered the value of rules of law which are survivals of ancient traditions, when the ancient meaning has been forgotten.” “And, accordingly, he has developed that remarkable tolerance which is the mark of high maturity.” (Jerome Frank, 1930: 270-277) In addition, Holmes’s famous motto, “The life of the law has not been logic; it has been experience” (Oliver W. Holmes, 1881) is the best expression of Frank’s humanism. In legal reasoning, Justice Holmes put forward the function of doubt: “To have doubted one’s own first principles is the mark of a civilized man...While one’s experience thus makes certain preferences dogmatic for one’s self, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else.” (Jerome Frank, 1930: 270-277) Because of Justice Holmes’s doubt about the many traditions, some famous judicial opinions, such as judicial restraint and “clear-and-present danger” principle in freedom of expression, are widely accepted in the following cases. Moreover, Holmes has exquisite dictions in his decisions. All in all, “The great value of Homes as a leader is that his leadership implicates no effort to enslave his followers.” Frank concluded some characteristics that
should be qualities of a good judge: to have the capacity to challenge the traditions; to open their judicial reasoning to the real life; be honest, modest, and fair when they make decisions; using poetry, creativity, and imagination in their judging.

Judge Learned Hand is another adored judge by Frank. Frank noted, “TO LEARNED HAND, OUR WISEST JUDGE” on the title page of his work Courts on Trial. Born and raised in a family of lawyers in Albany, New York, in 1872, Hand majored in philosophy at Harvard University and graduated with honors from Harvard Law School. After his graduation and influenced by his families, Hand began his legal practice as a lawyer in 1897. In 1909, at the age of 37, he was appointed as a Federal District Judge in Manhattan. Four years later, he ran for the Chief Judge of the New York Court of Appeals, but failed. However, he was promoted by President Calvin Coolidge in 1924 to the Court of Appeals for the Second Circuit, where he and Frank became colleagues after Frank’s appointment to the same court in 1941. Compared to Justice Holmes, Frank appreciated Judge Hand’s abundant judicial experience, flexibilities of applying the laws, and good judge characteristics of integrity, sympathy, and modesty. Thanks to his background, Judge Hand was familiar with the uncertainties and tediousness of the judicial process. Once he complained that, “I must say that, as a litigant, I should dread a law suit beyond almost anything else short of sickness and death.” (Jerome Frank, 20097: 43) Following Justices’ critics of the judicial formal logic and the respect to the legislature, Judge Hand tended to take the teleological interpretation rather than the grammatical interpretation. In a decision, Hand explained that, “one of the surest indexes of a mature and developed jurisprudence is not to make a fortress out of the dictionary, but to remember that statues always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest
That is to say, what the judges have to do in a judicial process is to make a subtle balance between the legislative intent and the discretion. The reason why the legislative makes some space for the judiciary is to make a compromise of justice in daily life. “Certainly such a function is ordinarily ‘legislative’; for in a legislature the conflicting interests find their respective representation, or in any event can make their political power felt, as they cannot upon a court. The resulting compromises so arrived at are likely to achieve stability, and to be acquiesced, which is justice. But it is a mistake to suppose that courts are never called upon to make similar choices: i.e., to appraise and balance the value of opposed interests and to enforce their preference…Besides, even though we had more scruples than we do, we have here a legislative warrant…and by so doing have delegated to the courts the duty of fixing the standard of each case.”

Because of the “sympathetic imagination” and the deep understanding of interpretations, Judge Hand could make an evaluation of judges. Many classical decisions were followed by the later judges. Hand Formula was one of them.

Frank admired Judge Hand very much.

In a nutshell, based on the analyses above, considering the different period thought of Frank, one could conclude that there were some differences between Frank’s early thought and later thought. Frank preferred the attitudes of critics of Justice Holmes in his early thought. On the other hand, Frank tended to become more peaceful and tolerant of Judge Hand when he got older. However, there was much in common in his

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1. Cabell lv. Markham, 148, F2d, 737-739.
3. it is created in United States v. Carroll Towing Co. 159 F.2d 169. Judge Hand proposed an algebraic formula to determine if the standard of care has been met. It explained in this way: Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner’s duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called \( P \), the injury, \( L \); and the burden, \( B \); liability depends upon whether \( B \) is less than \( L \) multiplied by \( P \): i.e., whether \( B < PL \).
criteria for judges: the criticism of formal logic; to pursue flexibility in applying statutes to cases; to defend the judges’ discretion and encouragement to be creative in making decisions; to pursue the substantial justice and be sympathetic to the human life; and judges’ virtues and elegant diction while making decisions.
Chapter 3 Modern Mind

There is no doubt that Frank and his academic thoughts have been a hot topic in the study of American legal realism until today. Although some fierce criticisms take Frank as a member of deconstruction or the post-modern skepticism, believing that one might misunderstand the core of Frank, some objective research by rereading Frank’s works and digging for the meaning of modern mind are still on the way. Professor Charles L. Barzun is one of them. In Jerome and the Law and the Modern Mind, Barzun tried to demonstrate “Frank's contribution to this intellectual tradition may be more justly appreciated.” In Barzun's opinion, “what he was articulating was essentially a normative theory of adjudication based on a substantive set of moral and intellectual virtues.” (Charles L. Barzun, 2010: 1130-1131). Frank’s modern mind, which sometimes was expressed from a scientific perspective, did not deny the role of reasons on trial; rather, what Frank was concerned about was now to figure out the role emotions played in the judicial process, by using the methods of psychoanalysis. Moreover, Frank claimed that judges should take the subjective factors and their influence on decisions seriously when they were to make a decision. Meanwhile, for the purpose of judicial reformations and realizing the substantial justice, the judges were appealed to keep wise, cautious, brave, responsible, and a zealousness for life in mind and put these virtues into practice, refusing a blind obedience to precedents. In all, Frank should be treated as a virtue theorist, rather than a scientific naturalist or pragmatist. Frankly speaking, Barzun offered a persuasive explanation for Frank and his mind. However, it is a pity that Barzun was constrained by the field of judicial theories, and he did not conduct further research on the essential reason for Frank’s
philosophical ground, the true motions to critics to the traditional legal theories or the causal relationships between platonism and determinism hinted between the lines. In additions, Barzun did not respond to Frank’s contribution to the democratic theory, which was proposed by Edward A. Purcell. (Edward A. Purcell, 1973) Therefore, series of questions come one after another, including how to understand Frank’s insistence on virtue judicial theories that reject natural science, but introduce psychoanalysis? Can one take it as a mediation of the criticisms of traditional legal theories and the scientific methods used by the legal research? In this chapter, taking the access of virtue theories, this dissertation author tried to discover the meaning and nature of the relationships Frank implies between science and the law. Furthermore, the author of this dissertation tried to express herein what Frank worried about: the possibility that totalitarianism might destroy democracy and the law.

In this chapter, the author organized the material presented as follows: first, the writer demonstrated the background of "Modern Mind" in Frank’s work and the criticisms of science; the author discussed in the contexts, strategy and the contributions to the judicial systems of "Modern Mind"; last, the author commented on the "Modern Mind".

3.1 The Theoretic Premises of Modern Mind

At the very beginning, what should be clear is that Frank was a Libertarian, whose political stance would benefit from his early experience of studying. Charles Merriam, who once was made an assistant to the foundation of the Progressive Party of Illinois, had credited his ideas of social reformation to Frank. In Merriam’s opinion, “these reforms could not operate automatically but depended on unreliable human beings for
their administration.” That meant social reformations would always be in a battle of self-reflection and self-doubt. On the other hand, Merriam believed that the studies of experience and the psychological research method were the right directions in social reformation. (Robert J. Glennon, 1985:16-18) Frank’s tutor was a good example for him, and that is the reason why Frank kept zealous of public service throughout his life. (David L. Sills, 1962:548-550) Frank lived at the time of the Progressive Era and the two World Wars, when most of changes of socials, politics, and economics could be explained as a challenge, and critics of liberalism, which was considered the cornerstone of America. To be specific, in economics, it meant that monopoly capitalism replaced state capitalism with laissez-faire capitalism. In the political arena, nationalism, which was espoused by President Theodore Roosevelt, tried to enhance the Federal government to protect society from the threats of monopoly capitalism, but at the cost of infringing on people’s civil rights. Members of the weak societal classes tried to protect their interests by striking for municipal reformation. Meanwhile, the country paid attention to the totalitarianism coming from Europe. (Richard Hofstadter, 1985)

Naturally, in Frank’s libertarian view, he had a responsibility to defend the philosophic foundations of liberalism, to build up a liberal legal reasoning, and to protect the liberalism in the daily legal and political practice. As Glennon once said, “Jerome Frank’s career, particularly in his effort to make law humane without disturbing its essential structure, provides a case study of the strengths and weaknesses of American liberalism.” (Glennon Robert J, 1985: 1)

Modern Mind is an abstract expression of that liberalism. However, the direct cause of this item is the impact of science on social science. After the middle of the 19th century, when the Civil War was over, with industrial production technology being
widely used, modern science had been changing various aspects of American society. Not only did it produce great social material wealth and promote the continuous progress of human civilization, but also made a strong impact on the traditional areas of knowledge, which could not obtain legitimacy as new and modern subjects without the foundation of "science." At that time, a modern physics foundation was strengthened by Albert Einstein’s theory of relativity and Max Planck and Niels Bohr’s quantum mechanics, traditional physics, which was based on the three laws of Newton. Even more, the waves of reform also resonated in social society research. The method of quantum mechanics, which emphasized experience, test, and inductive method rather than logical deduction and dogma (Cf. Davis, 1931:3), was introduced to social society, and the legitimate foundations of social society research were replaced by scientism. (Kalman, Laura, 1986: 14-16) The natural sciences, including chemistry and astronomy, became independent disciplines due to their use of the scientific method and being the object of studies. Law seemed to be no exception. “It became the mode that law should be made scientific” (Anthony D’Amato, 2008:102). Early in the 1910s, Roscoe Pound, the Dean of Harvard Law School, actively appealed for the introduction of scientific method into the sociology of law. Pound suggested that the validity of legal norms should become the standard of law. Pound tried to make jurisprudence scientific for the purpose of social control through the law (Roscoe Pound, 1912).

Frank complimented the achievements, goals, and approaches of modern science. Frank affirmed, “The purpose of eighteenth-century science was to observe and understand and control the actual. It was progressive, reconstructive, restless, and manipulative. It was adventurous, incessantly curious.” (Jerome Frank, 1912:108).

While remaining optimistic about science and its influence, Frank remained anxious, yet
vigilant regarding the possibility of negative influences on science. Could the vitality of science and its purpose be sustainable? The answer may be no. In Frank's opinion, modern science had two fatal wounds.

First, platonism, hidden in the core of modern science, pursued eternal truth. In Frank’s opinion, Plato followed the prototype of modern science, such as atomic theory -- in ancient Greek -- relativity, and pragmatism. “Plato, in his youth, was taught and was greatly impressed by the views of the earlier scientific-minded Greek thinkers. From their teachings he became acquainted with doctrines which would now sound modern, for the atomic theory, relativity and pragmatism then had their beginnings.” (Jerome Frank, 1912: 109, 110). However, it was a pity that Plato “did not help to foster those beginnings. On the contrary he was the great leader of the reaction” because Plato was against the earlier scientific-minded Greek thinkers, who were open-minded about the real world, but insisted on idealism.

The reason why modern science could obtain its achievements, to Frank, was because modern science inherited the ideas of earlier scientific-minded Greek thinkers and practiced them in the real world. But, according to idealism, sensible things, “are ever-changing, ever in flux, that there are no absolutes, and that all standards are relative.” Therefore, the sensible world was not real; it was secondary and subordinate to the universals, “which are Eternal, True and Real”. (Jerome Frank, 1912: 109, 110). In other words, once modern science abandoned the ideas of earlier scientific-minded Greek thinkers, but turned to the direction of idealism of platonism, it was inclined to be far away from the scientific method of observation, and became lost in the studies of abstractive idealism, and finally ruined the modern civil achievements we had.
Second, in the process of platonists seeking the absolute truth, that seeking itself constrained the desires and impulses of the explorers from exploring the unknown world, and, because of the blind worship of scientific rationality, believed that mathematical reason "could work out flawless solutions of every problem arising from the multitude of factual occurrences" (Jerome Frank, 1912: 109). As time went by, evil consequences occurred. The mathematical rationality would gradually become an unshakable authority, leading to a new absolutism in the scientific community.

Therefore, for Frank, returning to the original "scientific mind" became the most important task. Frank was particularly interested in mathematical rationality. Frank also admitted that “mathematical reasoning was being used as an aid to bold conjectures, as a method of checking up on impudent guesses about nature. Mathematics did not hamper, it aided creative work in physics and chemistry. It did not impede inquiry into the happenings of actual, concrete events.” Consequently, “the purpose of eighteenth-century science was to observe and understand and control the actual. It was progressive, reconstructive, restless, and manipulative. It was adventurous, incessantly curious.” In other words, it showed that Frank was not the person, as some scholars criticized, who completely denied the validities of reason and tended to the extreme deconstruction. (Anthony D’Amato, 2009; Eric Engle, 2008).

Modern science had become an important basis on which legal knowledge justified itself. However, regardless of the problems modern science had, for Frank, the transformation that scientific research gave to the study of law was quite doubtful.

It is harmful to abuse modern scientific terms when one is only half acquainted with their true meanings. “The purpose of the “inductive science of law” was to climb,
by the same Jacob’s ladder as Plato had used, to certainty. Like Plato, the further the legal philosopher of the nineteenth century was from facts, the nearer he thought himself to truth.” (Jerome Frank, 1912: 110).

Second, lawyers, who were essentially conservative, rather than paying attention to what the law was, got drunk on platonism for its abstract and eternal idealism. “[T]he jargon of the nineteenth-century philosophy of science was taken over by the lawyers, not in the interest of aiding an open-minded observation of what law is, but to support once again the worship of an “invisible law” consisting of vague jurally rules which are vastly superior to specific decisions, such decisions being governed by, or mere evidence of, those ultimate legal truths which constitute the real and true law.” (Jerome Frank, 1912: 112)

What’s more, although mathematical reason itself was far from good or bad, once it was manipulated by lawyers, it was probable that a new absolutism would emerge. “The emphasis in legal science was the exact reverse of that in natural science: It was not an observation of the particular but on the attainment of universals which were above and independent of experience. Not novelty, but fixity, was the goal. Certainly, stability, rigidity was to be procured by reason. And this was to be accomplished through the over lordship of arid abstractions. With the lawyers, the reign of Reason became a new Absolutism.” “But whatever of authoritarianism remains in the language of scientific philosophy, the philosophy of law will make the most of it.”(Jerome Frank, 1912: 111)

Moreover, Frank worried about derivatives of legal fundamentalism, including legal verbalism and scholasticism. Legal fundamentalism, which was sometimes called legal absolutism or Bealism, declared that “every political society … must have only one law. It is impossible that a single event should be followed by two contradictory
consequences”. In other words, “Beale means that what actually and irremediably happens in existing concrete cases is impossible in the world of law-by-definition.”

Verbalism and scholasticism shared similar attitudes with legal fundamentalism. In Frank’s opinion, these doctrines believed there were only truths, and formal logic was the best expression of absolute truth. There was a high risk for them to fall into a spiral of totalitarianism. Such situations not only existed for lawyers who were blindly obedient to science, even “one of the ablest critics of legal Platonism”, “a man singularly free of the vicious tendencies of that tradition,” Professor Walter Wheeler Cook, also mistakenly believed that “the way out of the legal Dark Ages is through acquainting law students with the logic of the natural sciences......we shall have lawyers with a scientific habit of thought, and then the artificialities of judicial thinking will gradually disappear.” (Jerome Frank, 1912: 111) “[t]he constant effort to achieve a stable equilibrium, resembling sleep, is regressive, infantile, and immature.” (Jerome Frank, 1912: 178)

3.2 The Context and Strategy of Modern Mind

After analyzing the influence of platonism on modern science and the drawbacks of transforming modern science into a legal discipline, Frank made the most stinging criticism of modern science. Frank denied that people should completely put their beliefs in modern science. First, from a psychological perspective, there were resemblances between natural science and children when they faced certainty. That meant both of them were afraid to face up to uncertainty and insecurity. Second, “[t]o expose the futility of the notion of a ‘legal science’, it is important to show that the idea
of a ‘social science’ has, itself, been a will-o’-wisp.” This meant that social science and natural science had equal status in the knowledge system, and it was not necessary for social science to follow natural science. (Jerome Frank, 1945: 209) What’s more, since “[n]o such ‘social physics’ has as yet developed, nor has a ‘social science’ modelled on biology” (Jerome Frank, 1945: 210) Third, once people took the law as technology, it tended to become “‘social engineering’ and invited the treatment of human beings as non-human entities, parts of, or materials to be used by, a machine; and ‘legal engineering’ encourages ‘mechanical jurisprudence.” (Jerome Frank, 1945: 217) In that situation, totalitarianism might have come out again. Therefore, Frank had to trace the traditions of Greek philosophies and find out what they essentially meant after science.

Based on the fact that “practice of the sciences has usually been in advance of the contemporary philosophy of science”, Frank suggested that one should surpass the modern science and meet the challenges of the world through the modern mind, which was much open to the real world. The reason why modern mind was better than modern science was that the modern mind was adult-thought, which “involves an abandonment of the spirit of the child which demands a guaranteed, certainty-insured world.” This kind of thought-in-adult, as Piaget stated, was “a change in the general trend of his mind”, which was caused by “the growth of consciousness of self which depends in turn largely on the liberation from the bonds that tie him to his father.” “If any lawyer can measurably prevent himself from making that substitution [fatherly authority], this thinking about law will become realistic, experimental-adult.” (Jerome Frank, 1930:106)

However, what is the exact meaning of modern mind? Frank, in his usual argumentative style, did not give a clear definition, rather he described the modern mind
from two levels. The first level was “[w]hile lawyers would do well, to be sure, to learn scientific logic from the expositors of scientific method, it is far more important that they catch the spirit of the creative scientist, which yearns not for safety but risk, not for certainty but adventure, which thrives on experimentation, invention and novelty and not on nostalgia for the absolute, which devotes itself to new ways of manipulating protean particulars and not to the quest of undeviating universals.” (Jerome Frank, 1912: 111-113) The second level was “[t]hat spirit entails the discipline of suspended judgment; the rigorous weighing of all the evidence; a consideration of all possible theories; the questioning of the plausible, of the respectably accepted and seemingly self-evident; a serene passion for verification; what I would call ‘constructive skepticism’.” (Jerome Frank, 1945:219) These two levels of descriptions of “modern mind” came from a special understanding of law which took the law as art: “[s]o we should admit that all government, and court-house government in particular, is not and can never be a science, that it is and ever will be an art—and a difficult one.” (Jerome Frank, 1945:221) From a perspective of platonism, one should overcome the emotional influence of the process of cognitive activities. If people continued in this way, Frank believed that we could not get to the truth, which was why Frank tried to restore the importance of emotions in human activities. The understanding of human behavior cannot be separated from the rigors of scientists or the sensitivity of poets. Frank suggested that people could cultivate the modern mind through several steps.

On methodology, Frank particularly emphasized the experimental approach, which would be peculiarly serviceable in law, “[F]or the practice of law is a series of experiments, of adventures in the adjusting of human relations and the compromising of human conflicts. The paradox is that where this approach is most needed it is all too
frequently repudiated. In one sense it is constantly in use, for the daily job of the lawyers would fail without it. But while we lawyers use it, we discount it. We do our job with an unfortunate unconsciousness of the nature of that job or of the technique we employ. For the practical work in which we are engaged is at variance with the illusory ideals we strive, at the same time, fruitlessly to serve.” (Jerome Frank, 1912: 111-113)

On epistemology, as Barzun pointed out, modern mind was an emotional capacity that “scientific character to questions as to what the law ought to be,” rather than an analytical skill. (Charles Barzun, 2010:1160-1161) Once judges could be “‘with a touch in them of the qualities which make poets,’ who will administer justice as an art.” (Jerome Frank, 1930: 168; Morris Cohen, 1967:188) For this purpose, one should “encourage, not to discountenance, imagination, intuition, and insight.” (Jerome Frank, 1930: 169; Graham Wallas, 1921:194) Frank took this capacity as a wakeful and vital kind of maturity, which had “[t]he acceptance of everything as transitory, the welcome of new doubts, and the keen interest in probing into the usual, the zest of adventure in investigating the conventional—these are life-cherishing attitudes.” (Jerome Frank, 1912: 178) That is to say, in Frank’s opinion, the modern mind had an insight and deep understanding of life and an independent introspection of tradition. Furthermore, the core of the modern mind, in practice, was the judge. Frank found two excellent examples in the real world: Justice Holmes and Judge Hand. The creativity of these two judges was not easy to follow, for it needed much more encourage, sympathy, and a deep understanding of laws and life.

In practice, modern mind promoted judicial reformation. Provided we agreed with the opinion that the formal logics were the correspondence with the static society, we
needed much more courage and adventure to a changing society if we try to keep pace with the developments of civilizations and technologies. This was the key to understanding Frank’s experience and legal thoughts. If people just put their heads in the sand and maintained a poker face to the abundant changing in the real world with out-of-date legal thoughts and formal logic, surely the function of law as the social pressure-reducing valve would be hurt and, in the long run, the law and the legal community would run in the opposite direction from justice. That was why Frank distinguished “science” from “science spirit” (modern mind), and why he developed “constructive skepticism.”

One could take the modern mind as a kind of humanistic concern. Since industrial society brought huge social problems to ordinary life and the single person in society seemed to be treated as the person who held society together, Frank tried to revoke the respect of the human being in legal theory.

Last but not least, one could take the modern mind as an attempt at a unified American jurisprudence. The American national strengths were enhanced year after year at the beginning of the 20th century, and pragmatism, the native philosophy of America, was on the rise. In the realm of American jurisprudence, legal reasoning theory followed the civil law traditions, and those precedents followed the New England colonies or even England. These external influences continued. However, modern mind emphasized the importance of daily experience, defended democracy in America, and attempted to awaken the judicial attention to what America was rather than what foreigners said hundreds of centuries and miles ago. Weighing in on this point, Frank built up American style jurisprudence.
3.3. Comments on the modern mind of Jerome Frank

Barzun gives sympathy and understanding of Frank and his modern mind. Barzun labels Frank’s theory as the virtue theories. In his opinion, the most important contribution Frank had made is developing the normal theories and expanding them. Throughout the demonstrations above, one may say Barzun’s researches and conclusions are illuminating, for some unique features he has discovered from modern mind for us. Above all, it is believed that the judges should keep zeal for their lives and sensitive to the unknown world. “Adventure”, one of the frequent words Frank likes to use, of course, would cause lots of questions if we just treat it without any context. However, if one puts it in Frank’s context that full of rivals between traditions and modern, we will find out that “adventure” has the positive meanings: to love your lives, and to question anything unreasonable in legal reasoning. In other words, there are many acceptable virtues in this word: encourage challenging the dogmas, love your life, responsibility for the failure and risks and individual introspection into the defects of ourselves. Therefore, to some extent, it is acceptable that we take Frank as a virtue theorist. If one looks deep into Frank and his theories, we will find that he is not the one who takes the psychoanalysis as the main tools as some criticisms to him. On the contrary, Frank suggested the judges to take the psychoanalysis as an effective tool when they do individual introspection. That is the key that we could take the zeal for science and alert to the violation from science in Frank’s theory as an integrity. In additions, it could be seen as Frank’s ambiguous attitudes of pragmatist. On one hand, Frank shared the rejecting attitudes to the metaphysics with the other pragmatists. For example, Frank was concerned with how the judicial system works effectively to respond to the challenge from society and politics. On the other hand, Frank went across
the fact-value dichotomy by himself and emphasized meanings in the normal action, abandoning the value-free belief.

One could get a better understanding if one turns back to Frank’s. It is obvious that Frank sometimes blurred the differences between politics and law, for his multiple identities of the real world. Since Frank’s understanding and consent on Aristotle’s expression of rule of law, one might conclude that Frank put much attention on the human factors, which, in his mind, play an active supplement to the rule of law. (Jerome Frank, 1930:407) However, Frank’s romanticism was contrary to American mainstream culture of the 1950s. “The 1950s search for ‘neutral principles’ was just one more effort to separate law and politics in American culture, one more expression of the persistent yearning to find an olympian position from which to objectively cushion the terrors of social choice.” (Morton J Horwitz, 1992: 271) The conservative characteristics of lawyers decided that from the legal community’s perspective, the law is procedural and neutral. After all, in the absent of a supreme authority, the character of law, procedural and neutral, is the only way to bridge the value gaps in a pluralistic society. Hence, Frank’s violating of fact-value dichotomy incurs lots of criticism and misunderstanding, and his theories could not be accepted by the mainstream American legal communities.

Furthermore, after demonstrating the contents and logics of modern mind, Frank put forward, one regrets to find out that there are several unexplained logical flaws in "modern mind," as well.

First, Frank attacked the supremacy of platonic idealism. At the same time, Frank himself fell into the morass of the supremacy of the modern mind idealism. Frank criticized that platonism placed the absolute truth beyond the sensible world; however, Frank, himself, had fallen into the same logic cycle. Taking the same approach, Frank
placed the characteristics of the sensible world, such as no absolutes, ever-changing, ever in flux, and relativity, on a permanent level. So Frank made it hard to justify himself, and had to use some vague and ambiguous words in some basic propositions. For instance, when Frank explained "what the law is", he describe the features rather than the essence of it, “instead, I shall speak, (1)of what courts actually do, (2)of what they are supposed to do, (3)of whether they do what they’re supposed to do, and (4)of whether they should do what they’re supposed to do.” (Jerome Frank, 1949:6)

Second, Frank stressed the observation of a sensible world, but at the same time, turned a blind eye to the rigid legal needs of the community. On the function of the law theory, the author pointed out that the predicted function of the law was not the only function. For the majority of people, law also had guidance functions and evaluation functions. (Chen Rui, 2011:124, 125) To some extent, perhaps this was a result of Frank confusing the difference between the objective existence of the law and legal study.

What’s more, Frank wrongly exaggerated the characteristics of trial-and-error methods in scientific research, and tried to completely graft it into the study of law. Scientific research did have an open trial-and-error characteristic. However, the purpose of trial-and-error in scientific research was to deepen the cognition of the law of nature, in order to take the necessary scientific activities. In Frank’s discourse, we regret that Frank’s understanding seems to be an objective understanding of the things that the law is exactly the same as in the pursuit of absolute truth, and completely excluded the purpose of scientific research.

Finally, Frank ignored the rigorous and pragmatic spirit in scientific research and the rigorous conditions to reach the scientific truth, but blindly exaggerated the bold hypothesis of the spirit of exploration in scientific research. As common sense, one
knows that the condition of the establishment of scientific truth is extremely harsh. For example, Newton's theorem applies to the macro world, and the same time, a series of theorems of quantum mechanics is applicable to the microscopic world. Of course, bound by the professional background and scientific knowledge, one cannot ask Frank as a jurist, who was versed in all scientific theories. But from Frank’s very romanticism diction, one has reason to believe that in unfamiliar disciplines, humility is necessary. Besides, from Frank’s perspective, what was different from his ideal judges to the “philosopher kings” of Plato? Is it possible that what Frank criticized would rebirth in the name of “good judges”?

3.4. Conclusion

It is easy to find that the vulnerability of logic and content is in the view of Frank’s "law and modern mind." The impact and less self-consistency in Frank’s theory inevitably lead to both Frank and his theory only as a momentary flash in the pan of American law. In the meantime, one should show one’s respect to this thinker who, to some extent, proposed and conducted a trial-and-error courageously. After all, this illustrates that in legal science, at least, some of the core concepts still have the characteristics of continuity, stability and conservatism. In a deeper sense, one can also see a legal theory system as a whole plays a positive testing of simulative factors in social science.

Theoretically speaking, Frank made a bold attempt to create an interdisciplinary that based on jurisprudence and psychology. His challenge to broaden the boundaries of traditional discipline had encouraged and enlightened the followers in American legal history.
After Frank and legal realism, a series of related research in this field as a theme of ‘Law and Society’ such as law and literature, law and gender, law and economy, could be regarded as the continuity of spirits of Frank’s idea of a "modern mind."

The legal continuity, stability, and conservative features of law have been tested, and have enlightened people so as to recognize that the experimental methods of scientific research, trial-and-error, may be introduced to the practice of law. Frank was an advocate of the American clinical legal education.
Chapter 4 Constructive Skepticism

If one takes the modern mind as the core of Frank’s thoughts, then constructive skepticism is the framework expression of Frank and his legal realism. This judgment is based on several reasons. First, it is well restored from Frank’s original expressions in his works, such as *Law and the Modern Mind, Fate and Freedom* and *Courts on Trial*. Frank took his theory of constructive skepticism and cited it several times in his papers and theses. Constructive skepticism is a systematic expression of Frank’s theories, rather than a contemporary or static label. Meanwhile, it is easier to build up a theoretical framework through this concept. Frank emphasized that reformation is his core mission for his legal practice and legal theories. That means the modern mind only could be built up by a systematic framework, where the theories could work directly to the practice. Here, the constitutional skepticism is the bridge connecting theories and the practice in Frank’s philosophical systems. This constitutional skepticism is composed of Frank’s absolute truth skepticism, absolute causality skepticism, and fact-skepticism. In other words, it could be seen as the philosophical expression of modern mind. One could understand why the iconoclast and the pragmatist, two dimensions of Frank in many scholars’ eyes, are united. From this perspective, one might say the constitutional skepticism is not only the challenger to the traditional dogmatism, but also the positive pioneer in legal reformations. At last, the academic label should be in according with the academic contexts. In this dissertation author’s opinion, the wrong label on Frank is probably leading to some misunderstanding of Frank and his thoughts. Therefore, it is necessary to clarify the label on Frank before giving Frank a precise academic location.

Based on such judgments, in this chapter, the author attempted to point out that
“constructive skepticism,” which includes absolute truth skepticism, absolute causality skepticism, and fact-skepticism, is systematic and mature rather than fragmentary and temporary in Frank’s legal philosophy.

4.1 Background of constructive skepticism

It is well known that the United States was established on the basis of freedom and democracy. Unfortunately, though, Frank worked mainly from the 1930s to the 1950s, when absolutism, the sworn enemy of liberalism, prevailed world-wide and impacted the founding faiths of the U.S. (Morton J. Horwitz, 1992: 193-199). So, as to Frank, the core proposition of his political and legal thoughts, with all his force, was to keep American society and the people away from absolutism. This went throughout Frank’s writings. For example, in his book, Law and the Modern Mind, Frank said, “I felt that, in a democracy, the citizens have the right to know the truth about all parts of their government, and because, without public knowledge of the realities of court-house doings, essential reforms of those doings will not soon arrive…. Man can invent no better way to balk any of his ideals than the delusion that they have already been his ideals than the delusion that they have already been achieved. If we really cherish our ideals of democratic justice, we must not be content with merely mouthing them.”(Jerome Frank, 1930: xxxi, xlii). In Fate and Freedom, a Philosophy for Free Americans, which mainly represented Frank’s political ideas, he emphasized again, “I am not a philosopher but an ordinary person humbly reflecting on some of man’s major problems. A more correct sub-title would be this, “Some materials for and some gropings toward a philosophy for Americans who believe in freedom.” (Jerome Frank, 1945: vi). In Courts On Trial, Myth and Reality In American Justice, which concentrated on Frank’s his legal thoughts of his
Chapter 4 Constructive Skepticism

later years, Frank kept on emphasizing the importance of democracy. Frank affirmed, “I am- I make no secret of it- a reformer, one of those persons who (to quote Shaw) ‘will not take evil good-naturedly.’…I repeat, that, in a democracy, it can ever be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children, who are unable to accept the inescapable shortcomings of man-made institutions…. It is the essence of democracy that the citizens are entitled to know what all their public servants, judges included, are doing, and how well they are doing it.” (Jerome Frank, 1949: 2)

Rather than keeping silent or conniving on potential dangers to absolutism, which did exist in judicial authority, Frank decided to “provoke constructive skepticism,” in order to “arouse you, to call attention to some court-house government activities which are less adequately performed than they could be, largely because they have been too little publicly discussed.” The approach Frank used was modest, which meant discoveries and reforms, but not negative or radical. Frank explained constructive skepticism in the Preface to Sixth Printing of his book, Law and the Modern Mind,. Originally, it was intended to substitute the label “fact-skepticism” for “rule-skepticism.” In Frank’s opinion, the “realism” in philosophic discourse, “has an accepted meaning wholly unrelated to the views of the so-called “legal realists”, and “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.” (Jerome Frank, 1930: xxii). That meant that “constructive skeptics” and “constructive skepticism” may be the better choice than “legal realists” to explain the substance of “legal realists”. (Jerome Frank, 1930: xxii). Although, Frank’s proposal received no responses from his colleagues, it showed more clearly and accurately the
attitudes and substances of Frank’s theories. Therefore, one could call Frank’s theories constructive skepticism.

Constructive skeptics adhere to three concepts: “absolute truth skepticism,” “fact-skepticism,” and “absolute causality skepticism.” Among them, “absolute truth skepticism” constitutes the main idea of Frank’s legal thought system.

4.2 Absolute Truth Skepticism

Walter E. Volkomer pointed out that the core theme which carried through Frank’s works was that of skepticism, and he denied the validity of all creeds which claimed to be the absolute truth. (Walter E. Volkomer, 1970: 207). Suspicion and denial of absolute truth constituted the core of Frank’s constructive skepticism, and became the premise of the establishment of “fact-skepticism.” However, because the words Frank used were abstract and obscure, these viewpoints were often associated with Frank’s critics on platonism, the logical thinking was metaphysical, and Frank’s attitude of absolute truth skepticism was hard to understand and, therefore, misunderstood by American traditional jurisprudence. So it was usually submerged under the heading of fact-skepticism.

Frank’s criticisms and doubt of the absolute truth began with a critique of modern science. Frank suggested that, with the industrial production technology extensively being used, modern science had been altering several aspects of American society. Not only did it produce great social material wealth and set up a continuous progress of human civilization, but it also made a huge influence on traditional areas of knowledge, which could not get the legitimacy as a new and modern subject without the foundation of “science.” Law seemed to be no exception. “It became the mode that law should be made scientific.” (Jerome Frank, 1930: 102). In spite of remaining optimistic about
science and its influence, Frank retained the anxiety and high degree of caution about the possibility of negative influences of science.

First, platonism, hidden in the core of modern science, pursued the eternal truths. Frank suggested that Plato followed the origin of modern science. To illustrate the atomic theory in ancient Greeks, relativity, and pragmatism, “Plato, in his youth, was taught and was greatly impressed by the views of the earlier scientific-minded Greek thinkers. From their teachings he became acquainted with doctrines which would now sound modern, for the atomic theory, relativity and pragmatism then had their beginnings.” However, it was with regret that Plato “did not help to foster those beginnings. On the contrary, he was the great leader of the reaction.” (Jerome Frank, 1930: 106). It was because Plato rejected the earlier scientific-minded Greek thinkers, who took an open-mind to the real world instead of insisting on the idealism.

To Frank, the reason why modern science could obtain its achievements was because it accepted the ideas of earlier scientific-minded Greek thinkers’ and operated it in the real world. However, according to idealism, sensible things “are ever-changing, ever in flux, that there is no absolute, and that all standards are relative.” Therefore, the sensible world is not real, while it is also secondary and subordinate to the universals, “which are Eternal, True and Real” (Jerome Frank, 1930: 106, 107). In other words, once modern science abandoned the ideas of earlier scientific-minded Greek thinkers, but held to the direction of idealism of platonism, it was inclined to be far away from the scientific method of observations, and was lost in the studies of abstractive idealisms, and finally ruined the achievement we gained.

Second, in the process of platonists seeking for the absolute truth, the seeking process constrained the desires and impulses of the explorers from the exploring the
unknown world. Because of the blind worship of scientific rationality, the mathematical reason “could work out flawless solutions of every problem arising from the multitude of factual occurrences.” (Jerome Frank, 1930: 106, 107). As time went by, negative consequences occurred. The mathematical rationality would gradually become an unshakable authority, leading to a new absolutism in scientific community.

Third, the lawyers, who were essentially conservative, rather than paying attention to the observation of what the law was, got drunk on platonism for the abstract and eternal idealism. “[T]he jargon of the nineteenth-century philosophy of science was taken over by the lawyers, not in the interest of aiding an open-minded observation of what law is, but to support once again the worship of an “invisible law” consisting of vague jurally rules which are vastly superior to specific decisions, such decisions being governed by, or mere evidence of, those ultimate legal truths which constitute the real and true law.” (Jerome Frank, 1930: 112)

What's more, although mathematical reason itself was far from good or bad, once it was manipulated by the lawyers, it was probable that a new absolutism would emerge. “The emphasis in legal science was the exact reverse of that in natural science. It was not on observation of the particular but on the attainment of universals which were above and independent of experience. Not novelty, but fixity, was the goal. Certainly, stability, rigidity was to be procured by reason. And this was to be accomplished through the over lordship of arid abstractions. With the lawyers, the reign of Reason became a new Absolutism.”“But whatever of authoritarianism remains in the language of scientific philosophy, the philosophy of law will make the most of it.”(Jerome Frank, 1930: 111).

In addition, because of traditions of the common law, legal activities were basically
dominated by lawyers. That meant that the lawyers would not disclose the real operation of the law to non-lawyers. Therefore, in Frank’s opinion, constructive skepticism would challenge the monopoly status of the lawyers who operated on the truth of law (Jerome Frank, 1930: 2).

4.3 Absolute Causality Skepticism

After criticizing the absolute truth, Frank turned his criticisms to absolute causality. Questioning absolute causality originated from the criticisms and doubts of inevitabilism. To Frank, free will was the metaphysical expression of human freedom, but for a long time, free will was strangely used to express inevitabilism, which had the opposite meaning. In Frank’s opinion, behind this misrepresentation, human cognitive abilities were implicitly questioned. That was “believe that man has a will separate and apart from his intelligence and emotions, or that human beings escape from a regime of complete determinism while everything else in the universe is governed at every point by inflexible laws, or that any man is ever free to act wholly as he pleases, regardless of circumstances.” (Jerome Frank, 1930: 145).

This limitation was known as determinism in philosophy. In this view, “nature exhibits loopholes in its uniformity and inflexibility of which man can avail himself; that men at times face real and not illusory choices.” (Jerome Frank, 1930: 145). To a large extent, it limited human beings to the pursuit of happiness by using their intelligence and the ability to change their fate.

However, one could change this situation. One could manifest “determination,” as distinguished from “determinism.” “[T]he point is that those who disbelieve in determinism believe that human purposes, guided by human intelligence, “have a
chance”, that in the universe there is sufficient contingency-chance-to make some human freedom possible.” (Jerome Frank, 1930: 145, 146). This limitation on philosophy also reflected in the cognitive process of law, and these showed a positive correlation. If absolute causality was established in philosophy, then it was also established in law and practice. So, if it could be proven that absolute causality was not established in philosophy, it also applied to the situation in law beyond questioned.

Freedom was everything for Frank. When there were conflicts between freedom and determinism, the latter must gave way to the former. That meant that absolute causality in legal had to make a concession to free. Hence, the term “absolute causality skepticism” played a role in transition from absolute truth skepticism to fact-skepticism.

Then, Frank proved as follows. “The controversy about free will-really a controversy about the character of the universe-is probably as old as man.” While, “[w]ith the triumphs of modern science, the anti-free-willists, the determinists, seemed in the nineteenth century to have the better of the argument.” (Jerome Frank, 1930: 157). The achievements of modern science in the 19th century had proved the existence of ultimate laws of nature behind the natural phenomena. However, quoting the results of quantum mechanics in the 20th century, Frank claimed that even the most authoritative quantum mechanics physicists, such as Planck and Heisenberg, admitted the law of nature was statistical.

“Statistical laws relating to non-living matter…resemble those unreliable statistical laws relating to human groups. A slight and unpredictable change in the conduct of one or a few of the individual particles composing some physical “systems” can bring about a substantial change in the average mass habits of all the particles in such systems; a statistical law as to such systems is therefore not reliable….that is, it cannot be said with
assurance that they are such that one who knew all the conditions existing at any moment, could infallibly tell what would happen the next moment; the “self-evidence” of causality has evaporated; the dogma of causality is no longer a necessary assumption for the physicist, and he might perhaps be better off, if he adopted as his basic assumption the principle that all events are not necessarily determined.” (Jerome Frank, 1930: 157).

Absolute causality was not established in philosophy, then, absolute causality in law could not be proved. Then Frank turned his eyes to the legal practice. “For practical life…the chance of salvation is enough. No fact in human nature is more characteristic than its willingness to live on a chance. The existence of chance makes the difference…between a life of which the keynote is resignation and a life of which the keynote is hope.” (Jerome Frank, 1930: 159-160).

### 4.4 Fact-Skepticism

Fact-skepticism began with Frank’s observations on the process of judging. In the trial, with the help of the conclusions of the psychologist, “[T]he process of judging…seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it.” (Jerome Frank, 1930: 108). Then, if judges were human beings, there were also no exception for judges. This means, the logics of traditional justice theories, which could be called as “from the norms to decisions,” following the formal logic of syllogism strictly, were not tenable. “There is no doubt that

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Frank had once made a bitter irony on the traditional view that there had been a blind worship of judges. See more from Jerome Frank, Are Judges Human? Part 1, 80 U. Pa. L. Rev. 17, 1931; Jerome Frank, Are Judges Human? Part 2, 80 U. Pa. L. Rev. 17 1931 80 U. Pa. L. Rev. 233, 1931; CT 146, 147
judicial decisions is as same as other judges, in most of the cases it starts from designed conclusion by reverse inference.” (Jerome Frank, 1930: 109).

Frank also pointed out that when one associated with others and commented on events, emotions would affect one’s judgment on affairs. The same thing occurred on the judges. Not only did the view of political and economic policy of people around them influence judges and the judgments they made, but also the experience of judges’ contact with witnesses, lawyers and litigants, and even the particular preferences or bias of the judges, nasal, cough, or position would affect the result of the trial. (Jerome Frank, 1930: 111; Jerome Frank, 1930: 159-163). Therefore, the different results of judges in a particular case were the differences in the recognition of the facts instead of the differences in legal points of view. From the perspective of cognitive theory, when the judge faced a particular case during a trial, he was also a specific “witness.” Judges must determine that the facts of the case depends on what he heard and saw from the other witness’ statements, positions, and actions in court. Thus, special characteristics, prejudices, and habits of a particular judge were the determining factors in his decision process. Finally, Frank pointed out that, “If judges’ personality is a key factor in the administration of justice, the law might be different as a result of the different personality of judges who hearing a case.” (Jerome Frank, 1930: 111). A judgment was the portrayal of the judge’s whole life experience.

Then, Frank advanced fact-skepticism. Frank believed that legal uncertainty was not only for the uncertainty of the law, but mostly for the uncertainty of facts, which was determined in trials. Differences in the judges’ decisions appeared in similar cases, due to judges having difficulty in deciding the facts of the case. During trials, the judges’ personality and psychological qualities would make differences in determining the facts.
The facts on which a judgment was based were not the facts of what actually happened between parties, but what the judge thought had happened. “A judge who is trying to make a judgment which agrees with to his concept of justice and does not go against the traditional rules, first depends on the fact which he reported as evidence in the case, makes the fact satisfy the traditional rules, thus legalizes his sentence.” (Jerome Frank, 1930: 135). In short, causal factors which related to the judge’s personality and psychology once had been changed, the fact in decisions would follow. According to “fact-skepticism,” Frank summarized the myth and reality in judicial decisions for two different formulas. The myth one was “R (Rule) plus F (Fact) = D (Decision),” but the real one was “S (Stimulus) plus P (Personality) = D(Decision).” Then, since the latter formula was a lack of prediction function, Frank proposed another formula, which was “R (Rule) plus SF (Subjective Fact) = D(decision)” (Jerome Frank, 1930: 419). Frank believed that the latter formula expressed the characteristics of legal realism clearly, which emphasized the facts which related to the judgment were subjective facts (the fact found by judges and jurors). The actual situation happened in the particular time and place before the first instance was called “objective facts.” Those who expected that judgments depended on objective facts were a “myth” which could not be achieved. On the issue of uncertainty of the facts, Frank maintained the subjective occurred not only to the judges, but also to the witnesses. Frank suggested that the witness not only stated the fact he went through, but were still reporting his judgments of the facts. (Jerome Frank, 1930: 109).

4.5 Conclusion

For individuals and human society, freedom, as well as democracy, not only is the
most basic value of American society, but also the best guarantee for human beings to pursue stability and happiness. Frank made every effort to defend such value as the cornerstones of American society, and stayed highly vigilant in every possible erosion and damage. As the old saying goes, “Absolute power corrupts absolutely.” The power inherently has self-expanding nature in every form and appearance. While the desire to reform, while starting from a goodness point, has risk of degenerating into absolutism of violence, as well. Then, in front of the danger of the erosions of freedom and democracy, one has reason to be vigilant, no exceptions for any system or desires, though they would settle for goodness at the beginning. Remember, “Revolution devours their children.” Therefore, for the tasks of political-law theories, which play a role in the guidance to social practice, it seems that it is better to pay much more attention to guarding against the possible risks, taking note of the possibility of the system degenerating and make perspective predictions and designs for it. Constructive skepticism is just such a theory. It is a theory that could reflect on itself, or, in other words, it is a core political and legal theory for sound social developing. There is no beginning or end in such a theory, while it seems that it would be handed down from generation to generation in the form of a movement. Perhaps, for this reason, in the waves of critical theories and ameliorative movements after legal realism, it seems that one could find a trace of legal realism and a shadow of Frank. This is the reason why Frank and his constructive skepticism should still be remembered by people today. From this perspective, Frank’s intense and acidulous words and radical points of view should be critically understood.
Chapter 5 Criticisms of Judicial Theories and Solutions

It is universally accepted that the judicial process cannot be simply summed up by R (Rule) * F (Fact) = D (Decision). Chinese scholars agree. They declare that “[u]p to this day, nobody can make such conclusion that the legal application is just in the major premise of syllogism.” (Zheng Yongliu, 2004: 140) However, when the judges decide to draft a decision, they prefer to discreetly follow the approach of syllogism. It appears that legal formalism is predominant in the legal community. In the civil law system, scholars tend to take the judicial process as a “circuit to and fro between legal norms and case facts.” (Zheng Yongliu, 2004: 142) In this process, the judges’ mission is to find a rule applicable to the case at hand between the established rules and the facts. It is believed that legal thinking concludes two theoretical premises: 1) The judicial process could and should encompass a rational approach, in which the judges’ task is to apply the law; and 2) The legal system should be so uniform and rigorous that all reality cases could be covered up. In such a legal system, personal characteristics could be excluded as much as possible. Therefore, it is almost a generally-accepted criterion in the legal community. Compared to the Civil Law System, the Case Law System provides a broader and more tolerant space for judicial discretion. However, the legal thinking demonstrated by the Civil Law System, to a great extent, could be applied to the Case Law System. That means, to some extent, that Case law System judges have legislative power. (Zheng Yongliu, 2004: 143-145)

However, Frank took a skeptical and critical attitude to the judicial opinion. Frank’s well-known opinion was that he denied the existence of legal certainty, and believed that legal certainty was nothing, but a basic legal myth. Judges’ personalities
and characteristics, to some extent, are part of a decision. Frank’s opinion was termed fact skepticism, a name which is heavily criticized by the legal community. Even so, according to some scholars, Frank’s radical opinion seems to be accepted and absorbed by the legal practice. Understanding Frank’s judicial opinions is currently a hot topic in jurisprudence. In this chapter, the writer attempted to review Frank’s opinions.

5.1 The critiques and the innovation

Generally speaking, legal realists share a common uncertainty with legal formalism. Some legal realists, for example, rule skeptics, believe that one cannot find a certain rule from the case law system. Big changes in the industrial age made a great challenge for traditional law, from which one cannot find certain precedents or rules to respond. For example, autonomy of will is a fundamental principle of the contract law. That means parties should be bound by the clauses included in the contracts, which then should be signed on an equal and voluntary basis. What is more, the judges should apply these clauses to the parties. However, in the progressive era, abundant administrative laws and regulations put restrictions on labor contracts. So rule skepticism tries to resolve these conflicts. Rule skeptics believe that the certainty of law is doubtful. The only rational standard is an interpretation from social and economic demands, which is labeled as, “Grand Style.”

Frank took the position of understanding and supporting rule skepticism. What is more, Frank critiqued the fact-finding. In Frank’s opinion, the process of fact-finding included the presentation of evidence and testimonial evidence. That meant the subjective inevitably became part of legal fact of action. So, in this sense, one should adopt the legal thinking of witnesses, judges, and the jury as part of legal research,
First, rule skepticism and traditional judicial theory ignore the process of legal facts. Frank’s critique came from his observation of American judicial practice. Frank believed that the pattern of judicial process was quite different from the pattern of legal theory, in which the legal facts are ignored. Although the scholars could declare that the process of “circuit to and fro between legal norms and case facts” (Zheng Yongliu, 2004:143-145) actually does due diligence to the fact factors, in the American judicial system, the function of a trial court is quite different from that of an appellate court. The trial court confirms the legal facts and applies the law. Meanwhile, the appellate court examines the legitimacy of the process, meaning that the fact finding of the trial court is the final decision for a case. However, people usually are unfamiliar with this process, for judges usually do not need to reiterate their process of fact finding. Frank took contract law as an example. No matter if the verbal offer exists or not, the trial court’s decision is the final decision for both parties. (Jerome Frank: 1949:177) In Frank’s opinion, the traditional judicial theories could not explain such cases. There are some self-contradictions in these cases. On one hand, such decisions are procedurally impartial. On the other hand, such decisions cannot realize substantial justice. Once such cases are appealed to the appellate court, what the appellate court can do is to examine the legality of the trial court. Therefore, the most likely outcome is that the appellate court supports the trial court’s opinion. In this situation, most legal scholars, legal fundamentalists, or rule skeptics, focus their attention on the process of examining the application of the law rather than fact finding. The judges trained in law school usually adapt this mechanism and follow it in each case. Frank criticized this, stating that one cannot protect the rights of the parties and the legal fact is a mystery in this
Meanwhile, the transformation of objective reality to legal fact is quite complicated. In an adversarial system, legal facts need to be queried by three links, including the witness giving evidence, the court debate, and the jury’s finding. So, in this process, it probably deviates from what it looks like in reality. Frank not only refuted this opinion philosophically, but also provided evidence of the lack of cognitive competence. The reason was because witnesses usually add their own judgments to the testimonies. So it is quite common for there to be conflicts between the opposing parties. Frank analyzed these phenomena using psychoanalysis: “(1) The witness may erroneously have observed the past event at the time it occurred. (2) But suppose a witness made no error in his original observation of an event. (3) Now we come to the stage where the witness reports in the court-room his present recollection of his original observation.” (Jerome Frank, 1949:17, 18) In addition, court debates might obstruct the process of fact-finding rather than make it clear. The reliability of testimony is the core of the testimony. A brilliant lawyer could probably weaken the reliability by demonstrating the backgrounds and experiences of witnesses. One could learn from the O. J. Simpson murder case. In this case, the criminal lawyers hung onto the misrepresentations made by the police during the investigation and search process, which finally helped to clear Simpson of the criminal charges. (Alan Dershowitz, 2010:37-56) In an adversarial system, the pursuit for winning and maximizing the client’s interest are the only tasks of a lawyer. (Alan Dershowitz, 2010:32) Frank called it a fighting theory. It is hard to realize justice in real life, and its purpose is for winning, rather than attaining higher goals.

The process of “finding” the “facts” is easily influenced by judges’ personal experiences. Based on the results of sociology research, Frank declared that, “[t]he
judge’s sympathies and antipathies are likely to be active with respect to the witness. His own past may have created plus or minus reactions to women, or blonde women, or men with beards, or Southerners, or Italians, or Englishmen, or plumbers, or minsters, or college-graduates or Democrats. A certain facial twitch or cough or gesture may start up memories, painful or pleasant. Those memories of the trial judge, while he is listening to a witness with such a facial twitch or cough or gesture, may affect the judge’s initial hearing, or subsequent recollection, of what the witness said, or the weight or credibility which the judge will attach to the witness’ testimony.” (Jerome Frank, 1949:151)

In addition, Frank fought against the rigidity and limitation of legal formalism. With the development of the natural sciences in the 19th century, American legal formalism was founded on its dominance in American legal history. The legal formalist believes that the law should be rooted in science, and the only responsibility of a body of legislation is to build up a legal system, which includes the legal principles, legal normal, and legal logic as a close circle. In their opinions, what the judges need to do under this system is to apply every existing rule to the case, without any creations or made-up information in the decisions they make. Frank concluded that there were “basic legal myths” in legal formalism: 1) reasoning first, excluding irrational elements; and 2) certainty and stability is the foundation of law. Frank’s conclusions came from his observations on history and psychological theories. “Even in a relatively static society, men have never been able to construct a comprehensive, eternized set of rules anticipation all possible legal disputes and settling them in advance. Even in such a social order no one can foresee all the future permutations and combinations of event; situations are bound to occur which were never contemplated when the original rules
were made.” (Jerome Frank, 1930: 6) Since the development of industrial society is fast and the progress made in research methods and social opinions are beyond what were expected before, it is impossible to predict what will happen and settle up every rule in advance. So legal formalism is nothing but its own wishful thinking. What the truth is, “the law always has been, is now, and will ever continue to be, largely vague and variable.”(Jerome Frank, 1930: 6) The pursuit of certainty is only the reflection of father-worship. Frank cited the advanced theories of psychology at that time and claimed that pursuing for certainty was similar to, “the child, in his struggle for existence, makes vital use of his belief in an omniscient and omnipotent father, a father who lays down infallible and precise rules of conduct.” (Jerome Frank, 1930: 15) With regard to specifics, in the view of the legal formalist, in the judicial formula “R*F = D”, the R (rules) stands for the role as father.

However, the formula “R*F = D” is destined to fail in real life because there are at least five kinds of “subjectivities” that can affect the objectivity of “R” and “F.”:

“(1). those which stem from the divers social heritages of divers social groups; (2). those due to the grammatical structures of particular languages; (3). those arising from physical location (Russell calls them ‘physical’ subjective); (4). those which derive from the unique ('private') attitudes of particular persons; (5). those which inhere in the finite, limited, capacities of all human beings.”(Jerome Frank: 1949:187-188)

Unfortunately, the legal formalist turns a blind eye to these objectivities. Instead, the legal formalist prefers to continue the obsessive issues on how to apply the rules to facts, with the help of deductive logic. Since the real need in legal practice cannot be met, and the theories can no longer offer an effective and reliable guideline for the
judges, a reformation in the core of modern mind is imperative.

5.2 Judicial Context of Modern Mind

Modern mind was the key to Frank’s legal thoughts. As was the case with his usual argumentative style, Frank did not give a clear definition of modern mind, but described the modern mind from two levels. The first level was, “[w]hile lawyers would do well, to be sure, to learn scientific logic from the expositors of scientific method, it is far more important that they catch the spirit of the creative scientist, which yearns not for safety but risk, not for certainty but adventure, which thrives on experimentation, invention and novelty and not on nostalgia for the absolute, which devotes itself to new ways of manipulating protean particulars and not to the quest of undeviating universals.” (Jerome Frank, 1912: 111-113)

The second level was that, “[t]hat spirit entails the discipline of suspended judgment; the rigorous weighing of all the evidence; a consideration of all possible theories; the questioning of the plausible, of the respectably accepted and seemingly self-evident; a serene passion for verification; what I would call ‘constructive skepticism’. ” (Jerome Frank, 1945:219)

These two levels of descriptions of “modern mind” come from a special understanding of law, which views the law as art: “[s]o we should admit that all government, and court-house government in particular, is not and can never be a science, that it is and ever will be an art—and a difficult one.” (Jerome Frank, 1945:221) That is to say, modern mind is a reformation attitude and experimental exploration rather than a specific judicial method or approach. In judicial practice, modern mind implies innovation, adventure, and challenge. To be more specific, there are three levels of this
First, when a judge presides over a trial, the judge should pay close attention to the fact-finding process rather than confining him-/herself to the application of the law. This open mind corresponds to the uncertainty of lives. Because “[m]odern civilization demands a mind free of father-governance. To remain father-governed in adult years is peculiarly the modern sin. The modern mind is a mind free of childish emotional drags, a mature mind. And law, if it is to meet the needs of modern civilization must adapt itself to the modern mind. It must cease to embody a philosophy opposed to change. It must become avowedly pragmatic. To this end there must be developed a recognition and elimination of the carry-over of the childish dread of, and respect for, paternal omnipotence; that dread and respect are powerful strongholds of resistance to change.”

(Jerome Frank, 1930: 252) At the same time, this judicial open mind fits the orientation of legal change. “[t]he fact is obvious that the cosmic stream, including the stream of human life of mankind, we should expect what we see to be a fact, that law [defined by Keyser as judicial behavior] is not an invariant somewhat but is a variable, changing with the time and place and the things that these involve. Law [i.e. judicial behavior] changes because the stimuli that evoke it and the circumstances that condition it do not remain the same and do not repeat precisely, but continually alter under the influence of new things emerging endlessly in the flux of life and the world.”(Jerome Frank, 1949: 205) Hence, modern mind argues that the judge should take seriously the objective uncertainty and changes of the essentials of law and the environment when apply the law, rather than finding another father-substitute for certainty.

It gives the reasonable grounds of judicial discretion and empowers judges with judicial legislative power. It is a breakthrough of the stare decisis and innovation from
the traditional theories. It is commonly accepted that with a gesture of conservatism, the judicial process of case law follows the beaten path. That is what the old legal education model, the Langdell method, tried to achieve.

It seems that legal fundamentalism, verbalism, and scholasticism used to take judges as a negative law-finder and legal applicator. For a long time, the legal community was proud of this tradition. However, it is not the best way to do justice. Frank had revealed that the statute law system was not the only resource, so it was possible for a judge to be somewhat creative in making decisions. “[T]he judge should not be a mere thinking machine”, and we needed judges “with a touch in them of the qualities which make poets,’ who will administer justice as an art.” (Jerome Frank, 1930: 168; Morris Cohen, 1967:188) Frank took this as an extension of the ancient Greek debate on the concept of justice between Plato and Aristotle. In Frank’s opinion, the reason why the “philosophical king” model went bankrupt was the theoretical ground of management systems, where the law was destined as becoming more rigid. On the other hand, Aristotle, whom Frank adored very much, got out of the theoretical cage and declared that a healthy society needs supplement of flexible executive with administrator. That means, a good system and a good operation by a good man are two indispensable components of the rule of law.

However, in the case law system, because of combining a common belief that judges should be restrained by the upper courts and their decisions, judges usually take a safe and convenient path, stare decisis. the precedents are nothing, but could be flexibly interpreted; the stare decisis has not operated as well as expected. Frank demonstrated four cases. “(1) In the first place, it is foolish to change a rule that does not harm. (2). Then there are established rules which the judges may think unwise, but
to which a majority of the community is deeply attached. (3). Moreover, there are many rules as to which the judges have a strong hunch that they have become deeply entrenched in community ways of acting, so that the judges, despite the fact that they think those rules unjust or unwise, hesitate to change them, although there is no specific proof of reliance in any particular case. (4). Most important are the cases in which there has been actual reliance upon the precedents, so that it would be unjust to change them, restoratively, as to persons who have thus relied.” (Jerome Frank, 1949: 314) That is to say, the “certainty” in the *stare decisis* is nothing, but a good excuse to prevent ordinary people and judges themselves from introspection into the system.

However, the breakthrough of *stare decisis* does not mean there is no restraint in the innovation. In Frank’s opinion, the restraint came from the legal practice. The function of litigation is built upon a universal and general normative system, from which the parties can obtain a vague and abstract impression. So judges should settle their current cases rather than set up an illusion that they could define the boundaries for similar parties in the future. Frank argued in a decision that “because they do not learn those views, and must largely rely on their own imaginations, they should be cautious about attempting, in present cases, to protect their formulations too far and too firmly into the days yet to come. To cope with the present is none too easy, in part because the present is only a moving line dividing yesterdays and tomorrows, so that reflections on what will happen are unavoidable elements of current problems. But, although continuity, both backwards and forwards, is to some extent a necessity, judges should not shirk the present aspect of today’s problems in favor of too much illusory tinkering with tomorrow’s. The future can become as perniciously tyrannical as the past. Posterity-worship can be as bad as ancestor-worship.” (Jerome Frank, 1949: 314-315)
Since one cannot solve all disputes by reasoning and process, one must accomplish them through caution and humility, which cannot be explained in an algebra formula. These emotions play an important role in modeling one’s values and opinions of justice. Barzun commented on this point:

*The emotional component was key because, Frank believed, the emotions played an important role in shaping our ideals, values, and notions of justice. "[The judge should not be a mere thinking machine," he insisted. "He clarified that he did not advocate a "`hard-boiled' matter-of-factness," nor did he discount the value of "ideals" in the law. Indeed, Frank made clear that he believed "[t]here can be ... a 'scientific character to questions as to what the law ought to be.'" Imagination and idealistic speculation were not the problem. Rather, the key was to develop the right kind of imagination-not the "compensatory, castle-in-the-air kind of imagining," that merely sought escape from reality, but rather a "creative, inventive phantasy [sic], projecting in imagination possibly useful rearrangements of experience."

(Charles L. Barzun, 2010: 1159-1161)

Frank’s insight into this issue revealed the inevitable subjective factors in the judicial process. It helps the judge take individual introspection rather than covering and denying the possible prejudice in the “basic legal myths.” In Frank’s opinion, hypocrisy was worse than mistakes, and the “basic legal myths” were worse than the prejudice in the judicial process, for it was possible for judges to correct their mistakes or reduce prejudice if one took the individual introspection frequently to ourselves; however, there is no chance for us to revive ourselves from the prejudice. The only possible outcome of the “basic legal myths” is to lower the social trust in judicial systems. “To speak bluntly, I urge that each prospective judge should undergo something like psychoanalysis. I say
‘something like,’ because the theory and techniques of the art of psychoanalysis are being constantly revised, and some adequate, less prolonged and complicated, substitute may soon appear...But such self-knowledge, I think, can be of immense help in reducing the consequences of judicial bias.” (Jerome Frank, 1949:250)

However, one should keep in mind that Frank did not deny the importance of formal logic. “In so working, the judge is doing nothing improper or unusual...The chronological priority of the judge’s hunch does not mean that his subsequent logical analysis is valueless. That analysis may have an artificial appearance. But such an appearance does not detract from the worth of such ex post facto analyses in other fields. If one chooses, loosely, to call that hunch-testing process ‘rationalization,’ then, in that sense, most logical rationality involves some ‘rationalization’.” (Jerome Frank, 1945: 184) In other words, the judgment “the hunch before the reason” has no conflicts with the invalidity of formal logic. Frank pointed out that judicial theories could not live without judicial observations and judicial practice. Maybe this was the real critical intention of Frank.

5.3 Discussion of Theories of Modern Mind

There is no doubt that research on subjective factors that affect the judicial process has promoted a deeper understanding of these factors. Empirical studies have shown that irrational factors, such as instinct, emotion, and even prejudice, often affect the judicial process, rather than the logic and legal reasoning proposed by traditional judicial theories.

However, Frank’s fact-skepticism has been criticized since Law and the Modern Mind was published, even as it spread to the other criticisms of legal realism. That is
why legal realism is sometimes referred to “Franklism.” These criticisms can be attributed to the following: First, Frank denied the role of legal reasoning in the judicial process. Llewellyn opposed Frank on this point. Frank’s opponents believed that he felt legal reasoning was just an illusion. This appears to be an overturn of the entire legal theory. Second, Frank paid a lot of attention to judges’ characteristics. For example, Professor Felix Cohen pointed out that due to overemphasis of judges’ personalities in the judicial process and omissions of some predictable social elements, Frank narrowly interpreted the subjective factors influencing the trial. Thurman Arnold was sympathetic to Frank on this point: “[a]s a judge he only had one disqualification. He lacked that narrowness of purpose, that preoccupation with the law as a separate discipline, that exclusion of social and economic considerations, which removes the ‘Law’ from the everyday world and thus makes it such an impressive and important symbol of abstract impersonal justice. It may well be that Jerome Frank was not solemn enough to personify that symbol.” (Thurman Arnold, 1957: 634) In other words, once we lose the illusion of legal certainty, the public is likely to abandon their beliefs on the rule of law. Third, Frank denied the role of rules in the judicial process. Professor Tamanaha, who maintains similar attitudes as legal realists, except for Frank, believes Frank not only had no innovative works, but also did some harm to existing theories. Finally, there are some self-contradictions between Frank’s theories and practice. Glennon Robett argues that although Frank’s works are full of criticisms of the precedents, the decisions Frank made when he was on the Second Circuit Court of Appeals were completely compliant with the precedents. (Glennon Robett J. 1985: 129-139)

Some scholars show sympathy toward Frank and his theories. Professor Rumble is one of them. Rumble believes Frank contributed to legal realism in two ways: one was
Frank’s skepticism for the traditional theories; the other was Frank’s zeal for reform. Frank’s writings explicitly expressed the essence the Realist. However, there are no further explanations of the reasons and alternatives. What can one gain from Frank and his clarification of fact-skepticism and rule-skepticism, though some scholars might pay more attention to the theories of trial courts? (Anthony J. Sebok, 1998:57) Professor Brian Leiter identifies three dominant legal schools in American jurisprudence: positivism, formalism, and legal realism. This approach might be labeled “naturalizing jurisprudence.” The most important contributions of Frank and other legal realists include their descriptions of judicial processes, rather than judgments about those processes. Typical characters in this theory include the following: 1) a descriptive theory of the judicial process; 2) the discretion of judges in the judicial process; 3) an attempt to make the decision in accordance with their personal values; and 4) putting the judicial process and legal reasoning together and rationalizing them. To Frank, a formalist could also be a positivist, but also a legal realist, because the legal realist would not evaluate a judgment on the merits of the case, nor predict what kind of decisions would be made based on the judges’ personalities. (Brian Leiter, 1997) Some scholars look at Frank differently. For example, Barzun argues that it would be much better if one took Frank as a virtue theorist. Barzun argues that Frank’s purpose was to lead the public to a better life by introducing specific virtues, such as humility, courage, generosity, maturity, and independent introspections into judicial systems.

As a leader of legal realism, Frank’s most important contributions to American jurisprudence were those that turned the research emphasis from judicial theories to judicial practice, rather than abstract deductive and inductive reasoning. Undoubtedly, the essentials of legal practice are methods of resolving conflicts. The law is destined to
be the law only on paper if it is not related or relevant to the practice. Second, in traditional legal theories and theoretical premises, legal facts and the process of fact-finding are often omitted. Although scholars could argue that they fully consider the facts in the “cycle between norms and facts,” the reality at that time is that few lawyers are trained for fact-finding in the judicial process. In this situation, how could the process work as the scholars contend in their papers? In addition, Frank specifically considered and discussed the subjective factors that might affect the judicial process, including witnesses and their testimonies, juries and their personalities, the jury systems, and the judges. Frank categorized the subjective factors, such as intuitions, personal emotions, the gestalt factors, and personal experience. Last but not least, Frank used abundant explosive terms and expressions to draw the attention to the virtues of judges, which had already been emphasized by the Greek philosophers. In the wise mens’ view, a good legal system could not live without good men. Since formalists reject moral elements, Frank had to reclaim them those elements in the name of judicial reform.

On the other hand, it is a pity that Frank never clearly explained the relationship between judges’ personalities and the law. It is obvious that it could not count on the field of traditional positivism, natural law, or the so-called legal principles of Ronald Dworkin. Frank seldom talked about how to compel judges to practice by their virtues. In this dissertation author’s opinion, that may be the reason why Frank received volumes of criticisms. Still, Frank’s famous argument that “we should admit that all government, and court-house government in particular, is not and can never be a science, that it is and ever will be an art—and a difficult one,” (Jerome Frank, 1945:221) should be remembered and considered.
Chapter 6 Suggestions for Judicial Reformation and Practice

Generally speaking, Frank should be taken as a legal practitioner rather than a legal thinker. That means that when one turns to Frank’s theories, one should realize that Frank emphasized the practical efficiencies rather the integrity of theory. In other words, Frank’s criticism of traditional judicial theories served his purpose of judicial reformation with a “modern mind” attitude. Hence, in this chapter, this dissertation author tried to demonstrate and analyze Frank’s suggestions for legal reformation, which were primarily concerned with the reformation of trial courts and legal education.

6.1 Pictures of Reformation of Courts on Trial

In Frank’s opinion, the model trial courts could be summarized as the adversarial system and the jury system. The American adversarial system is under the authority of the judge with a debate of the plaintiffs and the defendants in civil litigations or both sides in criminal litigations. In this model, the judge is believed to be a negative host, for the primary function of the trial court is “to render specific decisions of specific disputes, in order to bring about their orderly settlement, so as to prevent brawls which might cause social disruption.” (Jerome Frank: 1949:7). Frank believed this model inherited the characters of fighting in ancient society, essentially, and the “right” was nothing more than the trophy for the winners. Since the fighting is different from the others, the trophy of the fighting, right, is different from the others. In other words, the precedent settled in one case should not restrain another case. “Sensible’s legal rights, then, mean what will hereafter happen as the result of a specific lawsuit, if one is brought. Unless and until that suit has been tried and decided, Sensible’s legal rights are
unknown." (Jerome Frank: 1949: 11) Frank hated this fighting character in litigation. In this model, it would lead both sides in litigation only to winning by some legal strategies rather than the struggle for the discovery of a specific case. Consequently, nothing good results from this litigation model.

First, it closes the door to ordinary people, who lack the opportunity to get close to the litigation process. Instead, a special litigation group -- the lawyer and those familiar with the litigation -- emerge. To ensure their priorities in litigation, the lawyers intend to create a special wizard atmosphere of their profession with “hero worship” of the law and obscure vocabularies and complicated processes. That is how legal myths begin. Frank took it as pathological “thankful wishing” (Jerome Frank: 1949: 79). Lawyers’ best litigation strategy in a case is “(suppose a trial were fundamentally a truth-inquiry)...do our best to make sure that they testify in circumstances most conducive to a revealing observation of that demeanor by the trial judge or jury.” (Jerome Frank: 1949: 81). In Frank’s opinion, it was much more dangerous than before.

For example, with regard to testimony, crafty lawyers tend to guide the judge and juries to minor details rather than the main point of the case. Frank cited some complaints from a judge: “an honest witness testifies on direct examination. He answers questions promptly and candidly and makes a good impression. On cross-examination, his attitude changes. He suspects that traps are being laid for him. He hesitates; he ponders the answer to a simple question...Altogether the contrast with his attitude on direct examination is obvious; and he creates the impression that he is evading or withholding.” (Jerome Frank: 1949: 81, 82). Last but not least, Frank was also dissatisfied with the judge’s role in the adversarial system, in which the judge’s responsibility to justice is replaced by the purpose of economic efficiencies. In addition, the adversarial system is
believed to be a legal expression of classical economic liberalism and runs in the opposite direction of social welfares.

Frank criticized the jury system, as follows. Initially, the jury system is nothing, but a general verdict, which is given by the jury after tedious debating behind closed doors. Nobody could describe how the verdict was decided based on some written records. It is unfair to the plaintiff or the defendant, on whom the decision might have a significant impact. It should not be considered as justice to the litigants. Although in the early colonial period, in Frank’s opinion, the jury system and the anonymous process might have played an important role in protecting the colonies from oppression, which was in the name of judicial justice. However, from a progressive perspective of judicial reformation, the jury system was abandoned by many countries for its tedious and non-transparent process. Adapting this trend, Americans should refresh their views on this system and its foundations, since America no longer deals with colonial dominations. Frank illustrated several arguments. First, it is hard for less educated juries to follow the instructions and the interpretations of legal provisions from the judge. Second, since the judge’s instructions and their interpretations are not mandatory to the jury and nobody knows what actually happened in the process, it is likely to seriously affect the litigants’ legitimate rights. It is probable that juries at least partially believe the stories lawyers come up with, for they are unfamiliar with the litigations. In this situation, it is a perfect excuse for a judge to act irresponsibly. Last, but not least, the general verdict made by the jury plays a decisive role in the applying of the course of law to the final decision. Thus, the general verdict acts as the legislation role in a case. The litigation structure gives a door to the lawyers who play up to the juries rather than pursue justice. (Jerome Frank: 1949: 109-123) The jury system is just “the great
procedural opiate.” (Jerome Frank: 1949: 114). It could neither contribute to democracy nor to the institutional constraints on judicial corruption.

Based on the analyses above, a reformation of the adversarial system and the jury system is necessary, for “the basic aim of the courts in our society should, I think, be the just settlement of particular disputes. The just decision of specific law-suits.” (Jerome Frank: 1949: 102). Frank asserted the following suggestions.

1. Strengthening and enhancing the judge’s powers in testimony. For instance, the judges are supposed to have the power to question the witness, or to summon potential witnesses who are omitted by both sides.

2. Strengthening and enhancing the judge’s powers in interfering in the rights of selecting lawyers, to avoid the situation in which the litigant loses the possibilities of winning a case because of their wrong choice.

3. The government offices are authorized to take some responsibilities and cover the cost of collecting and submitting significant evidence omitted in the case, to reduce the expense of litigation and placing the burden of proof. Some states might try to obtain financial support in the form of public funds.

4. Well-trained and certified psychologists should be employed as specific testimonial experts to assist the judge and jury in eliminating distorted trial testimonies.

5. Totally abolishing the tortures prior to the trial, and designing judicial training systems as necessary virtue trainings for the police officers.

6. Replacing the general verdict with a fact-specific verdict, which emphasizes the fact-finding process with the judge’s instructions, rather than the general verdict of a case?

7. Setting up an advisory jury composed of special experts to replace the “normal”
jury in special cases.

8. Amending the exclusionary rules to reduce the possibilities of the jury making a mistake.

9. Keeping records of the juries’ discussion process.

10. The juries should be trained by specialists before they serve on a trial.

11. Implementing curriculums in public schools to encourage public participation in trials. (194980-102,126-145)

It is undeniable that Frank’s judicial reformation proposals were rich in imagination. Some of the operable proposals, such as abolishing the tortures prior to the trial, are accepted by the following judicial practice. However, most of them failed and were not given enough attention by succeeding scholars. It is easy to understand Frank’s predicament. First of all, as Max Webber has proved that the professionalization is an inevitable trend in a modern society, without any doubts, legal profession also consists part of the trend. One should distinguish between professionalization and legal myths. With all the information and knowledge being accumulated day by day, it is impossible for the public to understand every rule or case in the judicial fields. Legal professions result from the development of the social division of labor rather than the modern wizard worship. Frank pointed out the fighting element in litigation, which might be inherited from ancient society and the connections to the economic analyses on trial. However, it is a pity for Frank to stay on the surface of legal and economic analyses rather than digging in deeply. In additions, Frank may have misunderstood the judge’s role in the adversarial system. Contrary to Frank’s critics on judges’ negative roles in trials, which means judges just keep watching, it is widely accepted that the essence of the adversarial system is the judges’ negative role. As the old saying goes, the parties
are always the best judges of their own interests. With a premise of rational man on trial, the design of a negative judge in the adversarial system provides enough margins for the parties to fight for or drop their rights. That is to say, the adversarial system is in accordance with liberalism. Moreover, it is more likely to interfere in or even deprive the parties’ independent choice in the name of over-zealous totalitarianism. Last but not least, it seems that ignoring the juries’ basic judgments and their social responsibilities because of Frank’s blind faith of experts.

6.2 Pictures of Reformation of Legal Education

In Frank’s opinion, law schools, especially the case method in America, needed to take responsibilities for the prevailing of legal myths and the appellate court myths. As a counterpart to the traditional apprenticeship teaching method, the case method in American law schools was founded by Professor Christopher K. Langdell, who is considered one of the greatest Deans of Harvard Law School. Law, in Langdell’s opinion, “consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.” (C.C. Langdell, A Selection of Cases on the Law of Contracts vi-vii (Boston, Little, Brown, & Co. 1871).)

In Langdell’s opinion, since these law doctrines are growing in cases through centuries, there is certainly a legal system to be used to interpret and find the differences between the doctrines and the states. Studying in the appellate cases, especially the court opinions, this legal system could be used in legal education for discovering legal
doctrine and the judicial remedies. Not only could the students learn how to deal with a case, but the judges could find out the doctrines behind the cases which could be taken as the precedent in the ongoing case. What's more, since the purpose of this method is strictly restrained in the study of legal doctrines, the library should be the primary place for legal researches. “If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number”. (C.C. Langdell, A Selection of Cases on the Law of Contracts vi-vii (Boston, Little, Brown, & Co. 1871).

This is the case method system, and the purpose of the system designers is to allow easy access for students to practice and improve their skills in court. At the very beginning, it did make response to the calling for legal science and legal practice in modern times. Students may understand the reason why a judge made such a decision, the factors judges take into account in a court case, and the balances judges make. Some famous law schools at that time, such as Harvard Law School and Yale Law School, use this or similar methods in their teaching. Based on research on this issue, it is believed that in 1907, more than 30 law schools implemented this teaching method. More and more law schools insist on the stability, practicability, and science.

However, in Franks’ opinion, the case method system had obvious and severe problems. The students were requested to concentrate on the analysis of court opinions rather than lectures, regulations, and textbooks. As time goes by, confined to the library, the case method and the students run counter to the judicial practice. Since legal doctrine is considered the primary purpose in legal education, students are weighed down with the tedious collecting of cases, analyses of the reasons in cases, and the abstract doctrines. There is little time and few opportunities for the students to keep
pace with the judicial realities happening in daily life. They do not know the real reasons hidden between the lines, the intentions of plaintiffs and the defendants and how the testimony works and its outcome. What is more, the materials law school students could read are the opinions of appellant courts, which mean the students are just led to concern on the appellant methods and attitudes, except the processes on trials, which are crucial to the practice. It is more likely that the practical experience and skills, such as evidence collection, court debates and convincing the jury, are untouchable in the case method system, which just focuses on the legal principles or the legal doctrines. In addition, legal doctrines are not equal to the whole legal system, which includes legal negotiations, legal arbitrations, and the other dispute systems. Last, but not least, the foundation of the case method system is nothing, but so-called science. In Frank’s opinion, it was impossible to build up a legal system only in the legal concepts, formal logic, and legal principles. One of the scientific propositions is the repeatability of the same methods, which means the judge should make the same decision under the same circumstances. Nevertheless, in the legal formulas, R (Rules) * F (Facts) = D (Decision), it is impossible for the decision to be maintained while there are numerous variables in facts. Moreover, it is hard for legal doctrine or legal interpretation to clearly express causality in legal formulas.

Frank also questioned the purpose of the case method. Since the system focuses on the appellant cases, the students are assumed to be familiar with the case on appeal rather than the case on trial. However, the cases on trial are much more than the appeal one in daily life. Therefore, are they qualified to handle the processes they are not familiar with? It seems that the system easily aggravates substantial injustice. It is much easier for lawyers educated in this system to cater to the judge’s need to win, rather than
to justice itself. Frank could not accept this possibility.

Finally, a vicious legal educational cycle comes from this system. The best students are sent to law school to give lessons to the freshmen though they have no experience in legal practice. “Adolf Berle, then a Columbia Law School professor, but himself an exception to the rule, said to me that 90% of teachers in our leading law-schools had never so much as ventured into a court-room... Yet it is, I think, still true that at many law schools the majority of the professors have never met and advised a client, negotiated a settlement, drafted a complicated contract, consulted with witnesses, tried a case in a trial court or assisted in such a trial, or even argued a case in an upper court.” (Jerome Frank, 1949: 227) What they tend to teach their students is questionable.

In addition, Frank did not have a good impression of Langdell, satirizing Langdell as “a neurotic advisedly” and “a cloistered, bookish man, and bookish, too, in a narrow sense,” since Langdell felt “the library is to us what the laboratory is to the chemist or the physicist and what the museum is to the naturalist.” (Jerome Frank, 1947:1303)

In Frank’s opinion, the Langdell teaching method was dangerous to law, which is rooted in the practice. So Frank listed series suggestions for law schools:

(1) A considerable proportion of teachers in any law school should be men with not less than five to ten years of varied experience in actual legal practice.

(2) The case-system, so far as it is retained, should be revised so that it will in truth and fact become a case-system, so that it will in truth and fact become a case-system and not a mere sham case-system.

(3) At best, dissection of court records would merely approximate the dissection of cadavers which first-year medical students learn.

(4) Now I come to a point which I consider of first importance... Some of these men could run the law school legal clinics, assisted by the students. The work of these clinics would be done for little or no charge... They would take on important jobs, including trials, for governmental agencies, legislative committees, or other
quasi-public bodies. Their professional work would thus comprise virtually every kind of service rendered by law offices. (Jerome Frank: 1949: 231-237)

6.3 The Judicial Practice of Frank’s Constructive Skepticism

Frank did not only make changes in the theories, but he also prompted the legal reformation in judicial practice when he was the judge of the Second Circuit Court of Appeals. In the following cases and his opinions, one can find out what his humanism, pragmatism and the trial models he advocated were.

The first case is Ine. v. Rohrliehetal. & Rosenbaumteal. vs. Triangle Publications Ins.. In this case, Frank fully demonstrated the open and experiment methods in fact-finding. The general case went as following. In 1944, Triangle Publications published a magazine named “Seventeen”, and registered “Seventeen” as a trademark on January, 1945. Subsequently, with the current fashion clothes published in Seventeen magazine, the magazine became more and more influential nationwide. Considering its influence on the consumers, many fashion clothes manufacturers contacted the magazine and were to publish their advertisements, in order to promote their brands. However, on February, 1945, Miss Seventeen Foundation Co., the defendant on trial, used “Miss Seventeen” as a trademark to manufacture women’s belts. Three months later, it registered “Miss Seventeen” as a trademark for women’s belts on June 28, 1945.

Subsequently, Triangle Publications initiated a law suit against Miss Seventeen Foundation Co. for the infringement of a trademark and fair competition as soon as the plaintiff found the suspected infringement. However, the court on trial made a decision that the trademark “Miss Seventeen,” owned by Miss Seventeen Foundation Co., did not constitute the infringement of “Seventeen,” for they belonged to a different realm of sales. On the other hand, the defendant actually took advantage of the plaintiff’s
commercial influence in media and the possible confusion of the consumers. That was a kind of marketing method of free riding in business, violating the principle of fair competition. The defendant was aggrieved by the decision, and appealed to the Second Circuit Court of Appeals. In spite of affirmation by the appeals courts this original judgment of violating fair competition; Judge Frank made a dissent in the decision with the doubts of testimony. He questioned the ground of decision. In Frank’s opinion, since the court on trial got the evidences of the possible confusion of the consumers submitted by both parties with a price and there were just four testimonies offered by the plaintiff, it was obvious that the testimonies were probably subjective and thus lacked of persuasion. That meant it should not be taken as an effective testimonies. Regretfully, the judge did not realize it, and, on the contrary, the judge took a quite conservative but reliable strategy in the case. He admitted these testimonies and took them as the ground of the case. Challenging the traditional methods, Frank tried to be different and questioned the confusion of these two trademarks to the consumers at random. To their surprise, the outcome, which was quite different from what the plaintiff submitted to the courts, showed that the consumers would not confuse these two brands when they were consuming. Frank wrote in his dissent that although the outcome of the random questionnaires might be completely according to the facts, it was a relatively reliable method in fact-finding. So the trial courts are supposed to adopt this method to make sure to reduce the possibility of the consumer confusion of if they wanted to make the fact clear. Nevertheless, it was a pity that the judge of the trial court did not use this method.①

The second case is the *United States vs. Rubenstein*, in which Frank showed his

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① See *Ine. v. Rohrliehtal. & Rosenbaumteal. vs. Triangle Publications Ins.(dissenting)* (1948;2nd, Cir. 167 F2d. 969)
attitude to the juries. The general case went as following. Alice Spitz, who was a
Czechoslovak, tried to get a green card by means of a sham marriage with Sandler, who
was an American and could be paid 200 dollars from his assistant. Rubenstein, the
defendant of the trial, was an attorney and he was good at faking legal documents in
sham marriage. In this case, the defendant helped Alice Spitz get her green card by
faking legal documents and kept Sandler from the process. When the transaction was
exposed, Rubenstein’s practice license was revoked and he was prosecuted and
sentenced to as guilty.

The defendant was aggrieved by the decision, and appealed to the Second Circuit
Court of Appeals. The key issue in this case was the defendant’s claim that the judge on
trial actually had given the juries a wrong implication by asking whether his practice
license was revoked. Consequently the juries were led to a biased opinion. Applying the
principle of harmless error, the appeal court maintained the decision.

Frank did not dissent against the decision, which was made by honorable Judge
Learned Hand, but criticized to the Second Circuit Court of appeals, who usually apply
the principle of harmless error. In Frank’s opinion, it was a dangerous path once it
became routine. First of all, the appeals court confused the different responsibilities of
the trial court and court of appeals. It was obvious that the court of appeals only had the
power of examination of the appeal materials rather than the power of fact-finding,
which was the responsibility of the court on trial. That is to say, the court of appeals
should focus on the procedural errors of the court on trial. However, the principle of
harmless error was easy to become the best defense for their faults on fact-finding.

With a little stretch, the courts more easily infringed upon the civil rights and
freedom that Frank valued a lot. Frank had once been wrongfully suspected in a murder
and was urged to confess to false charges under the abuse of public authority. Once the principle of harmless error was abused, undoubtedly suspects lose their rights, freedom and even lives. So the principle of harmless error was outside of the responsibility of court of appeals and the principle should be confined. Therefore, the principle of harmless error should be excluded from several situations such as the following: the criminal defendants had been deprived of fundamental rights; court on trial was partial to the prosecutors; the key evidences were not absorbed in questioning and a case where a sentence of death of life imprisonment was probable.

Generally speaking, Frank usually dissented in the decisions. However, Frank personally wrote the judgment in the United States vs. Rosenberg et al., which could be best reflected in his pragmatism and political attitudes. This case was adjudicated in the 1950s, when the cold-war had begun and Americans were engaged in hostility to the Soviet Union. The Rosenbergs were prosecuted under the Espionage Act, for their exposure of the lists of the nuclear weapons tests and transfer of the key digital of tests to the Soviet Union. All the Americans were shocked on hearing this news. On trial, witness David Greenglass, a soldier at the New York nuclear exploration test station, testified that he was instigated by Mrs. Rosenberg, his sister, to steal the secrets from the test station. Harry Gold confessed to his identity of the spy from the Soviet Union, in charge of delivering information. The Rosenbergs refused to confess. However, the trial judge strongly implicated that David Greenglass’s testimony should be admitted, though he and the Rosenbergs were the defendants in the same case. Finally, the juries came to a verdict that the Rosenbergs had leaked the crucial data and information to the Soviet Union, which was against Espionage Act and decided that they were guilty. The appeal went to the Second Circuit Court of Appeals. At this time, although there were
some common features between the second and third cases in that the judge on trial had given some spinning tendencies to the juries, Frank firmly supported the judge on trial, because it was necessary and rightful instruction in the field of judge’s discretion. Although it was proved the Rosenbergs were wronged, the decision was been approved by public opinion.

What one could learn from this comparison is that the judge’s personality takes priority over judicial reasoning. In a specific case, if there were conflicts, even Frank would maintain their personal values rather than applying what they promoted in theory. This example clearly demonstrates that one may not figure out what is happening if one just focuses on the traditions and the regulations.

Chapter 7 Frank’s Influence on the American Legal Thoughts

It seems that after President Roosevelt’s New Deal, American legal realists, including Frank and Llewellyn, gradually faded out of the professional judicial fields. In other words, Frank’s legal theories and legal realism, which is deemed as the official judicial theory of the New Deal, is not the American mainstream anymore. (M.E. Tigar, 2005:290-310) The reason for the decline of this theory was the anxiety and introspection after World War II. People realized that it was likely be a totalitarian disaster if we forgot the legal principles. However, as Professor Joseph Singer once pointed out, although legal realism declined after World War II, many legal schools and legal thoughts were notably influenced by legal realism. The following schools and scholars are interested in the critics on realists’ arguments of the challenge of legal formalism and the dynamic analyses on the judicial process. It is commonly accepted that after legal realism, the American legal scholars tend toward reality on legal practice.
That is why Joseph William says, to some extent, “[w]e are all realists.” (Joseph William, 1988: 50) The same is true when one talks about Frank and his influence. Undoubtedly Frank and his legal thoughts have influenced American jurisprudence and legal practice, though many researchers do not agree with Frank’s opinion. In this chapter, the dissertation author tried to demonstrate this influence.

7.1 The Inheritance and Development of Modern Mind

The core of Frank’s modern mind was to challenge legal traditions and legal authorities. It corresponds to America’s attitude toward exploration. It is believed that some important legal schools, such as the critical legal studies (CLS) movement, post-modernist law and neo-legal realism, inherit the spirit of legal realism.

In the 1950s, civil rights movements, antiwar movements, and the rising of punk nourished the CLS movement. The intelligentsias who come from the middle class tend to rethink profoundly of some symbolic cases, such as the nonviolent civil disobedience African-American civil rights movement led by Dr. Martin Luther King, Jr., anti-invasion of Vietnam and Cambodia movements sweeping Harvard and Yale. Influenced by the social movements, legal realism, and neo-Marxism, scholars in the CLS movement proposed much more radical theories than realists. Compared to Frank’s theories on judges’ personalities on legal judicial system, the CLS movement further criticized liberalism. In traditional liberals’ opinions, law is nothing but law; it is a social dispute resolution system based on the foundation of freedom and pluralism. There is no direct relationship between law and politics. However, members of the CLS movement argued that the judicial process and legal reasoning are a judgment of politicizing, and eventually, are a reflection of interest and will of the ruling class. The
so-called law is just an aggregation of professional legal expressions, such as party autonomy, property rights, and freedom of contract. On the other hand, the ruled class, including ethnic minorities and women, find it impossible to fight for themselves in the existing systems. Therefore, the essence of law is nothing but a product of fight and game from different classes, different social groups. It is not inevitable or absolute. In other words, the studies on laws should put much attention to the interaction of law and the social politics, law and the social events and law and communities rather than the traditional legal fields.

If one takes Frank’s suggestion of judicial revolutions and the attitudes toward opening legal research as a beginning, the CLS movement proposes a whole social reformation project. Professor Roberto Unger’s work, *The Critical Legal Studies Movement*, is a typical example at that time. Unger points out that those traditional legal theories emphasized the differences between law and ideology; however, the social legal structures are not set in stone and, actually, are closely related to the social and historical backgrounds. Therefore, the Enlarged Doctrine should be promoted in the CLS movement analyze the ideology elements in legal studies. That is an effective way to span the theoretic gaps. (Zhu Jingwen, 1996). Unger takes the access of social cultural revolution to put forward the reformation. For example, the existing social class should be adjusted, in order words, in order to realize the individual freedom, the boundaries of the rich and the poor should be broken down. Based on this ground, the social reformations must also be promoted in democracy, the formation of governments, the formation of economics, and the systems of rights. Unger even argues that immunity rights and destabilization rights, which challenge and threaten the existing social institutions, should be created to prevent civil rights from the interference by other
countries and other organizations. (Roberto Unger, 1983)

Feminism jurisprudence, economic analysis of law, and racism theories of law are also influenced by legal realism. Even in the 2000s, neo-legal realism is rising in America. In this trend, scholars try to re-think the strategies, goals and methods discussed in legal realism, for a deeper reformation in legal educations and constitutions of legal ideals of new times. (Macaulay Stewart 2006). Professor Stewart, the sponsor of neo-legal realism, believes that, compared to legal formalism, legal realism has contributed in transformation of legal researches and legal studies, constituting neo legal ideals and the legal education reформations. That means the legal researches are not only constrained in the studies of case laws, but also introduce the social variables into legal studies. However, it sounds as if there are some elitisms in their research. For example, Frank’s suggestions on the reformation of courts demonstrate his ideal of elite administrations rather than his democracy theory, for a deep doubt of the capacities of the folks. Besides, what Frank argues on the judges’ personal characteristics also support his ideal of elite administrations. On the contrary, neo-legal realism asserts that we should take an attitude of “bottom-to-top” in the legal reformation, rather than the elite administrations in legal realism. That means, what happens in dairy life, and what has not been put into the judicial process should be the key in legal researches. Under these circumstances, the researchers could take more objective attitudes to observe how the judicial system works in social lives and how the social lives and judicial elements interplay. In addition, since the ideological conclusions do not have persuasions enough and they might decline the credits on the researches, the neo-legal realism does not agree on the confusion of legal researches and the ideologies as promoted in the CLS movement. Rather, they suggest a neutral and value-free on the researches. “We will not
be surprised when a bottom-up empirical approach finds that a program enacted by liberals fails to achieve its announced goals of helping ordinary people. Certainly one strand of law and society work has questioned attacking social problems by creating individual rights without providing any real means of implementing them. A new legal realism might well support some or many conclusions generally favored by conservatives. The old cliche is apt: it is an empirical question.”(Macaulay Stewart, 2006)

7.2 The Inheritance and Development of Thought of Legal Reasoning

Some of Frank’s opinions have been inherited and developed by scholars though the critics of legal myths are drawn criticisms. Professor David Kairys, in the CLS movement, is one of them.

Comparing to the access of the legal uncertainties and the uncertainty of facts in judicial process, Kairys makes his critics to the *stare decisis*. (David Kairys, 1982) In regard of the *stare decisis*, there are totally contradictory precedents in practice. For example, In the *Hudgens v. NLRB*, 424 U.S.551(1976), the Supreme Court came across two conflict cases dealing with freedom of expression and the private property. In a decision made in 1968, the Supreme Court had pointed out that since the freedom of expression is one of the Constitutional rights, it should be prior to the private property. So the labor unions’ speeches in a private commercial plaza should be protected primarily. However, In the *Lloyd v. Tanner*, 407 U.S.551(1972), the Supreme Court believed that the assembly held by anti-war campaigners in a private commercial plaza invaded the private property. Then, what should the Supreme Court apply when two contradictory precedents came together? If we insist on the *stare decisis*, which one has
Chapter 7 Frank’s Influence on the American Legal Thoughts

the final interpretations and legalities? Why? Is it possible for the Judges to make another expression to the same problems? It is obvious that the *stare decisis* could not offer a good answer. Therefore, Kairys points out that the *stare decisis* is nothing but a mysterious tool used by the legal professional community. Eventually, the ideology of Supreme Court makes the final decisions. From this prospective, the legal certainty theory is just paralysis to the society. (David Kairys, 1982)

Influenced by the phenomenonism and psychoanalysis, Peter Gabel, another famous scholar in the CLS movement, took a similar Franklism analysis method in the legal reasoning process. Professor Gabel believes that a judge’s consciousness in the judicial process could be composed of three stages. The first stage is the integrity understanding of the judicial system. Since all cases are generated in established cultural backgrounds, all people are inevitable to be influenced in the contexts. Besides, since the judges are chosen by the ruling class, the values of the ruling class are certainly accepted by the judge. So it is no doubt that the judges are going to express what they believe in their cases. That is to say, at the beginning of taking a case, the judges actually have a general decision before the formal process. It is likely that the case differing from the judges’ value could not be supported. Moreover, the second stage is the adjusting process to the society. From the aspect of judges, no matter the civil or the criminal cases, they are the expressions of the disequilibration of the social orders. It is the judges’ responsibility to drag the disequilibration to the normal social orders. Based on these two stages, what the judges need to do in the third stage is revert the abstract values to the legal concepts and apply these concepts to the specific case. For example, transforming the abstract ideal of private property to the liability of fault in torts to re-experience the specifics, the judge may get the case which is according
with his values. In a word, the so-call legal reasoning is just a “signification of an image” of legal scholars. Furthermore, Professor Gabel concludes that the judges and courts under capitalism are the legalization tools of their values and ideals. So their decisions could not give the real justice and freedom to all the classes in the society. (Peter Gabel, 1982)

7.3 The Inheritance and Development of Thought of Legal Clinic Education

Not only Frank’s thought of legal clinic education is inherited in the CLS movement, but is also accepted by numerous legal educational institutes and universities. However, compared to Frank, the following scholars pay much attention to the ideology factors in education, and the active promotions to the social reformation. Professor Rand E. Roesenblatt’s opinion is typical of them. In his opinion, thanks to the pioneers of legal realism, including Frank and Llyewellyn, the negative effects in traditional education, such as the dogmatism of education system, addicting of precedent study, and the separation from the practice, are pointed out. In the meanwhile, they have promoted some advanced legal educational ideals. For example, they try to use some moot court to simulate the real case, in order to encourage the students to be familiar with the working process in judicial system. On the other hand, Professor Rand E. Roesenblatt’s also points out that realists do not focus on the ideologies and the political meaning in the legal education system. In other words, realists omit the role of legal education in the social reformation. Therefore, their promotions in legal education are deemed to fail, and the reformers tend to become the conservatives in legal education. Not only should the reformer focus on the reformation in technology level, but he/she should also have the function of critics and introspections. (Rand E.
Roesenblatt, 1978) At the end of the 1970s, the criticism becomes much more radical in
the critics of legal education, and it seems that they are deviated from the education
fields of realism. (Howard Lesnick, 1978; Rand E. Roesenblatt, 1978). However, most
law schools have taken the clinical education as part of their curriculum systems. (Gary
Bellow, 1978; Kennedy D, 1982; Elizabeth M. Schneider, 1983)
Chapter 8 Rethinking Modern Mind

There is an old Chinese saying that says, “Those who let themselves be guided by the current course of events are real heroes.” In English, its counterpart is that, “it is as well to know which way the wind blows.” It is this dissertation author’s opinion that one cannot understand Frank and his modern mind without the context. Here, the “time” is not limited to the international and external political situations, but also includes his personal experience. One could make the following conclusions.

Above all, beyond what Frank expressed in his works, theoretical origins and decisions, it is necessary to understand Frank’s experience. This is the case because there are some certain causal relationships between his personal experience and his theoretical choices of psychoanalyses, father worship, and legal uncertainty. Frank’s family background, such as being raised by a strict father and mother, determined his understanding of orders; Frank’s emphasis on fact-finding was influenced by his special suspected experience. Frank’s effective psychotherapy experience and the political reformation cultivated in his early age made him believe that the psychological method would become more and more important in the following days. Frank had an elite complex. Frank had been at the top since he was a child, and the same situation continued on when he began to work.

This personal experience could not avoid aggravating Frank’s superiority complex and extreme optimism about the judges and the legal communities, who played the role of the main force in the grant legal reformation. On the other hand, it was inevitable for Frank to have some doubts about the capacity of ordinary people, though he had a grant reform democratic purpose. That is the reason why Frank demonstrated conflicting
dimensions on advocating the role of outstanding and humble judges in judicial system, but criticizing the “philosopher kings” of Plato’s political idea.

In addition, because of Frank’s abundant administrative experience and legal practice experience, it was hard for him to identify a clear boundary of politics and law, although there are some common features in these two subjects. In this regard, one cannot just take Frank as a pure legal theorist or a pure politician, especially when one analyzes his role in American jurisprudence. All of these complex factors make up a complex Frank and his theory of modern mind, which was structured by the constructive skepticism system in philosophy for the purpose of legal reform. That is what the author has done in this dissertation.

Compared to Frank’s volumes of citations in his works, this dissertation is just at the beginning of research. After numerous hours have been put into this field, this dissertation author has many immature opinions on this issue. First of all, by reading Frank and his background, the author learned how to choose a theoretical issue as a legal researcher. Although the scholar should take a value-free attitude in his research, he still has to choose a theoretical starting point before he does his research. Frank took the starting point of firm liberal and humanism in his theory and legal practice. To respect human beings, to evaluate the subjective initiative of human beings, are of the core of modern mind. It is also a fresh point rather than an out-of-fashion platitude.

In Frank’s time, a well-developed and highly-institutionalized society existed at the cost of the values and dignities of ordinary people, though the social institutions were created for the purpose of ideal justice. However, many people forget to keep their eyes open in regard to how it operates and what are their emotional feelings after the institution is built up by reason.
Once one is used to the institution and its operation, misfortune may follow subsequently. Because of the inherent inertias and abandoning of criticisms and questions about the institution, the institution tends to become a leviathan that paralyzes our emotions, infringes on one’s values and deprives one’s rights in the name of reason and justice. That is what Hannah Arendt calls “the banality of evil.” The moment one abandons questioning and resisting is the beginning of the loss of substantial justice. There are the theoretic concerns of Frank and his modern mind. The worries take place in the judicial system of America, for example, the Dred Scott Case and the *Lochner v. New York* case. Of course, one may argue the reason why judges who are considered as the guardian angels for freedom make such decisions, but what one should pay more attention to is why a well-designed institution goes wrong. Therefore, Frank promoted modern mind as a response to these problems.

In Frank’s opinion, the only approach to avoiding this evil consequence was to evaluate the human factor in the judicial process. Rather than totally denying the formalism or the importance of process, Frank tried to awaken one’s attention to the subjective factors affecting the judicial process, the independent introspections of his colleagues, and the importance of reformation in judicial systems and legal education. Those are the ways Frank thought injustice could be avoided. Hence, Frank’s his works have two dimensions: pragmatism and idealism. Protecting the precious academic attitudes, this dissertation author takes a sympathetic and understandable attitude to Frank’s criticisms of to legal uncertainties. It should be permitted under an open and democratic environment, especially for these experimental legal reformations. Besides, the following scholars could benefit a lot from Frank’s radical and explosive discussions. That is why Frank and his modern mind could stand for a long time.
In addition, Frank and his modern mind indicated an academic consciousness in American jurisprudence. It is commonly accepted that legal realism is a real sense of native jurisprudence in legal history. This dissertation author believes it is constructed by conscious striving rather than by a coincidence. A mature political and legal system needs a suitable theory to explain. One could find such a struggling for independence in academics through Frank’s works.

Furthermore, contemporary China could learn a lot from the theory of modern mind during the transformation period. There are volumes of commonalities between China and America at the beginning of the 20th century. Though the reform and opening policies made a huge change in China for many areas, when one faces the social problems in China, such as welfare inequalities, judicial injustice, and needed improvements in protection of civil rights and appeals for further reformation, it is easy to associate what had happened in America. Since Frank and his legal realists’ colleagues were the main forces at that time, it is necessary to dig into their theories and gain some useful understanding.

Above all, only could a social reformation based on a consideration of human beings and the balance between procedural justice and substantial justice last for a long time. This is also the scale of measures of modern mind. Different from the American experience, there is no sophisticated institution and the matched institutional ideals in China, the Chinese have kept building mature political and judicial institutions for more than 30 years. However, one could learn from America, which keeps formalism blindly may threaten individual freedoms and social democracy in the long run. Therefore, a balance between institutional constructions and the pursuit of substantial justice is the key in the following days.
It is necessary to cultivate good people to operate a good judicial system. Frank’s descriptions and standards of ideal judges include humanity, sympathy, individual introspection, creativity, and an open mind.

Last, but not least, the self-consciousness of the legal community is an important consideration. For China, the law systems and the theories behind them are Western imports. The legal community in China should keep self-consciousness in mind while maintaining pace with the developments of westerns.
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Resume and Publications

Resume

1986. 6. 30: Born in Zhanjiang City, Guangdong Province, China.
2003. 9 – 2007.7: Bachelor of Law, South China University of Technology.
2009.9 – 2013.7: PhD in Law, Tsinghua University.

Publications