

Jerome Frank and the Modern Mind

CHARLES L. BARZUN†

INTRODUCTION

Whether or not “we are *all* realists now,” the movement in legal theory that emerged from a few law schools in the 1920s and 1930s and came to be known as “Legal Realism” continues to hold a grip on the attention of legal scholars.¹ Both its meaning and its ultimate significance remain subjects of intense debate. Scholars disagree not only about what the core jurisprudential claims of Legal Realism were,²

† Associate Professor of Law, University of Virginia. I would like to thank the following people for helpful comments on this and earlier drafts: Josh Bowers, Neil Duxbury, Robert W. Gordon, Rachel Harmon, Mike Klarman, Jody Kraus, Sarah Lawsky, Brian Leiter, Greg Mitchell, Jedediah Purdy, George Rutherglen, Fred Schauer, John H. Schlegel, Micah Schwartzman, Zahr Stauffer, Simon Stern, Brian Tamanaha, Cora True-Frost, and G.E. White, as well as participants in the University of Virginia School of Law Summer Workshop Series.

1. Michael Steven Green, *Legal Realism as Legal Theory*, 46 WM. & MARY L. REV. 1915, 1917 (2005) (denying the truth of that claim, but noting that it has been repeated so often that “it has become a cliché to call it a ‘cliché.’”).

2. Compare LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* 3 (1986) (suggesting that the best description of Realist jurisprudence is “functionalism,” by which she means a tendency to evaluate the law by its effects), with Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 476-77 (1988) (criticizing Kalman’s account and arguing that a central ambition of Legal Realism was to reconceptualize the public-private distinction). Compare Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 626 (1984) (suggesting a link between the Critical Legal Studies (“CLS”) movement and Legal Realism on the ground that both denied the autonomy of law and legal reasoning), with G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 841 (1986) (suggesting that Critical Legal Studies is properly seen to be “the heir to only one phase of the Realist movement, its deconstructionist phase”). For other works on Legal Realism, see generally WILFRID E. RUMBLE, JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

but also about whether one can even profitably generalize about “Realist” positions in the first place.³ They even debate whether the Realists’ insights amounted to a genuine and novel contribution to legal theory at all.⁴

Within these larger debates about Legal Realism, Jerome Frank occupies an odd place. For a long time, he was widely considered to be, along with Karl Llewellyn, one of the two thought-leaders of the Realists.⁵ And his most famous contribution to legal theory, *Law and the Modern Mind*, is still regarded as a legal classic.⁶ But these days Frank is typically characterized as an “extreme” Realist,

3. Compare NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 68-69 (1995) (concluding that Legal Realism is best described as a “tendency” and “more a mood than a movement”), with BRIAN LEITER, NATURALIZING JURISPRUDENCE 89 (2007) (criticizing Duxbury’s description of Realism as “unduly vague and even misleading” in part because the descriptive thesis that Duxbury himself correctly ascribes to the Realists, namely that the facts of cases determine legal outcomes more than rules do, “surely constitutes a positive (as opposed to merely negative) thesis about adjudication: what I have called elsewhere ‘the Core Claim’ of Realism”).

4. Compare LEITER, *supra* note 3, at 1 (“American Legal Realism was, quite justifiably, the major intellectual event in 20th century American legal practice and scholarship.”), with Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 734 (challenging Leiter’s assessment of Realism’s significance and doubting “the historical distinctiveness of the Legal Realists as a group”).

5. See KALMAN, *supra* note 2, at 164 (referring to Frank as “the father of legal realism”); SCHLEGEL, *supra* note 2, at 5 (noting that earlier scholars of Realism tended to focus on Llewellyn and Frank); TWINING, *supra* note 2, at 405 n.2 (“Jerome Frank . . . is usually treated as one of the two leading ‘realists’, [Karl] Llewellyn being the other.”); see also EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 81-86 (1973) (focusing primarily on Frank and Llewellyn in his account of Legal Realism); RUMBLE, *supra* note 2, at 107 (focusing his study of Legal Realism on Llewellyn and Frank, particularly Frank’s “fact-skepticism”); Tamanaha, *supra* note 4, at 736 (asking rhetorically, “but if not Llewellyn and Frank—who both separately and in collaboration coined *realism* as a label in the legal context—then who?”).

6. JEROME FRANK, LAW AND THE MODERN MIND (1930) [hereinafter FRANK]; see also Bruce A. Ackerman, *Law and the Modern Mind by Jerome Frank*, 103 DAEDALUS 119, 121-22 (1973) (book review) (“While no single work is typical of the Realist movement, Jerome Frank’s book, *Law and the Modern Mind*, has worn comparatively well and is probably the most comprehensive Realist effort to expose the fallacies involved in the Classical effort to state legal rules clearly and to systematize them around fundamental legal principles.”).

who was a peripheral figure in the movement.⁷ He tends to be treated as an erratic, if perhaps brilliant, thinker who made some insightful critiques but who never even attempted to develop anything like a coherent theory of adjudication or a constructive vision for reform.⁸

This view of Frank seems to me deeply mistaken, and the aim of this essay is to correct it. I do so by offering a close reading of *Law and the Modern Mind* that situates it within the intellectual context in which it was written. My argument, in short, is that generations of scholars have misinterpreted Frank because they have misunderstood his philosophical worldview and, therefore, his intellectual ambitions. Frank may be more to blame for this misunderstanding than his critics. He said many different things in the book, not all of them consistent, and some of them perplexing. But if one takes *Law and the Modern Mind* on its own terms and if one reads its argument as a whole, rather than simply as a series of one-off critiques, one can see that Frank did not deny the possibility of rational legal decision making, but rather sought to articulate the habits of mind and character on which he believed the sound administration of justice depended.

My hope is thus to show that a proper reading of Frank reveals another side of Legal Realism—one with some surprising intellectual heirs. As the title of his book suggests, Frank was above all concerned with the judicial mind. For him, legal progress depended less on getting the right institutions or rules in place than on properly training people to populate those institutions and to apply those rules. Today, in political, moral, and legal philosophy, we call theories that focus on qualities of mind and character in this way “virtue” theories because they tend to see particular human characteristics—virtues and vices—as the appropriate object of analysis and evaluation.⁹ It is true that Frank rarely used the term “virtue” himself, and was wary of labels that purported to classify any group of thinkers,¹⁰ but the burden of this Article is to show why seeing Frank

7. See *infra* notes 14-15.

8. See *infra* note 14.

9. See *infra* pp. 1167-1171.

10. See JEROME FRANK, *LAW AND THE MODERN MIND*, at vii-ix (Coward-McCann, Inc. 1949) (1930) [hereinafter FRANK—1949].

as a virtue theorist, albeit of a rather idiosyncratic sort, is more illuminating than obscuring. Most importantly, doing so shows the sense in which—contrary to what critics have alleged—Frank did offer a theory of adjudication and a proposal for directing legal reform.

What follows is an attempt to recover and articulate what I take to be Frank's core concerns in *Law and the Modern Mind*. These concerns became even more pronounced in Frank's later work, but I focus on his first book because it is generally considered Frank's most radical and critical attack on legal orthodoxy. Part I briefly surveys the scholarly criticism of *Law and the Modern Mind* and suggests that critics have misunderstood Frank's project because they have failed to properly place his philosophical views within the intellectual debates of his time. The next three parts look closely at each of the key components of the book's argument. Frank first describes what he calls the "Basic Legal Myth" ("Myth"), namely the belief in legal certainty, so Part II examines Frank's account of the Myth and why he finds it harmful. There I distinguish among Frank's empirical critique, his normative critique of rule-based decision making, and his conceptual critique of the Myth's conception of law as a series of rules. I suggest that only the empirical critique warrants the label "extreme."

Part III then surveys the various explanations Frank considers for the Myth's persistence among laypeople, lawyers, and judges. The explanation Frank settles on, which is the most controversial aspect of his book, is that the longing for legal certainty stems from an unconscious desire in judges and laypeople to maintain the sense of security that a person's father provides in childhood. I argue that this "father-substitute" explanation for the Myth is best understood not as a literal causal explanation of the desire for legal certainty, but as a useful heuristic or "fiction" that Frank hoped would channel reform efforts in the right direction, namely the cultivation of a "modern mind" in judges.

Thus, in Part IV, I explain what Frank meant by a "modern mind" (or what he also called the "scientific spirit"). In short, I argue that it described a set of judicial excellences or virtues that included a capacity for reflecting accurately on one's own emotions and beliefs and the courage to act in the face of deep epistemic uncertainty. That Frank's analysis of these mental attributes was cloaked in the language of psychology and psychoanalysis

should not obscure the fact that what he was articulating was essentially a normative theory of adjudication based on a substantive set of moral and intellectual virtues. My hope is now that discussions of judicial character have once again become academically respectable in law and philosophy, Frank's contribution to this intellectual tradition may be more justly appreciated.¹¹ And if my account is persuasive, it suggests that scholars may have ignored a strand of Legal Realism that puts human character at the center of jurisprudential inquiry.

I. *LAW AND THE MODERN MIND* AND ITS CRITICS

From the moment it was published, *Law and the Modern Mind* has been the subject of commentary and controversy. Judge Charles Clark wrote years later that it fell "like a bomb on the legal world" when it was published.¹² Within months it was attacked by critics of the nascent Legal Realist movement and defended by Realist allies, though even the allies found things in it with which to quarrel.¹³ More recent scholarly treatments of it have varied. It was long considered to be a definitive Realist text, but recently scholars tend to treat Frank's work as very much outside mainstream Realism.¹⁴ Frequently it is characterized as one of the more "extreme" or radical Realist attacks on traditional jurisprudence, though the

11. For recent discussions of judicial character, both normative and empirical, see generally DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* (2009); RICHARD A. POSNER, *HOW JUDGES THINK* (2008); H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* (2008); Paul Horwitz, *Judicial Character (and Does it Matter)*, 26 *CONST. COMMENT.* 97 (2009).

12. Charles E. Clark, *Jerome N. Frank*, 66 *YALE L. J.* 817, 817 (1957).

13. See, e.g., K.N. Llewellyn, Mortimer J. Adler & Walter Wheeler Cook, *Law and the Modern Mind: A Symposium*, 31 *COLUM. L. REV.* 82, 82-115 (1931) (book review).

14. See LEITER, *supra* note 3, at 17 (criticizing scholars' tendency to identify Frank with Realism generally); SCHLEGEL, *supra* note 2, at 5-6 (noting that Frank and Llewellyn had quite different styles); TWINING, *supra* note 2, at 405-06 n.2 (noting that Frank was "something of an outsider" and did not share with the other Realists an ambition "to do 'objective' empirical research"); Singer, *supra* note 2, at 470 n.6 (criticizing the importance Laura Kalman ascribes to Frank and labeling Frank as "a peripheral figure" in Realism).

respect in which it was extreme is not always clear.¹⁵ Usually it refers to the extent of legal uncertainty Frank observed and the relative causal insignificance of legal rules to case outcomes;¹⁶ other times it refers to his “fact skepticism”;¹⁷ still other times to his alleged denial of rational adjudication.¹⁸ Finally, Morton Horwitz takes a quite different tack, describing *Law and the Modern Mind* as embodying an “existentialist” strand of Legal Realism.¹⁹ As we will see, that characterization hits close to the mark, but Horwitz does not develop this insight, aside from noting its connection to the philosophy of Oliver Wendell Holmes and William James.²⁰ If there is any consensus about the book, it is that its argument was enmeshed in an outdated psychological theory and that (perhaps relatedly) it failed to offer any kind of affirmative program. Frank’s “father-substitute” explanation for the desire for legal certainty has been a perennial target. Some criticize it for simply being bad science.²¹ Others have suggested that it is best explained—and explained away—by Frank’s own experience undergoing psychoanalysis.²² Even those who

15. See Roger D. Citron, *The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, the Revival of Natural Law, and the Development of Legal Process Theory*, 2006 MICH. ST. L. REV. 385, 391 (“[Frank’s] views made him an extreme—and extremely clear-spoken—legal realist.”).

16. See LEITER, *supra* note 3, at 17 n.12; PURCELL, *supra* note 5, at 82.

17. RUMBLE, *supra* note 2, at 38.

18. Even those who recognize that Frank passionately defended the power of reason in other areas characterize that later defense as standing in tension with *Law and the Modern Mind*. See ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK’S IMPACT ON AMERICAN LAW* 25 (1985); Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC’Y 175, 183 (1991).

19. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 176-77 (1992).

20. *Id.*

21. Llewellyn, Adler & Cook, *supra* note 13, at 96 (Adler’s contribution) (calling Frank’s discussion of psychology “a poor statement of psychoanalytical theory”); Duxbury, *supra* note 18, at 182 (noting that Frank’s account is “built upon a mixture of psychoanalytical concepts and insights strung together rather haphazardly according to the dictates of his own curious speculation”).

22. See GEORGE C. CHRISTIE & PATRICK H. MARTIN, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 870 (1995) (asking students to consider whether Frank’s father figure theory is “telling us something about how we view law or about his own relationship to his father?”); WALTER E. VOLKOMER, *THE*

endorse Frank's other arguments in the book encourage readers to more or less ignore his psychological one.²³ But regardless of the validity of Frank's psychological speculations, most seem to agree that the work as a whole was primarily a critical attack on legal formalism and that it failed to offer any kind of constructive vision for legal reform.²⁴

One can find support for each one of these views in the text of *Law and the Modern Mind*. Many of its themes, such as the influence of traditionally "non-legal" factors on case outcomes, are familiar Realist ones; at the same time,

PASSIONATE LIBERAL: THE POLITICAL AND LEGAL IDEAS OF JEROME FRANK 216 (1970) (noting that Frank's father-figure theory "probably came to Frank as an insight during analysis").

23. See Brian H. Bix, *Introduction to JEROME FRANK, LAW AND THE MODERN MIND*, at xv (Transaction Publishers 2009) (1930) [hereinafter FRANK—2009] (noting that he agreed with Llewellyn that "Frank's psychoanalytic approach is more distracting than helpful."); POSNER, *supra* note 11, at 118 (calling Frank's proposal that judges undergo psychoanalysis "ridiculous" but noting that Frank's "emphasis on the psychological dimension of judging was not ridiculous"); J. MITCHELL ROSENBERG, *JEROME FRANK: JURIST AND PHILOSOPHER* 17 (1970) ("Divorced of its theoretical and mythical psychological underpinning, *Law and the Modern Mind* still represents a landmark volume in the annals of jurisprudence."); FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 130-31 (2009) ("psychological silliness in Frank's work should not blind us to the importance and arguable soundness of his major insight," namely that non-legal factors play a role in determining case outcomes); Llewellyn, Adler, & Cook, *supra* note 13, at 85-86 (rhetorically asking, "[h]ow is it possible for the canny student who discriminates so skillfully the proved from the dubious when reading a legal writer to swallow at a gulp a yearning for the pre-natal serenity which is not only unproved but unprovable?").

24. See HORWITZ, *supra* note 19, at 209 (distinguishing between two "faces" of Realism, "one critical, another reformist and constructive," and noting that the "social science reformism" came to dominate after 1933); JULIUS PAUL, *THE LEGAL REALISM OF JEROME N. FRANK: A STUDY OF FACT-SKEPTICISM AND THE JUDICIAL PROCESS* 49 (1959) ("That [Frank] did not develop a definitive philosophy of law is not a fair criticism, because the American legal realists were generally averse to any official creed or doctrine of law . . ."); VOLKOMER, *supra* note 22, at 20-41 (recognizing that Frank meant his skepticism to be "constructive," but criticizing *Law and the Modern Mind* for its failure to offer any affirmative program for legal reform); Citron, *supra* note 15, at 392 ("In *Law and the Modern Mind*, Frank described 'the basic legal myth'—the myth of certainty—and explained its causes. He did not, however, prescribe a solution for it."); Duxbury, *supra* note 18, at 183 (describing Frank's praise of the "modern mind," but concluding that Frank advanced "no programme [sic] for cultivating this new mind").

Frank had a flair for the dramatic and often leveled critiques in more hyperbolic language than was warranted, giving the book a vituperative quality. Nor is it free of internal inconsistency. Sometimes, for instance, Frank seemed to say that rules play a constraining role in legal decision making; at other points, he suggested that they were incapable of playing such a role.²⁵ The form and structure of his book only aggravate this problem. The argument is presented piecemeal, with one ramblingly-titled chapter following another, in no logical order, followed by eight separate and unconnected appendices.²⁶ All of which lends support to the judgment of one scholar about Frank's contribution as a whole: "Clever rather than wise, a dilettante intellectual rather than a scholar, a brilliant controversialist, but somewhat erratic in his judgments, in his juristic writings Frank exhibited the strengths and weaknesses of a first-class journalist."²⁷

Nevertheless, the impression left by these accounts of *Law and the Modern Mind* profoundly misrepresents its central argument and the core concerns of its author. For all the reasons just mentioned, Frank deserves much of the blame for the disconnect. But scholars have also misunderstood Frank's intellectual motivations, I think, because they have had a somewhat cramped view of the philosophical debates taking place during the time in which

25. Compare FRANK, *supra* note 6, at 100 ("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. If he cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another."), with FRANK, *supra* note 6, at 128 ("There is no rule by which you can force a judge to follow an old rule or by which you can predict when he will verbalize his conclusion in the form of a new rule . . . His decision is primary, the rules he may happen to refer to are incidental."). See RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 29 (1961) (noting Frank's inconsistency on this point).

26. See, e.g., FRANK, *supra* note 6, at Ch. XIV, "Illusory Precedents: The Future: Judicial Somnambulism," 148-59.

27. TWINING, *supra* note 2, at 379; see also PAUL, *supra* note 24, at 134 ("One valid criticism of Jerome Frank's writing has been the slipshod manner in which he deals with his materials. His books are a conglomeration of various and diverse materials gleaned from voluminous reading, but sometimes without adequate digestion of their contents.").

Frank wrote. They seem to have assumed that there were mainly two opposing philosophical camps at that time. On one side were what Professor Edward Purcell has called “scientific naturalists,” who confidently asserted that science revealed empirical truths about the world but who denied the objectivity of ethical values.²⁸ Opposing them were religious and moral “absolutists,” who affirmed the existence of objective standards, derived through a priori reasoning, that could be used to justify ethical positions. To the absolutists, scientific naturalism seemed to imply ethical relativism and moral nihilism.²⁹

If those were the only options available, then the conventional interpretations of Frank make some sense. For under this view, the Legal Realists, including Frank, clearly fell within the scientific naturalist camp. All legitimate theoretical inquiry required the study of observable phenomena, which, in turn, required drawing a sharp distinction between facts, which could be observed, and values, which could not be.³⁰ Progress in legal theory and practice thus primarily entailed the application of empiricist methods to the legal domain.³¹ The ethical

28. See PURCELL, *supra* note 5, at 11 (describing the core characteristics of the scientific naturalists).

29. See *id.* at 139-58.

30. See GLENNON, *supra* note 18, at 57 (“Edward Purcell has convincingly demonstrated that realism was part of a social science movement, known as scientific naturalism, which rejected the idea that absolute rational principles govern the universe.”); LEITER, *supra* note 3, at 57-58 (“The 1920s and the 1930s marked the heyday of ‘positivism,’ in philosophy and the social sciences: natural science was viewed as the paradigm of all genuine knowledge and any discipline—from philosophy to sociology—which wanted to attain epistemic respectability had to emulate its methods, i.e., had to be ‘naturalized.’”); PAUL, *supra* note 24, at 43 (“To Jerome Frank, this struggle is not exclusively in the domain of jurisprudence: it is the battle of modern science, the search for empirical truth amidst dogma, the age-old struggle to free men’s minds from the shackles of past emotion and sentimentality. . . .”); PURCELL, *supra* note 5, at 49 (“American social scientists agreed by the early thirties that the scientific method could offer no validation of ethical judgments.”); SCHLEGEL, *supra* note 2, at 5-6 (praising Purcell’s book but noting that it excludes various debates among Realists); White, *supra* note 2, at 823 (suggesting that the Realists assumed that “while arguments based on legal doctrines were necessarily value laden, arguments based on empirical observation” were value-free).

31. See GLENNON, *supra* note 18, at 48 (“Frank pioneered in using social science analysis to study the law, but his effort never took hold.”); KALMAN, *supra* note 2, at 17 (“The realists looked to the social sciences to help them

“ought” for such a project was either taken for granted or temporarily bracketed until later. If Frank saw the world this way, then it is easy to see how his skepticism about the predictive power of the social sciences would seem to reflect a cynicism about legal progress. It is also not hard to see how his patently psychological explanation of the demand for legal certainty would seem to imply irrationalism about human cognitive capacities. This reading is especially understandable given that Frank did occasionally appear to endorse this scientific naturalist position.³²

But those were not the only philosophical options available. In addition to those two, a third strand of philosophical thinking at that time attempted to reconcile the rationality of ethical, aesthetic, and even religious values within a largely naturalistic worldview.³³ Like that of the scientific naturalists, this view emphasized experience as a source of knowledge, but it differed from the scientific naturalist position in two ways. First, it stuck to its empiricist guns in rejecting any metaphysical view about the ultimate nature of reality, including a materialist one.³⁴

reform jurisprudence. A determination to integrate law with the social sciences pervaded their functionalism.”); PURCELL, *supra* note 5, at 78 (“If [the Realists] were to be professional scientists, they argued, then they must be truly scientific. In the twenties that injunction pointed in just one direction—cooperation with the confident new social sciences.”), 85-86 (“Llewellyn and Frank were united in calling for careful empirical studies of the way the law actually operated in society . . .”); G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 124-25 (1978) (noting that Frank shared with Llewellyn a belief that judicial decision making could be “improved by an abandonment of artificial logical concepts and an increased use of empirical data gleaned from ‘scientific’ studies of contemporary social phenomena.”).

32. See, e.g., FRANK, *supra* note 6, at 132 (“But if we are not to be befogged by words we will not assume that the ‘principles of law’ are similar to the ‘principles of biology.’ The principles of biology are based directly on the biologist’s description of the conduct of animal organisms; the principles of law are often only remotely related to judicial conduct.”). Though, even here the problem with legal principles seems to lie in their remoteness from what judges actually do, not in the fact that they refer to questions that are inherently indeterminate.

33. Schlegel makes a similar criticism of Purcell on this front. See SCHLEGEL, *supra* note 2, at 6 (noting that Purcell’s focus on the Catholic critics of Realism obscures other critiques of Realism by such scholars as Morris Cohen, Roscoe Pound, John Dickinson, and Lon Fuller).

34. By ‘materialist’ I mean to describe a metaphysical view according to which the only thing that exists in the world is matter (as compared, for

Second, it had a broader notion of what experience included; specifically, it included common-sense intuitions embedded in human experience. Its defense of the rationality of ethical and other values was thus two-pronged. By refusing to commit itself to any metaphysical picture—including a materialist one—it held out the possibility of, at the very least, human free will and perhaps even a moral reality. By counting deep intuitions about values as components of individual experience, it legitimized the values based on those intuitions as consistent with an empiricist epistemology that had proven so successful in achieving scientific progress.³⁵

One could fairly label this philosophical view “pragmatist,” but that term has been used to refer to so many different methods and philosophies that it probably obscures more than it clarifies.³⁶ Another good candidate is “humanist,” but that too is plagued by similar difficulties. More important than the label is whose views it plausibly describes. It describes, very roughly, the views of the philosophers on whom Frank relied most heavily in *Law and the Modern Mind*, Hans Vaihinger and F.C.S. Schiller, as well as other, far better known figures whose works he also drew upon, such as William James and John Dewey.³⁷

instance, to dualism, which asserts that everything in the world is *either* matter or mind). Today, many philosophers endorse a comparable view called “physicalism,” which is sometimes distinguished from the older term “materialism” on the ground that not everything physical is necessarily matter. But for our purposes, any slight distinction between the two is not significant. See William Seager, *Physicalism*, in *A COMPANION TO THE PHILOSOPHY OF SCIENCE* 340 (W. H. Newton-Smith ed., 2000) (noting that the distinction between physicalism and materialism is “vague and murky” and that for many philosophers the two terms are “interchangeable synonyms”).

35. WILLIAM JAMES, *THE MEANING OF TRUTH* 238 (Harvard University Press 1978) (1885) (“The essential service of humanism, as I conceive the situation is to have seen that *tho* [sic] *one part of our experience may lean upon another part to make it what it is in any one of several aspects in which it may be considered, experience as a whole is self-containing and leans on nothing . . .* It seems, at first sight, to confine itself to denying theism and pantheism. But, in fact, it need not deny either.”).

36. See LEITER, *supra* note 3, at 46 (“Unfortunately, [the term pragmatism] has been so recklessly overused in recent years that it has been rendered, by now, either utterly banal or simply empty.”).

37. For connections between Vaihinger and Schiller, and both to pragmatism, see, for example, EUGENE THOMAS LONG, *TWENTIETH-CENTURY WESTERN*

Of course, these philosophers all differed in important respects.³⁸ But, all of them sought to affirm the possibility of human freedom and the rationality of human moral or spiritual values within a broadly naturalistic framework.³⁹

And so did Frank. He was skeptical about the possibility of gaining “objective” knowledge about the world but confident in the possibility of intellectual, legal and moral progress. And like these philosophers, he sought to reconcile these two seemingly contradictory positions by assessing intellectual progress by reference to the practical fruits a given theory bore rather than to its supposed correspondence to some “reality.” In determining what counts as such practical benefits, he was reluctant to draw firm distinctions between the philosophical and psychological domains, between reason and emotion, and between fact and value.

Once we see that Frank adopted this humanistic philosophical perspective, his book’s true radicalism appears to lie less in what it criticized than in what it

PHILOSOPHY OF RELIGION 1900-2000 67 (2000) (noting that Vaihinger is often classified as a pragmatist and shares “much in common with F.C.S. Schiller”); Steve Fuller, *Richard Rorty’s Philosophical Legacy*, 38 PHIL. SOC. SCIENCES 121, 122 (2008) (“Hans Vaihinger and F.C.S. Schiller are two largely forgotten figures of the period who articulated philosophies that were ‘pragmatist,’ sometimes even in name.”). Frank also mentioned other philosophers, such as G.B. Foster and Alfred North Whitehead, who shared similar philosophical motivations. See FRANK, *supra* note 6, at 201, 248.

38. For instance, Vaihinger was far more committed to Darwinism than Schiller, and James looked more to individual experience than Dewey, who emphasized the role of society in generating values.

39. See, e.g., JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 165 (1920) (“After all, then, we are only pleading for the adoption in moral reflection of the logic that has proved to make for security, stringency and fertility in passing judgments upon physical phenomena.”); WILLIAM JAMES, PRAGMATISM 106 (1907) (criticizing materialism for its failure to offer “a permanent warrant for our more ideal interests, [or] a fulfiller of our remotest hopes”) F.C.S. SCHILLER, STUDIES IN HUMANISM 10 (1907) (“[T]he most essential feature of Pragmatism may well seem its insistence on the fact that . . . *all mental life is purposive*. This insistence in reality embodies the pragmatic protest against naturalism, and as such ought to receive the cordial support of rationalist idealisms.”); HANS VAHINGER, THE PHILOSOPHY OF ‘AS IF’ at xlvii (C.K. Ogden trans., Harcourt, Brace & Co. Inc., 1925) (1924) (explaining his philosophy of “As If” as a form of “positivist idealism” and emphasizing that the world of “unreal” fictions is “as important as the world of so-called real or actual (in the ordinary sense of that word)” and “far more important for ethics and aesthetics”).

affirmed. *Law and the Modern Mind* is, in brief, an apology for a particular kind of philosophical stance or attitude. From its attack on legal orthodoxy, to its diagnosis of what plagues legal thought, to the remedy it offers as a cure for the Myth's symptoms, the book constitutes one long, sustained demand for the cultivation of a quality of mind that Frank sometimes called the "modern mind" and at other times called the "scientific spirit." But to see why he thought such cultivation could serve as a balm for what plagued legal thinking, we must first understand what Frank took the problem to be.

II. THE SYMPTOMS: THE BASIC LEGAL MYTH AND ITS CONSEQUENCES

Much of Frank's critique of the Myth in *Law and the Modern Mind* invoked such familiar Realist themes as the vagueness of formal rules and the influence of traditionally non-legal sources on case outcomes. It was also probably a gross caricature of how most, or at least many, judges at the time actually viewed the law.⁴⁰ What concerns us here, however, is clarifying exactly what his criticisms of the

40. See Tamanaha, *supra* note 4, at 748 ("Virtually all the core insights about judging associated with the Realists were prominently stated decades before, often by Historical Jurists."). Tamanaha argues that Frank not only overstated the prevalence of the Myth among judges of his time, but deliberately distorted the views of some of the jurists he cited as evidence of the Myth. As some evidence of this distortion, Tamanaha points to a passage Frank quotes from a work by Sir Henry Maine in which Maine refers to a belief in legal certainty and permanence, seemingly in support of Frank's thesis about the prevalence of the Myth. But Frank excised from the passage a sentence where Maine explicitly says that "we now admit" that the law is not complete and that court decisions change the law. But Tamanaha himself fails to include the sentence before that sentence, which reads, "*Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision has modified the law.*" HENRY MAINE, ANCIENT LAW 31 (1861) (emphasis added). The first sentence makes clear that Maine was not contrasting the current view of law with an older view according to which law was certain and changeless. Rather, Maine was drawing attention to how views about the changeability of any given law changes once a judicial decision is rendered. Tamahana adduces other persuasive textual evidence as well, but none, to my mind, definitively establishes that Frank's use amounted to a "calculated distortion" of Maine. Frank could have reasonably believed that Maine held the view Frank ascribed to him.

Myth were, regardless of whether or not they were deserved. In doing so, we can usefully distinguish among three distinct critiques Frank leveled against the Myth: an empirical critique, a normative critique, and a conceptual critique. Let us consider each in turn.

Frank identified the indeterminacy of legal rules as the source of much of the actual uncertainty in the law. The language of statutes and court opinions was sufficiently vague that rival interpretations were always possible, making it nearly impossible to predict which interpretation a court would choose. Until we knew how another court would interpret a previous court's ruling, we could not say what the rule of that case was.⁴¹ Instead of rules, what really determined the outcome of court decisions was a host of "subjective factors—desires and aims which push and pull us about without regard to the objective situation."⁴² Frank quoted at length Judge Hutcheson, who had explained that judges based their decisions on a "hunch," by which he meant "that intuitive flash of understanding that makes the jump-spark connection between question and decision"⁴³ Judges, though, like most people, were typically unaware of the influence of these factors—or "biases," as Frank called them—on their thinking.⁴⁴ Although, of course, judges spoke as if they were applying rules, they only did so after they had reached their conclusions based on this "hunch."⁴⁵ The reasoning articulated in a judicial opinion was, then, best understood as an ex-post "rationalization."⁴⁶ Given that such factors, and not rules, determined the outcome of cases, "[w]hatever produces the judge's hunches makes the law."⁴⁷

This all sounds like standard Realist fare, but what made Frank "extreme" among the Realists was his skepticism about our capacity to predict the outcome of legal

41. See FRANK, *supra* note 6, at 124-25.

42. *Id.* at 28.

43. *Id.* at 103 (quoting Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 278 (1929)).

44. *Id.* at 28.

45. *Id.* at 103.

46. *Id.* at 29-30.

47. *Id.* at 104.

decisions by reference to any observable factors.⁴⁸ Whereas other Realists hoped to use social science to identify and predict case outcomes, Frank was doubtful that such efforts would find much success. He identified at least two reasons to be skeptical. First, even when the meaning of a rule was so clear that there was wide consensus as to what the outcome should be on a given set of facts, judges might interpret those facts differently. In trial courts, what the court determined the “facts” to be depended on whose testimony the judge or the jury believed. Who the judge would believe, again, depended on his own biases and prejudices.⁴⁹ According to Frank, a trial judge did not even distinguish his “belief as to the ‘facts’ from his conclusion as to the ‘law. . . .”⁵⁰

Frank’s second reason for being skeptical about predicting case outcomes was that the number of potential psychological influences on a judge’s thinking was too large for the influences to be usefully categorized for predictive purposes, as some Realists hoped to do.⁵¹ Although such attributes as a judge’s race, class, or political ideology were surely relevant to how they decided cases, they were, for Frank, “too gross, too crude, too wide” to form the basis of predictions.⁵² This was particularly true in the context of fact-finding. In viewing the parties and attorneys to a suit, Frank explained, the judge’s “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 ministers, or college students, or Democrats.”⁵³ Since these reactions were the result of the judge’s “entire life-history,” in order to know the true basis of a particular judge’s reasoning, and, therefore, the likely outcome in a given case, one would need to have information akin to what

48. See LEITER, *supra* note 3, at 63 (distinguishing Frank as an “extreme” Realist who did not subscribe to the view that the central goal of legal theory was “to identify and describe—not justify—the patterns of decision”).

49. FRANK, *supra* note 6, at 106-07.

50. *Id.* at 116. Frank’s skepticism about the accuracy of fact-finding was what earned him the label—one he welcomed—of a “fact-skeptic.” See FRANK—1949, *supra* note 10, at ix-x.

51. FRANK, *supra* note 6, at 151.

52. *Id.* at 105.

53. *Id.* at 106.

one would provide in a “detailed autobiograph[y].”⁵⁴ It is thus fair to characterize Frank as “extreme” in his skepticism about our capacity to use scientific methods to predict case outcomes.⁵⁵

But Frank was far less concerned with identifying, let alone preventing, the degree of actual legal uncertainty that existed than he was with rejecting the goal of legal certainty itself. His protest against the Myth was not simply that it was false. The problem was that it encouraged people to demand certainty and predictability in the law, and that demand, in turn, required judges to adhere strictly to rules. Frank thus lamented “the insistent effort to achieve predictability by the attempt to mechanize the law, to reduce it to formulas in which human beings are treated like identical mathematical entities.”⁵⁶

For Frank, then, rule-based decision making itself was the problem and for reasons now familiar to every first-year law student. “To apply rules mechanically,” he insisted, “usually signifies laziness, or callousness to the peculiar factors presented by the controversy.”⁵⁷ Frank believed that the predictability which the generality of the law made possible came at the cost of accuracy and, therefore justice, in adjudication—a plausible and relatively uncontroversial view of the costs and benefits of rule-based decision making.⁵⁸ Here Frank was directly attacking not just the

54. *Id.* at 114-15.

55. One of his biographers takes Frank to task on this score. See GLENNON, *supra* note 18, at 50 (“He trivialized his argument, however, by making judicial decisions turn on whimsical irrelevancies, such as the color of a person’s hair. If he had placed his analysis on historical and demonstrable grounds, such as racial, ethnic, or sexual prejudice, or perhaps economic class and interests, he would have been on firmer terrain.”). One goal of this essay is to show that this type of criticism misses Frank’s deeper point, namely that we should not even try to render decisions predictable.

56. FRANK, *supra* note 6, at 118.

57. *Id.* at 131; see also *id.* at 55 (“Why is *generality* so highly prized by lawyers at the expense of *particularity*?”).

58. Uncontroversial, to be sure, but not necessarily correct. See FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 98 (2003) (“The inevitable suboptimality of rules, however, is premised on a supposition about the accuracy of individualized decisionmaking. We know, however, that this accuracy often does not exist, and especially when there are reasons of bias and mistake, among others, to distrust the reliability of the individualized decision.”); Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1987-88 (2008)

relative causal efficacy of written legal rules, but rather the central values he perceived to lie behind any rule-based legal regime—generality in decision making for the sake of predictability of outcomes.⁵⁹

It may at first seem that Frank's empirical and normative critiques stand in considerable tension with each other. According to the former, judges make decisions based on subjective biases and prejudices, and according to the latter, judges ought not be constrained by rules. Is this not a recipe for sanctioned irrationalism? The answer is no, but to see why we must look to Frank's third, conceptual critique of the Myth. According to the Myth, "the law" consisted exclusively of legal rules and principles derived from cases and statutes.⁶⁰ This was a view Frank clearly rejected, but what he sought to put in its place is less clear. At times, he seemed to endorse what Professor Brian Leiter has called "Conceptual Rule-Skepticism," according to which the law consists not of any rules at all, but simply whatever courts decide.⁶¹ For instance, Frank quoted Oliver Wendell Holmes' proclamation that "[a] generalization is empty so far as it is general" and insisted that "[l]aw is made up not of rules for decision laid down by the courts but of the decisions themselves."⁶² Thus, "[t]he 'law of a great nation' means the decisions of a handful of old gentlemen, and whatever they refuse to decide is not law."⁶³

But this view seems tough to reconcile with other parts of the book, where Frank clarified that he did not mean to deny the existence of rules or legal reasons, only question

(drawing on Schauer's work to make a similar point in the context of adjudicative fact-finding).

59. Frank does not seem to recognize another purpose generality serves, namely formal equality. See FRANK, *supra* note 6, at 131.

60. *Id.* at 32.

61. LEITER, *supra* note 3, at 69. Leiter suggests that this was how H. L. A. Hart (mis)interpreted Frank and the other Realists. See *id.* at 70; see also H. L. A. HART, THE CONCEPT OF LAW 133 (1961) (referring to "rule-skepticism" as the view that "law consists simply of the decisions of courts and the prediction of them. . ."). Purcell seems to interpret Frank as such a skeptic as well. See PURCELL, *supra* note 5, at 82-83.

62. FRANK, *supra* note 6, at 124-25 (emphasis omitted) (quoting O.W. HOLMES, COLLECTED LEGAL PAPERS 240 (1920)).

63. *Id.* at 125.

their relative causal importance in legal decision making. Immediately following his observation, just noted above, that the law consisted of the “decisions of a handful of old gentlemen,” he continued, “[o]f course those old gentlemen in deciding cases do not follow their own whims, but derive their views from many sources. And among those sources are not only statutes, precedents, customs, and the like, but the rules which other courts have announced when deciding cases.”⁶⁴ Elsewhere, he rejected the view that “to deny that law consists of rules is to deny the existence of legal rules.”⁶⁵

Professor Leiter has recently defended the Realists against the charge of conceptual rule-skepticism by showing that their arguments presupposed a positivist conception of law.⁶⁶ According to Leiter, the Realists argued that non-legal factors were the real causal determinants of case outcomes and that this view presupposes the existence of criteria of legal validity that distinguish between “legal” and “non-legal” factors. And the substantive criteria that the Realists presupposed, he argues, were essentially those of the legal positivist, namely ones that looked to the pedigree of the rule in an authoritative source such as a statute or court opinion.⁶⁷

The problem with this response is that however well it may describe the jurisprudential views of other Realists, it fails dramatically in characterizing Frank’s.⁶⁸ The reason is that Frank was explicit in insisting that the personal, subjective reactions of judges ought properly be considered a legitimate part of the law. This was true for two reasons.

64. *Id.*

65. *Id.* at 132; see also JEROME FRANK, *LAW AND THE MODERN MIND* 162 n.3 (Anchor Books 1963) (1930) [hereinafter FRANK—1963] (clarifying that he was arguing not that no case could possibly be determined by a legal rule, just that they were so determined more rarely than was commonly supposed).

66. LEITER, *supra* note 3, at 72-73.

67. See *id.* at 45.

68. Though he does not address Frank’s views in much depth, the tenor of Leiter’s discussion suggests that he well recognizes this point. And this view is confirmed by a recent posting on his blog, in which he distinguishes Frank from other Realists in this regard, though he does so on the basis of Frank’s fact-skepticism. See Brian Leiter, *Green on Legal Realism and Naturalized Jurisprudence*, BRIAN LEITER’S LEGAL PHILOSOPHY BLOG (Apr. 14, 2009), <http://leiterlegalphilosphy.typepad.com/leiter/2009/04/green-on-legal-realism-and-naturalized-jurisprudence.html>.

First, such personal judgments were inherent in all human reasoning; and second, they were necessary for the exercise of sound discretion, which was itself constitutive of law.

On the first point, Frank thought all human reasoning—even the paradigmatically syllogistic reasoning of lawyers—had an ineliminable personal, subjective component. Here he was influenced by the British philosopher F.C.S. Schiller. Schiller’s main target of criticism was the traditional philosophical account of deductive logic according to which logic was a normative science that could properly deem irrelevant how human beings actually reasoned. Typical is the quotation from Schiller that Frank included as the first of three quotations before the title page of *Law and the Modern Mind*:

Whenever an attempt is made to point out that in every step in actual thinking a person intervenes and directs the course of thought in accordance with his interests and ideas, and that therefore to understand the sequence and connection of thought this fact must be taken into account, the cry is raised that this is psychology, and an attack upon the dignity and integrity of logic. It may be so, but it does not follow that the fact can therefore be disregarded.⁶⁹

The problem with traditional logic, according to Schiller, was that by focusing exclusively on the formal structure of statements, it abstracted away from the speaker’s true meaning.⁷⁰ Such meaning, he said, depended on the intent and purposes of the speaker, which could only be gleaned from the context in which it was uttered.⁷¹ And the question of the meaning of a speaker’s statement was ultimately a psychological question because it depended on “the whole of his concrete personality.”⁷² Schiller’s influence on Frank is evident. Frank quoted Schiller’s statement that “in every case of actual thinking . . . the whole of a man’s personality enters into and colors it in every part” in order to show that the true causal determinants of judicial decisions were not the syllogistic chain of reasoning in

69. FRANK, *supra* note 6, at tit. p.

70. SCHILLER, *supra* note 39, at 87 (“For the ‘logical’ context never recovers its full concreteness, and so can never guarantee to ‘Logic’ a knowledge of the actual meaning.”).

71. *Id.*

72. *Id.* at 86 (emphasis omitted).

which court opinions are framed, but rather the emotional hunches of judges.⁷³ If it was impossible for judges to reason without their emotional reactions infecting their thinking—even if only to provide the major and minor premises of a syllogism—then for Frank, there was no good reason to deem such psychological factors alien to legal reasoning.⁷⁴

The personal element was not only an essential component of all reasoning, it was positively valuable in the case of legal decision making. As we saw above, Frank blamed the Myth for frustrating judges' capacity to do justice in individual cases. Immediately after praising judicial discretion, Frank recognized that while "[t]he unavoidable intrusion of the judge's personality has its evil aspects," he thought it preferable to at least acknowledge the central role it played in resolving legal disputes.⁷⁵ "The judge is trying to decide what is just; his judgment is a 'value judgment' and most judgments rest upon obscure antecedents."⁷⁶ Indeed, relying on rules was nefarious precisely because it encouraged the judge to ignore such "obscure antecedents—the subjective elements of his decision—in himself."⁷⁷

At the same time, Frank considered such discretion to be an essential element of law. Although he praised both Aristotle and Roscoe Pound for defending the value of "equitable" or discretionary decision making, he criticized them both for suggesting that such decision making somehow took place outside of law.⁷⁸ Pound, for instance, had described judicial discretion as "anti-legal" or "non-legal" decision making, but Frank denied that one could reasonably draw "a sharp cleavage between something

73. FRANK, *supra* note 6, at 111.

74. Of course, a defender of formal logic might well respond that even if a person's emotions or interests determine the major and minor premises, such a fact does not undermine the validity of the rules of logic that one then applies to such premises. It is not entirely clear whether Schiller denies that point, but what is clear is that Frank shared with Schiller a much greater interest in discerning how people fill the content of their premises than in analyzing the formal structure in which they place those premises. *See id.* at 66.

75. *Id.* at 142.

76. *Id.* at 143.

77. *Id.* at 131.

78. *See id.* at 139-41.

which we call law and something which we call discretion.”⁷⁹ And, in fact, “what Pound calls the non-legal is the dominant, the more important, the more truly legal, for it is found at the very core of the whole business.”⁸⁰

If a judge’s subjective emotions are not only part of all human reasoning, but are also required for the wise and just exercise of discretion, and if such discretion is an essential component of law, then it would seem to follow that the personal, subjective reactions of judges are themselves part of the law. And indeed, that is precisely what Frank argued. Appreciating the extent to which a judge’s decision depends on his subjective reactions to the facts, Frank said, “must lead to a vision of law as something more than rules and principles, must lead us again to the opinion that the personality of the judge is the pivotal factor.”⁸¹ Thus, it is not that the judge’s personality informs the judge’s view of the law, but rather that—since the law is just judicial interpretations of its texts—the judge’s personality itself constitutes part of the law.

But what does it mean for the “personality” of a judge to be constitutive of law? And is that even a plausible conceptual claim about the nature of law? It certainly does not seem consistent with a conventional positivist account, or a natural law account, or even a Dworkinian-type account that sees legal or moral principles as an essential component of law. Whether a persuasive jurisprudential account can be built on this idea is unclear, to say the least. For one thing, it would seem to require drawing a distinction between legitimate “personal reactions” by judges and illegitimate ones, perhaps premised on some notion of judicial virtue.⁸² Regardless, though, what seems clearer is that Frank did not aim to provide a philosophically sophisticated explication of the concept of law. Rather, he sought to inquire into what law practically meant for various participants in legal institutions. He at one point noted that he was interested in what “the law

79. *Id.* at 140-41 (quoting Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905)).

80. *Id.* at 141.

81. *Id.* at 133.

82. See *infra* text accompanying notes 192-215 (discussing virtue theories of adjudication).

means to the average man of our times when he consults his lawyer.”⁸³ And he elsewhere considered law from the standpoint of the legal reformer. Thus, Frank offered one sure way to improve the predictability and certainty of case outcomes:

If we were to elect or appoint to the bench the most narrow-minded and bigoted members of the community, selected for their adherence to certain relatively fixed and simple prejudices, willing to be and remain ignorant of those niceties of difference between individuals the apprehension of which makes for justice and insensitivity to the rate of social change—we then might have stability in the law.⁸⁴

In other words, Frank’s claims about the nature of law were made not in order to weigh in on conceptual debates about the nature of law; rather, they were made with the goal of pointing where to look if one wants to improve the law. For Frank, the question of what the law is was more fundamentally a question of who decides legal disputes. Thus, if we care about the character of our law—about what its aims and purposes are and how well it achieves those aims and purposes—then we ought to look at the character of the people settling those disputes. So that is the topic to which he devotes most of the rest of his book.

III. THE DIAGNOSIS: EXPLAINING THE BASIC LEGAL MYTH

Frank’s investigation of the legal mind required him first to explain why lawyers and judges held this false belief in legal certainty. The explanations Frank rejected are as illuminating as the explanation he eventually settled on, for they demonstrate nicely how Frank’s epistemological assumptions differed from those that have traditionally been ascribed to him.⁸⁵ Frank quickly ruled out as

83. FRANK, *supra* note 6, at 42. Leiter defends Frank and other Realists from Hart’s criticism on the same ground. See LEITER, *supra* note 3, at 71.

84. FRANK, *supra* note 6, at 133. Judge Richard Posner has recently made a similar point: “[T]he more homogenous the judiciary, the more likely it is that judges’ intuitions will coincide. That will impart stability to the law, at the price of epistemic weakness, as the judges’ intuitions will rest on a narrower base of unconscious knowledge.” POSNER, *supra* note 11, at 116.

85. Chapters VII and X both discuss competing explanations, and in the first Appendix, entitled “Other Explanations,” Frank listed fourteen other possible

insufficient the view that a “social want” for certainty in adjudication explained the misperception that law was definite and certain: “It provokes the further question, what is back of this ‘social want?’ Why must law seem to be, what it is not, a virtually complete set of commands?”⁸⁶

Frank then considered in far more depth an explanation that blamed what he called “scholasticism.” By this term he meant to describe an intellectual habit of mind that accorded undue significance to abstract terms and to the concepts they purported to describe.⁸⁷ Frank noted that this explanation found support in the work of two influential linguistic theorists. In their book *The Meaning of Meaning*, C. K. Ogden and I. A. Richards had argued that the obstacle to clear thinking about any subject matter was our failure to use words appropriately or to understand their proper function.⁸⁸ In primitive cultures, people held a false belief that a word possessed a certain power over the thing to which it referred.⁸⁹ This belief that words had special power—what Frank called “word-magic”—still affected thinking and explained the impulse to invoke vague words for their emotive power despite their failure to refer to anything actually in the world.⁹⁰

Frank found this hypothesis in many ways persuasive, particularly since it seemed to explain analogous intellectual vices in the realm of metaphysics and epistemology. “Abstraction,” he explained, “was the Jacob’s ladder by which the philosopher ascended to certainty. The further he was from the facts, the nearer he thought himself to truth.”⁹¹ Instead of explaining the evil, chaos, and messiness of the world, “wishful” metaphysicians such as Plato sought to explain away such phenomena as mere illusion, not “Reality.”⁹² They insisted that there was a

explanations, such as “the aesthetic impulse,” “effect of professional habits,” and “inertia.” See FRANK, *supra* note 6, at Ch. VII, Ch. X, App. I.

86. *Id.* at 11.

87. *See id.* at 63-65.

88. *See generally* C. K. OGDEN & I. A. RICHARDS, *THE MEANING OF MEANING* (8th ed. 1923); *see also* FRANK, *supra* note 6, at 84.

89. *See* FRANK, *supra* note 6, at 84.

90. *Id.* at 85.

91. *Id.* at 59.

92. *Id.* at 58-59.

Reality behind the appearance, which they described with words like "One, Eternal, Unchanging."⁹³ They would then use "that instrument of reasoning which was worshipped by all men of the Middle Ages—formal logic" to deduce further conclusions from these very abstract metaphysical concepts.⁹⁴

If the Myth primarily reflected an undue emphasis on abstract concepts and deductive reasoning, the appropriate solution might seem obvious: apply the empiricist methods that had proven so successful in the natural sciences to the legal realm by observing and measuring the behavior of judicial actors. This response would seem to be particularly likely given the intellectual climate in which Frank wrote. According to Professor Edward Purcell, during Frank's time, "[t]he concept of science as method was crucial [I]n an intellectual environment that rejected *a priori* principles and categories, method provided the one certainty that was needed."⁹⁵ Under the influence of positivist strains of thought, philosophers would eventually insist that words describing metaphysical or moral concepts were, strictly speaking, meaningless.⁹⁶ And indeed, Ogden and Richards had argued that the cure for "word-magic" in general lay in being more precise with our language and in recognizing that words were simply "signs" that people used to stand for observed phenomena.⁹⁷ Importantly, such Realists as Karl Llewellyn and Leon Green made comparable critiques of verbalism in the law.⁹⁸

93. *Id.* at 59.

94. *Id.* at 64-65.

95. PURCELL, *supra* note 5, at 29.

96. See, e.g., ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC 38-39 (1946) ("[I]t is the mark of a genuine factual proposition . . . that some experiential propositions can be deduced from it in conjunction with certain other premises without being deducible from those other premises alone.").

97. OGDEN & RICHARDS, *supra* note 88, at 10-11; see also PURCELL, *supra* note 5, at 48 (observing that the influence of logical positivism "reinforced the arguments of Ogden and Richards").

98. See Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 464 (1930) ("A clearer visualization" of the problems in legal theory required "moves toward ever-decreasing emphasis on words, and ever-increasing emphasis on observable behavior . . ."); see also FRANK, *supra* note 6, at 57-58.

Frank thought that this over-concern with words, and the twin intellectual vices that it fostered—a privileging of abstract concepts over observed phenomena and of deductive logic over inductive reasoning—did indeed plague legal thinking. But he ultimately rejected both the scholastic explanation of the Myth and its implied solution. He rejected the explanation because it was conclusory; what he sought to know was why these methods had been employed successfully in the realm of natural sciences and not in the law.⁹⁹ Are lawyers, he asked, “characterized by unusual dullness, lack of shrewdness, blindness to the minutiae of every day affairs?” Frank’s answer: “Surely not.”¹⁰⁰ And he rejected the solution because it had been falsified by experience: even those who practiced such scientific methods suffered from what he perceived to be at the heart of the Myth—the desire for certainty.

Frank offered an interesting example to illustrate his point. According to Frank, Francis Bacon, the man more associated with the “scientific method” than just about anyone, had recognized the danger of letting our thoughts be driven by the words we use. And he had rightly criticized medieval philosophers for their refusal to recognize observation as a chief source of knowledge.¹⁰¹ Nevertheless, Frank argued, this fact “did not help Bacon to escape from the most hampering characteristics of scholasticism: At the basis of his ‘scientific’ method was the assumption that ‘certainty at all costs and by the shortest route is the sole aim of inquiry.’”¹⁰² The problem was that Bacon “did not develop a scientific, that is an adventurous, a risk-taking type of mind.”¹⁰³

For Frank, then, the source of the Myth was not just excessive conceptualism—that itself was simply another symptom. Rather, it was an emotional need or desire—the desire for certainty in our knowledge of the world and how it works.¹⁰⁴ And the key to the success of scientific inquiry

99. FRANK, *supra* note 6, at 68.

100. *Id.*

101. *Id.* at 89-90.

102. *Id.* at 90 (quoting F.C.S. SCHILLER, *FORMAL LOGIC; A SCIENTIFIC AND SOCIAL PROBLEM* 259 (BiblioLife 2010) (1931)).

103. *Id.*

104. *See id.* at 97.

had not only been the use of empirical, inductive methods but also an overcoming of the desire for certainty itself. The persistence of the Myth must thus somehow reflect an incapacity or unwillingness on the part of lawyers and judges to develop such a habit of mind—or at least to apply it in the legal arena. But why does this require “a risk-taking type of mind?” In answering this question, Frank invoked a concept that proved crucial to the rest of his argument: the fiction.

Drawing heavily on the work of German philosopher Hans Vaihinger, Frank explained that a “fiction” was a concept that one used with the conscious knowledge of its falsity.¹⁰⁵ It was distinguished from a myth, which was false but was believed by its exponent, and it was distinguished from a lie, which was used in order to deceive others.¹⁰⁶ A concept was a fiction when its exponent used it for a legitimate theoretical or practical purpose, but did so knowing that it was false.¹⁰⁷ The value of fictions lay in their capacity to clarify thinking in a given domain or to enable us to better conceptualize how to achieve certain goals. So, for instance, the “completely healthy man,” Frank explained, was a fictitious concept because no such person actually exists, but it is useful insofar as it aids medical thinking about diseases and disorders.¹⁰⁸ Indeed, Vaihinger had argued that many of the concepts used in science, philosophy, ethics, and economics ought properly be understood as fictions.¹⁰⁹ Similarly, Frank argued that legal rules and principles, too, were properly understood as fictions.¹¹⁰ We should think of all rules the way we think of those that deem business corporations to be persons for certain purposes; we know that businesses are not literally people, but we also recognize that it is sometimes useful to

105. *Id.* at 37.

106. *Id.*

107. *Id.*; *see also id.* at app. VII, 312-22.

108. *Id.* at 37-38.

109. For Vaihinger, atoms were fictions, as were absolute space, Adam Smith's notion of economic self-interest, and the soul. VAIHINGER, *supra* note 39, at 184-87, 213, 217-22, 227-233.

110. FRANK, *supra* note 6, at 166-67.

treat the organization as an entity distinct from its management or shareholders.¹¹¹

Fictions, Frank explained, were vital to intellectual progress, but there was always a danger that a fiction could become a myth.¹¹² This occurred when those using the fiction began to believe that the concept employed actually described a feature of the objective world.¹¹³ In fact, according to both Frank and Vaihinger, it was psychologically difficult to use fictions because it required taking them seriously enough to have real practical consequences depend on them, but not seriously enough to believe that they actually mapped onto the world.¹¹⁴ Frank described this state of mind as one of “painful suspension” in a chapter with that phrase as its title.¹¹⁵ It was a mental condition that resisted the pull toward a more comfortable state of rest. “If an idea is accepted as objective, it has a stable equilibrium, whereas an hypothesis has an unstable one. The mind tends to make stable every psychical content and to extend this stability, because the condition of unstable mental equilibrium is uncomfortable.”¹¹⁶

This desire for mental “equilibrium” would, then, seem to explain the desire for certainty reflected in the Myth. Because it was psychologically painful to use legal rules and principles to decide cases while simultaneously recognizing their subjective nature, judges and lawyers subconsciously convinced themselves that rules were objective, clear, and certain. But where does this need for mental security or “equilibrium” come from? According to Frank, Vaihinger had believed it to be “natural,”¹¹⁷ so for him overcoming it

111. *Id.* at 37-38.

112. *Id.* at 40.

113. *See id.*

114. *See id.* at 160-69; VAHINGER, *supra* note 39, at xlv (“Naturally the human mind is tormented by this insoluble contradiction between the world of motion and the world of consciousness, and this torment can eventually become oppressive.”)

115. *See* FRANK, *supra* note 6, 40.

116. *Id.* at 162.

117. *Id.*

required "a high degree of mental training; by the production of a highly developed logical mind"¹¹⁸

Once again, though, Frank found such an explanation wanting because it failed to usefully distinguish scientists from lawyers. After all, both lawyers and scientists were trained in analytical methods. "Yet there is one group of human beings, the scientists, who apparently seek to avoid that peace," Frank explained.¹¹⁹ "They go out in search of disturbing problems. They provoke for themselves situations which compel them to anguish themselves recurrently with suspended choices, with the retention of an open mind."¹²⁰ The question for Frank, then, was why the scientist, but not the lawyer, had "come to enjoy what the psychologists tell us is painful."¹²¹

To answer this question, Frank looked to child psychology. The Myth and the desire for certainty it reflected, he said, stemmed originally from the emotional needs of the child.¹²² According to the psychologist Jean Piaget, children possessed a number of emotional attitudes or modes of dealing with the world that reflected a deep desire for stability and security.¹²³ From an early age, children sought physical and emotional security, which

118. *Id.* at 163-64.

119. *Id.* at 160.

120. *Id.* Frank's characterization of scientific practice may have been as unrealistically romantic as his view of legal practice was bleak. Thomas Kuhn, for one, took a dimmer view:

The scientific enterprise as a whole does from time to time prove useful, open up new territory, display order, and test long-accepted belief. Nevertheless, *the individual* engaged on a normal research problem is *almost never doing any one of these things*. Once engaged, his motivation is of a rather different sort. What then challenges him is the conviction that, if only he is skillful enough, he will succeed in solving a puzzle that no one has solved or solved so well If it is to classify as a puzzle, a problem must be characterized by more than an assured solution. There must also be rules that limit both the nature of acceptable solutions and the steps by which they are to be obtained.

THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 38 (2d ed. 1970).

121. FRANK, *supra* note 6, at 161.

122. *Id.* at 13.

123. *Id.* at 13-14; *see generally* JEAN PIAGET, *THE LANGUAGE AND THOUGHT OF THE CHILD* (Marjorie Warden trans., 1926).

their parents were quick to provide for them.¹²⁴ The parents were thus perceived by the child to be “all-powerful, all-knowing.”¹²⁵ And whereas the child’s mother offered him “domestic tenderness,” the father had to “adopt the position of the final arbiter in force and authority.”¹²⁶ He thus personified “all that is certain, secure, infallible, and embodie[d] exact law-making.”¹²⁷ Eventually, of course, the child realized that the father was not all-knowing or all-powerful, but he still found it hard to face a life that was unpredictable and full of uncertainty and chance, so he sought substitutes for this father figure.¹²⁸ Frank’s hypothesis was that the law served well as such a father-substitute, with the result that this unconscious longing for fatherly authority manifested itself in the desire for legal certainty.¹²⁹ Hence, the Basic Legal Myth.¹³⁰

In this account, Frank believed, we finally had an explanation of the Myth that successfully illustrated why lawyers treat law differently than natural scientists treat the natural world: “‘Scholasticism’ has survived in lawyerdom while it is on the wane among natural scientists because the *emotional* attitudes of childhood have a more tenacious hold on men when their thinking is directed towards the law than when they are thinking about the natural sciences”¹³¹ The sciences were “not so easily as law converted into a father-substitute.”¹³² In other words, what explained the difference in relative success between natural scientists and jurists was not that the scientists discovered real, objective facts about the world whereas the jurists arbitrarily drew lines in a world of indeterminate values. Rather, it was that the impulse to cling dogmatically to generalizations about the world was simply stronger in

124. *Id.*

125. *Id.* at 14.

126. *Id.* at 15 (quoting BRONISLAW MALINOWSKI, *SEX AND REPRESSION IN SAVAGE SOCIETY* 257, 259 (1927)).

127. *Id.*

128. *Id.* at 14-15.

129. *Id.* at 18-21.

130. *Id.*

131. *Id.* at 82.

132. *Id.*

law than in science because the law dealt with situations that more closely resembled those from our childhood, when we craved certainty.¹³³

What are we to make of Frank's speculations about childhood longings and father-substitutes? Some scholars have interpreted Frank more or less literally as making an empirical claim about precisely how a belief in legal certainty arose in the minds of lawyers and judges. Finding the theory outdated and empirically unsupported, they then dismiss it as superfluous to Frank's core claims.¹³⁴ The reading is in some ways charitable, but the problem is that Frank devoted a substantial portion of the book to ruling out other explanations and to describing the father-substitution theory, so it is hard not to think that something significant about his argument is lost if it is so easily cast aside.

But it may be that Frank did not intend to make such a strong empirical claim at all. If, as we have seen, Frank insisted that all thinking was driven by purposes and values, perhaps Frank's father-figure explanation is best understood as an effort to serve Frank's own rhetorical purposes, namely to show the value of, and need for, the skeptical attitude he advanced. Indeed, I think this is so. Frank's account of the "child's world" essentially served as a foil with which he could contrast the "adult" or "modern" mind he thought so crucial to intellectual progress. To be

133. Nor were scientists entirely immune from such longings. In an appendix, Frank expressed skepticism that science could provide objectively true and absolute answers to questions about what the world was like. *See id.* app. III, at 285-88. He thus described as an "unscientific conception of science" the view that science offered "a charter of certainty, a technique which ere long will give man complete control and sovereignty over nature." *Id.* app. III, at 285. The reason was that science was itself a human enterprise and was, like all knowledge, restricted by the limits of the human mind. The universe, therefore, "will always contain some remnant of what, humanly speaking, is chaos, something which refuses to be reduced to our conception of order, something astray which cannot be formulated in terms of 'scientific laws.'" *Id.* app. III, at 287. The world as described by "popular science" is, according to Frank, "a child's world, a dream world." *Id.* app. III, at 288.

134. *See* SCHAUER, *supra* note 23, at 130-31; Llewellyn, Adler & Cook, *supra* note 13, at 82-90 (Llewellyn's contribution); *see also* FRANK—2009, *supra* note 23.

sure, Frank thought there was some rough causal connection between the emotional attitudes of the young and a yearning for legal certainty. And indeed, he may have been justified in doing so, for the thought is hardly implausible and is still taken seriously by psychologists.¹³⁵ But the point is that the contrast in mental outlook itself, not the particular “father-substitution” theory, does the important work in Frank’s argument.

This reading requires justification, but a few reasons in support of it can be offered. First, Frank explicitly qualified his account in the text itself, saying repeatedly that his was only a “partial explanation,” and at one point explicitly “absolv[ing] from responsibility” Piaget for the inferences drawn from his work, which, Frank said, he had juxtaposed with his own interpretations “to suit the writer’s own purposes.”¹³⁶ Second, such a reading is consistent with his endorsement of the use of “fictions” noted above.¹³⁷ Recall that according to Vaihinger, a fiction refers to a concept that is known to be false. It treats something “as if” it had one or another property. The theoretical value of fictions is measured not by how well the fictions correspond with reality—since they do not correspond to any reality—but rather by the fruits of the theoretical or practical enterprise in which it is put to use.¹³⁸

But if we think of Frank’s father-substitute theory of the Myth as a “fiction,” the question then becomes, what purpose does it serve as a fiction? What is its function as an explanation for the Myth? Answering these questions is the final and most important justification for this interpretation. Thus, below I seek to show how Frank’s

135. See, e.g., Detlef Oesterreich, *Flight into Security: A New Approach and Measure of the Authoritarian Personality*, 26 POL. PSYCHOL. 275, 282 (2005) (describing the concept of an “authoritarian reaction” as one that seeks comfort and security and noting that the child’s flight towards their parents is an early instance of such a reaction).

136. FRANK, *supra* note 6, at 69 n. For some examples of Frank’s repeated assertions that his was only a “partial explanation,” see *id.* at 20, app. I, at 263.

137. See *supra* text accompanying notes 105-16.

138. See VAHINGER, *supra* note 39, at 99 (“For us the essential element in a fiction is not the fact of its being a conscious deviation from reality, a mere piece of imagination—but we stress the useful nature of this deviation.”). Frank made explicit in later editions his desire that his father figure explanation be interpreted as a fiction. See FRANK-1963, *supra* note 65, at 23 n.8.

speculations on child development illuminate a type of philosophical disposition or stance toward the world—what he called the “scientific spirit”—that Frank thought necessary to improve legal thought and practice.

IV. THE REMEDY: CULTIVATING THE “SCIENTIFIC SPIRIT”

Given scholars’ tendency to describe Frank as an “extreme” Realist and the large amount of attention paid to his speculations about child psychology, one might think that the “modern mind” of his book’s title was meant to describe an irrational mind—one pulled in different directions by conflicting impulses and emotional drives. In fact, the opposite is the case. For Frank, the “modern mind” was one “free of childish emotional drags, a mature mind.”¹³⁹ It was imbued with what Frank called the “scientific spirit.”¹⁴⁰ And the remedy for the ills caused by the Myth was to cultivate the “scientific spirit” in lawyers and judges.¹⁴¹ Frank’s discussion of the “scientific spirit”—of how and why it should be cultivated—thus reveals his deepest jurisprudential concerns.

What exactly is the “scientific spirit”? Frank gives the reader the first indication in a chapter entitled “Scientific Training” about halfway through the first and main part of the book.¹⁴² There he considered Walter Wheeler Cook’s proposal that lawyers be taught the “logic of the natural sciences.”¹⁴³ Frank was far less sanguine than Cook about its prospects for achieving progress in legal practice or theory. His skepticism was based on previous attempts to apply the methods of science to the law. In the eighteenth century, for instance, mathematics had “aided creative work” in physics and chemistry and was “progressive, reconstructive, restless . . . adventurous, incessantly curious.”¹⁴⁴ Not so in legal science. There, “[n]ot novelty, but fixity, was the goal. Certainty, stability, rigidity were to be

139. FRANK, *supra* note 6, at 252 (emphasis omitted).

140. *Id.* at 98.

141. *Id.* at 98-99.

142. *See id.* at 93-99.

143. *Id.* at 93.

144. *Id.* at 95.

procured by reason.”¹⁴⁵ Similarly in the nineteenth century, jurists co-opted the language of “induction” from natural scientists, but it only further served to “worship an ‘invisible law.’”¹⁴⁶ Thus, Frank said that rather than teach lawyers the scientific method, he hoped to foster in them:

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.¹⁴⁷

Here we see Frank describe precisely the same characteristic that he claimed Bacon, the father of empiricism, had lacked.¹⁴⁸ The relevant question for Frank was how such a spirit could be cultivated. “Can the scientific spirit be inculcated by instruction in the ways of the scientists? It would seem not.”¹⁴⁹ It did not require, he said, “formal education.”¹⁵⁰ The reason for lawyers’ failure to develop this type of adventurous mind was not “dull-mindedness.” It was because the law possessed the power to “excite a spirit of devotion to fatherly authority.”¹⁵¹ It was, in other words, an “emotional blocking due to the very character of law” that made lawyers continue their “childish habits of thinking” by craving legal certainty.¹⁵²

We can now begin to see clearly how Frank used his account of the “child’s mind” to frame what he took to be the principal intellectual vices behind the Myth. Whereas the

145. *Id.* at 96.

146. *Id.* at 97. Once again, Frank’s picture is somewhat of a caricature. At least some legal theorists in the nineteenth century took seriously the comparison to science in thinking that its methods could be used for the purpose of discovering and improving, rather than merely fixing, the law. *See generally* Charles L. Barzun, *Common Sense and Legal Science*, 90 VA. L. REV. 1051 (2004).

147. FRANK, *supra* note 6, at 98 (emphasis omitted).

148. *Id.* at 90.

149. *Id.* at 98.

150. *Id.*

151. *Id.* at 99.

152. *Id.* (emphasis omitted).

child's mind craved comfort and security,¹⁵³ the adult mind—the modern mind, the scientific mind—celebrated risk and adventure,¹⁵⁴ whereas the child sought explanations for events,¹⁵⁵ the adult mind was comfortable with chance and contingency,¹⁵⁶ whereas the child would not “assume a hypothesis unless you can force him to believe it,” for one imbued with the “scientific spirit,” suspended judgment was a “source of pleasure, not of pain”;¹⁵⁷ and whereas the child was “singularly non-introspective” and had “no curiosity about the motives that guide his thinking,” the modern mind is one that undertook “searching self-analysis” and “ventures of self-discovery.”¹⁵⁸ Thus, although the child would “regard his own perspective as immediately objective and absolute,”¹⁵⁹ the modern mind recognized the subjectivity of its own judgments.¹⁶⁰ Clearly, then, Frank did not use the word “adult” in any conventional sense; rather, it described a particular kind of intellectual or philosophical achievement.

More important, as any good fiction must, the father-substitute theory also served the function of explaining two features of the “scientific spirit” that were crucial if it was to serve the jurisprudential role Frank hoped for it. First, as we have already seen, it described an emotional capacity, not a purely analytical one. The emotional component was key because, Frank believed, the emotions played an important role in shaping our ideals, values, and notions of justice. “[T]he judge should not be a mere thinking-machine,” he insisted.¹⁶¹ He clarified that he did not advocate a “‘hard-boiled’ matter-of-factness,” nor did he discount the value of “ideals” in the law.¹⁶² Indeed, Frank made clear that he believed “[t]here can be . . . a ‘scientific

153. *Id.* at 16.

154. *See id.* at 98.

155. *Id.* at 72.

156. *See id.* at 17-18.

157. *Id.* at 164-66.

158. *Id.* at 114-17.

159. *Id.* at 77.

160. *See id.* at 161-62.

161. *Id.* at 147 & n.

162. *Id.* at 168.

character to questions as to what the law ought to be.”¹⁶³ 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.”¹⁶⁴ Frank hoped to cultivate a “more constructive type of speculating.”¹⁶⁵ We needed judges “with a touch in them of the qualities which make poets,’ who will administer justice as an art,” so we should “encourage, not to discountenance, imagination, intuition, insight.”¹⁶⁶ After all, what lawyers and judges think the law ought to be “constitutes, rightfully, no small part of the thinking of lawyers and judges. Such thinking should not be diminished, but augmented.”¹⁶⁷

The second feature of the “scientific spirit” that Frank’s father-substitute “fiction” usefully accounted for was that it could be developed—not just by those with particular intellectual talents, but by anyone willing to give it the effort. All it required was some rigorous introspection. Judges, he said, must “come to grips with the human nature operative in themselves.”¹⁶⁸ The judge must thus become a psychologist who studied his own personality “so that he might become keenly aware of his own prejudices, biases, antipathies, and the like.”¹⁶⁹ This is what the child is unable to do. Recall that for Frank, legal decisions entailed value judgments, and such judgments rested on “obscure antecedents.”¹⁷⁰

Obscure, but not arbitrary. Through careful introspection, the judge could discern which of his “subjective reactions” were appropriately triggered by the

163. *Id.* (quoting MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* 188 (1967)).

164. *Id.*

165. *Id.*

166. *Id.* at 169 (quoting GRAHAM WALLAS, *OUR SOCIAL HERITAGE* 194 (1921)).

167. *Id.* at 168.

168. *Id.* at 147.

169. *Id.* at 147 n.

170. *Id.* at 143.

facts of the case—by the injustice done to a civil plaintiff, for instance—and which were the result of some arbitrary prejudice or bias. The key to reform was thus not observation of judicial behavior, but rather for judges themselves to engage in individual introspection as to their own thoughts, feelings, beliefs, purposes, goals, and assumptions. The skill required was both emotional and analytical. It was emotional in that it required a certain sensitivity to one's own felt reactions to a set of legal facts. And it was analytical because it required isolating that reaction and comparing it to how one reacted to previous comparable situations in order to distinguish the appropriately stimulated emotions from the arbitrary biases and prejudices.¹⁷¹ If Frank's faith in introspection and self-scrutiny as a means of achieving legal reform owes in part to his own experience in psychoanalysis, it makes this reading all the more plausible. For if Frank had undergone what was conventionally labeled a "psychological" or "emotional" form of analysis and yet come out of it with a conviction that he saw his own life and the choices he faced in a clearer way and made better decisions as a result, it is easy to see how he would find it difficult to distinguish the rational from the emotional component.¹⁷²

It is not an overstatement to say that for Frank, developing the "scientific spirit" in oneself was akin to a religious conversion after which one attained a kind of

171. *Id.* at 122-25.

172. Frank would thus passionately deny that he was substituting emotion for reason, or will for intellect, a charge some scholars have leveled. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 191 (1993) ("Frank's attack on Langdell's science of law thus begins by substituting will for reason as the key faculty in adjudication."); VOLKOMER, *supra* note 22, at 218 ("From this cursory inquiry into Frank's psychological make-up it can be tentatively stated that the origins of much of Jerome Frank's political thought were emotional and not rational."). Instead, Frank would have joined Schiller in dismissing the will/reason distinction as one based on an outdated conception of the human mind:

The analysis of psychic process into 'thinking,' 'willing,' and 'feeling,' in order to justify the restriction of 'Logic' to the first and the exclusion of the two latter, appears to be an unwarranted piece of amateur psychologising. For the analysis in question is valuable only as a rough reference for popular purposes, and is really a survival from the old 'faculty' psychology.

SCHILLER, *supra* note 39, at 98-99.

heightened consciousness. The craving for certainty resembled a sleep from which one eventually woke up and saw “everything as transitory” and so “welcome[d] of new doubts.”¹⁷³ He envisioned the modern, mature judge as one who “positively enjoys a state of mind in which he is not at rest, in which there is a struggle of many persons within him, and in which he arrives at judgments as the result of prolonged and wakeful combat between opposing possibilities.”¹⁷⁴ Once he cultivated this capacity for “wakeful combat” within himself he saw things with clearer vision. Specifically, he understood that legal rules and principles were not “finalities” but rather “shorthand expressions, ingenious abbreviations, metaphors, shortcuts, figures of thought, intellectual scaffoldings, and the like.”¹⁷⁵ In other words, he understood that for the judge, legal rules and concepts like negligence and due process, just as the concept of economic self-interest was for economists, were useful fictions or “as-ifs,” whose value lay in their theoretical and practical payoff, which, in the case of law, meant facilitating just decision making.¹⁷⁶ Once he had given up the dream of perfect fidelity to the past and control of the future, he could focus on doing justice in the present. Such a judge would have finally learned “the virtue, the power and the practical worth of self-authority” that slavish adherence to rules had thus far prevented judges from developing.¹⁷⁷ The cure for the ills produced by the Myth

173. FRANK, *supra* note 6, at 166.

174. *Id.* Posner, on the other hand, criticized legal formalism for placing unrealistic demands on judges, “who in our system *should* often have the uncomfortable feeling of skating on thin ice without the luxury of being able to defer decisions until certitude descends on them.” POSNER, *supra* note 11, at 249.

175. FRANK, *supra* note 6, at 166.

176. *Id.* at 167.

177. *Id.* at 121. One can see in such descriptions support for Horwitz’s characterization of *Law and the Modern Mind* as “existentialist.” HORWITZ, *supra* note 19, at 176-77. Frank’s emphasis on the need for judges to accept the uncertainty of their situation and to take responsibility for their decisions resembles at least one strain of existentialist thought. One can imagine, for instance, Frank agreeing with Jean Paul Sartre that when facing ethical dilemmas, “[i]f values are vague, and if they are always too broad for the concrete and specific case that we are considering, the only thing left for us is to trust our instincts.” JEAN-PAUL SARTRE, *EXISTENTIALISM AND HUMAN EMOTIONS* 26 (Bernard Fretchman, trans. 1957). But it is not clear that Frank would follow

thus lay in developing a judiciary filled with judges infused with the “scientific spirit.” He envisioned a world in which judges were developed from “the more enlightened, sensitive, intelligent members of the community.”¹⁷⁸ The decisions of such judges would not be uniform, because not all judges would “react identically to a given set of circumstances or will be obtuse to the recognition of unique facts in particular legal controversies.”¹⁷⁹ But, having given up the dream of perfect predictability ourselves, we will no longer crave it. Furthermore, “[i]n a deeper sense,” Frank explained:

[U]niformity of point of view among judges is likely to increase to the extent that judges are the more enlightened, the more quick to detect and hold in check their own prejudices, the more alive to the fact that rules and precedents are not their masters but merely agencies to be utilized in the interest of doing justice.

He had in mind “such judges as Holmes, Cardozo, Hutcheson, Lehman and Cuthbert Pound.”¹⁸⁰

Of course, a deep tension runs through this account. For there is all the difference in the world between saying that judges will justifiably decide cases differently on the same set of facts and saying that case outcomes will vary because judges will be attuned to the subtle factual and legal distinctions among cases. The former implies that there is no single, determinate “right answer” to most cases, whereas the latter implies that there is a single right answer, but that it depends on the unique facts of each case. This leaves the meaning of the “deeper” certainty Frank imagined somewhat ambiguous. Does the certainty lie in the fact that justice has been done in each case, even if we

Sartre in concluding that “[t]he only way to determine the value of [a feeling or instinct] is, precisely, to perform an act which confirms and defines it.” *Id.* at 27. For even this view seems to assume a strong distinction between fact and value, which Frank rejected. According to Sartre, the absence of God meant that the “possibility of finding values in a heaven of ideas disappears along with him,” *id.* at 22, but for Frank, as we have seen, ethical or legal decisions were not acts of pure will—they had an ineliminable epistemic component and could thus be improved through careful introspection and cultivation of the proper intellectual habits.

178. FRANK, *supra* note 6, at 134.

179. *Id.*

180. *Id.*

cannot describe the outcomes using an easily generalizable rule? Or is it that there is uniformity simply in the judges' (correct) "point of view" that there is no single right outcome of most legal disputes? On this point, Frank does not offer a clear answer.

Frank concluded *Law and the Modern Mind* with one of his most famously entitled chapters, "Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist."¹⁸¹ Frank's treatment of Holmes as a model jurist may at first seem in tension with his praise of the value of ideals and imagination in the law. But it was not the cynical side of Holmes that Frank revered.¹⁸² He nowhere endorsed Holmes's desire to wash moral notions from the law with "cynical acid."¹⁸³ Instead, much of what he admired in Holmes were fairly moderate—if "realist"—judicial virtues: Holmes's respect for the utility of logic, along with his recognition that it was often insufficient to decide cases; his deference to, but not enslavement by, history and precedent; and his recognition that ultimately the aim of law was to serve the needs of society.¹⁸⁴

Not surprisingly, what Frank most praised about Holmes was his skepticism. But Frank clarified that it was a constructive, not cynical, skepticism.¹⁸⁵ Here again, Frank drew on Vaihinger, who had noted that the ancient Greek skeptics fell into a state of despair when they "realized the deep chasm between thought and reality."¹⁸⁶ Such despair was understandable, Vaihinger explained, because "mere subjective thinking" had not "yet achieved these tremendous scientific feats which are distinctive of modern times."¹⁸⁷ According to Frank, the situation is comparable to that of jurists today. They wither at the "subjectivity" of the law and its apparent implications, but they do so needlessly.

181. *Id.* at 253.

182. For the many different interpretations of Holmes, see WHITE, *supra* note 31, at 194-226. White observes that Holmes was elevated to "demigod" status in the 1930s. *Id.* at 210. That characterization seems accurate in the case of Frank.

183. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

184. See FRANK, *supra* note 6, at 253-55.

185. See *id.* at 255, 259.

186. *Id.* at 259.

187. *Id.* (quoting VAHINGER, *supra* note 39, at 136).

Just as scientists have been able to employ such fictions as electrons and atoms to construct plausible accounts of the natural world that enable us to manipulate it in useful ways, so too should lawyers feel confident in their capacity to use the fictions of law—its rules, standards, and principles—for the purpose of securing justice in each case. According to Frank, Holmes exemplified this capacity to see “the relative nature of all human thought-contrivances.”¹⁸⁸ Maintaining this attitude in the law required even more courage than it did in science because it had already proven its worth in science. But Holmes showed that it could be done in law as well.¹⁸⁹

That is roughly what Frank meant by the term “scientific spirit,” which he offered as a remedy for the harms caused by the Myth. Commentators, however, have been uniformly unimpressed by it and deny that it amounts to a constructive vision for legal reform.¹⁹⁰ Why? It depends, I suppose, on what one means by that criticism. If one means that Frank failed to offer a “substantive theory about the good society,” then the charge seems fair.¹⁹¹ He did not propose criteria for allocating resources within society, nor for determining what purposes governments ought to pursue. Nor did he lay out strategies for using the social sciences as tools to solve concrete problems of public policy. But those were not his aims. *Law and the Modern Mind* is a book about the adjudication of legal disputes. And in it he presented an argument that (1) encouraged judges to treat the primary materials used for settling disputes in a radically different way (at least to his mind) than they had been treated previously, (2) offered a philosophical justification for such a shift, and (3) provided guidance as to how to bring about that change in attitude towards legal materials. In other words, Frank offered a normative theory of adjudication. Now his theory may have been deficient in a number of respects, but it is important to at least see what he was trying to do.

188. *Id.* at 259-60.

189. *Id.*

190. *See supra* note 24.

191. Ackerman, *supra* note 6, at 125 (noting Frank’s failure to develop such a theory).

To this end, it may be helpful to see that today we would probably call Frank's account a "virtue" theory of adjudication. In the past several decades, philosophers have developed normative accounts in political theory,¹⁹² ethics,¹⁹³ epistemology,¹⁹⁴ and jurisprudence¹⁹⁵ based on the notion of human virtue or excellence. Virtue theories vary widely, but they typically share certain core features. First, the turn to virtue theory reflects a general aversion to legalistic or rule-based approaches to the relevant field. Thus, virtue-based approaches to analyzing particular epistemological, ethical, or jurisprudential problems tend to be highly particularized and context-sensitive.¹⁹⁶ Second, and most obviously, they all see human virtues—that is, qualities of mind and character—as the starting point of normative inquiry in their respective domains.¹⁹⁷ In ethical theory, for instance,

192. See generally, e.g., ALASDAIR MCINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).

193. See generally, e.g., *VIRTUE ETHICS* (Roger Crisp & Michael Slote eds., 1997). The classic article in this area is G.E.M. Anscombe, *Modern Moral Philosophy*, 33 *J. ROYAL INST. PHIL.* 1 (1958).

194. E.g. LINDA TRINKAUS ZAGZEBSKI, *VIRTUES OF THE MIND: AN INQUIRY INTO THE NATURE OF VIRTUE AND THE ETHICAL FOUNDATIONS OF KNOWLEDGE* (1996).

195. Lawrence Solum has thus far developed the most sophisticated virtue-based account of legal adjudication. Solum defines judicial virtue as "a naturally possible disposition of mind or will that when present with the other judicial virtues reliably disposes its possessor to make just decisions." Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 *METAPHILOSOPHY* 178, 198 (2003). One such virtue, for instance, is a disposition to fairness, which is "constituted in part by having the right sort of emotional equipment for sympathy, an appropriate, even-handed concern for the interests of others." *Id.* at 197. Having the right "emotional equipment" is crucial because just decisions at some point depend on a judges' inarticulate sense of how he or she "sees" the case. *Id.* at 201; cf. FRANK, *supra* note 6, at 143 ("The judge is trying to decide what is just; his judgment is a 'value judgment' and most value judgments rest upon obscure antecedents."). Like other virtue theorists, Solum defines the good sought after by reference to the human capacity necessary for its attainment. Thus, according to Solum, "the notion of a just decision cannot be untangled from the notion of a virtuous judge grasping the salient features of the case. Virtue, in particular the virtue of phronesis, or judicial wisdom, is a central and ineliminable part of the story." Solum, *supra*, at 202. For a collection of essays using the concept of virtue to analyze various legal topics, see *VIRTUE JURISPRUDENCE* (Colin Farrelly & Lawrence B. Solum eds., 2008).

196. See *VIRTUE ETHICS*, *supra* note 193, at 3.

197. See *id.* Linda Zagzebski's definition of virtue is typical: "[A] deep and enduring acquired excellence of a person, involving a characteristic motivation

philosophers have argued that we can get a better grip on what an ethical life entails by looking to particular virtues, such as courage, humility, and generosity, rather than by looking to abstract principles of justice or utility.¹⁹⁸ In epistemology, relevant virtues might include, among others, diligence, care, open-mindedness, sensitivity to salient facts and intellectual humility.¹⁹⁹ Finally, many of the most important virtues, especially that of phronesis or “judgment,” are seen to be both moral and intellectual virtues, which depend on emotional and rational faculties.²⁰⁰

It is not hard to see how Frank’s account amounts to a virtue theory of adjudication. First, Frank’s entire book is one long, sustained attack on the legalistic, rule-centered mode of legal reasoning, and he is quite explicit in his demand for individualized and particularized judgments.²⁰¹ Second, as we saw above, the emphasis he placed on the judicial “personality” demonstrates clearly that he saw human qualities and capacities as the relevant subject of analysis and that he thought possession of such virtues necessary for the just adjudication of legal disputes. Finally, the virtue—or set of virtues—he prized above all others, the “scientific spirit,” has both an intellectual and moral component. He insisted that it was ultimately an “emotional attitude,” and one that required a type of courage and acceptance of responsibility (moral);²⁰² at the same time, though, it entailed adopting a particular philosophical perspective about the limited nature of human knowledge (intellectual).

This last point warrants special emphasis, because it responds to an obvious sort of objection to the interpretation I have been offering. The conventional view has been to see the transformation Frank envisioned as mostly the negative

to produce a certain desired end and reliable success in bringing about that end.” ZAGZEBSKI, *supra* note 194, at 137.

198. See Philippa Foot, *Virtues and Vices*, in VIRTUE ETHICS, *supra* note 193, at 163-77.

199. ZAGZEBSKI, *supra* note 194, at 114.

200. See ZAGZEBSKI, *supra* note 158, at 148 (noting that such virtues as “[c]uriosity, doubt, wonder, and awe” seem to be both intellectual and moral virtues); Foot, *supra* note 198, at 164.

201. See, e.g., FRANK, *supra* note 6, at 55.

202. *Id.* at 98-99.

one of throwing off various prejudices—a process of “liberation.”²⁰³ Frank’s use of the language of psychotherapy, which is often seen as a process of “uncovering” neuroses or prejudices, gives some support to this characterization and probably explains its appeal.²⁰⁴ Under this view, it would be perverse to call Frank’s a “virtue theory,” because he offers no substantive virtues. Far more plausible would be to characterize Frank as a legal pragmatist of the sort Judge Richard Posner praises.²⁰⁵

To be sure, Frank was indeed a legal pragmatist, but one advantage of framing his view as a kind of virtue theory is to emphasize the extent to which any plausible normative theory of adjudication calling itself pragmatist depends on some conception of judicial virtue. For if the legal pragmatist not only means to accept but to affirmatively endorse the view that judges make decisions on the basis of their own prior experience, hunches, and intuitions, then one might fairly demand some kind of account as to what intellectual or emotional capacities well suit them to the task.²⁰⁶

And Frank did just that. In both its moral and epistemic dimensions, the “scientific spirit” has real content. First, the virtue of courage is included on most traditional accounts of

203. See, e.g., KRONMAN, *supra* note 172, at 193 (“Liberated by his self-understanding, the mature judge stands ready to meet the real, and unavoidable, tragedies of life.”).

204. Not surprisingly, Frank largely abandoned this way of framing the issue in his later work.

205. See POSNER, *supra* note 11, at 230-65.

206. Hence, Judge Posner describes the legal pragmatist approach as “a nondoctrinaire, open-minded, experimentalist approach to law and public policy,” *id.* at 232, and, at another point, takes law professors to task for failing to devote attention to subject of judicial character:

Ours remains a case law system, and judges are central players in such a system. But because few law professors are interested any longer in trying to understand what makes judges tick or in trying to improve the judicial ticker . . . academic discussion of judicial opinions rarely even identifies the judges whose opinions are being discussed . . .

Id. at 218-19. I hope to have shown that Frank was primarily concerned with “improv[ing] the judicial ticker.”

ethical virtues,²⁰⁷ and Frank made quite clear that what he was demanding was a form of courage. Of course, the courage Frank had in mind was not physical courage, but rather a kind of moral or philosophical daring. It required making legal decisions, which depend largely on one's inchoate intuitions, in the face of deep uncertainty. One infused with the "scientific spirit," he said, "yearns not for safety but risk, not for certainty but adventure."²⁰⁸ And maintaining this skeptical spirit "requires courage, more courage than is required in the natural sciences."²⁰⁹ True, Frank did not offer much in the way of substantive criteria to determine what counts as courageous judicial action and what does not, but the whole point of virtue-centered theories is to deny that such explicit criteria can be provided. Instead, we learn about courageous actions by looking to the actions of courageous people.

The same is true of the epistemic side of the "scientific spirit." It is not that one simply becomes aware of one's prejudices and is magically no longer affected by them. Rather, one must adopt a particular stance towards one's own beliefs—to view them with critical distance without abandoning them completely. Recall that Frank thought the emotions played a central role in all legal decision making, whether just or unjust. The key, then, was not simply to overcome one's prejudices but to develop the right ones—the ones that reflect the values in the law relevant to the facts at hand. "The best we can hope for," Frank said, "is that the emotions of the judge will become more sensitive, more nicely balanced, more subject to his own scrutiny, more capable of detailed articulation."²¹⁰

Even if Frank advocated the cultivation of substantive judicial virtues, it may still be objected that they are not precise enough to determine how judges should decide particular cases. And this deficit might render Frank's theory of adjudication not only impractical but

207. Foot, *supra* note 198, at 169; *cf.* Solum, *supra* note 195, at 189 (including "judicial courage" among the judicial virtues).

208. FRANK, *supra* note 6, at 98.

209. *Id.* at 260.

210. *Id.* at 143.

illegitimate.²¹¹ The point is fair insofar as it accuses Frank of failing to offer any sort of decision procedure for deciding cases. He offered no such thing, believing it to be impossible. But the relationship between legal determinacy and moral justification is a philosophically controversial one.²¹² It also does not render Frank's theory irrational or self-defeating that it cannot alone decide concrete cases.²¹³ Furthermore, there is at least one class of cases in which Frank's approach would likely yield predictable results, namely those in which applying a rule does not fulfill its underlying rationale. Professor Fred Schauer, for instance, has argued that the essence of legal reasoning consists in applying the rule anyway in such cases, but Frank's view implies that in such cases the rule should be discarded as soon as its rationale gives way.²¹⁴

A more persuasive objection is that Frank's substantive conception of judicial virtue, which encouraged judges to treat rules as merely instruments for meting out justice to the individual parties, left virtually no space for traditional rule-of-law values, such as predictability, stability, and formal equality.²¹⁵ But making that argument confirms the central thesis of this essay, for it requires engaging in precisely the kind of normative debate to which scholars deny that Frank even attempted to contribute.

211. For an argument that a theory cannot morally justify an outcome it does not determine, see Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 WM. & MARY L. REV. 1773 (2007).

212. Compare Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987), with RONALD DWORKIN, MATTER OF PRINCIPLE 119-45 (1985).

213. See Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4 L. & ETHICS HUM. RTS. 33 (2010) (noting that unconstrained legal decision making is not necessarily irrational decision making).

214. See SCHAUER, *supra* note 23, at 7 (“[E]very one of the dominant characteristics of legal reasoning and legal argument can be seen as a route toward reaching a decision other than the best all-things-considered-decision for the matter at hand.” (emphasis omitted)).

215. Indeed, Solum makes for a useful contrast on this front because he includes respect for the stability and coherence of the law as a key judicial virtue. Solum, *supra* note 195, at 197.

CONCLUSION

I began this Article by situating Frank within a philosophical debate about the status of human values in a non-theological conception of the world. There I distinguished “scientific naturalists,” who insisted upon a clear fact-value dichotomy, from a group of thinkers and philosophers—plausibly dubbed “pragmatists” or “humanists”—who denied that committing oneself to an empiricist epistemology ruled out rational debate about religious, ethical, or aesthetic values. Most scholars have characterized Frank as a conventional scientific naturalist, and in *Law and the Modern Mind*, Frank gave them much evidence to support that characterization, not the least of which was his repeated invocation of a particular theory of child psychology. Still, I have sought to show that the overall structure of his argument (not to mention the philosophical sources he relies on) demonstrates that he was far more sympathetic to this latter school of thought, which rejected strong dichotomies between fact and value, reason and emotion, philosophy and psychology. And once we understand him to have held such philosophical assumptions, we can see that his psychological explanation of the Basic Legal Myth did not necessarily imply irrationalism and that his skepticism about predicting case outcomes did not mean that he failed to give any guidance for legal reform.

If this interpretation of *Law and the Modern Mind* has been persuasive, my hope is that it will prompt not only a reevaluation of Frank’s contribution to legal theory but a reexamination of Legal Realism itself. As mentioned at the outset, the themes discussed in this Article—from Frank’s skepticism about the utility of using social-scientific methods to study law, to his concern with the education and training of judges, to the importance of cultivating the “scientific spirit” in judges and legal scholars—became only more pronounced in his later work.²¹⁶ Frank never denied the value of the empirical study of judicial behavior, but as we have seen, he was far more concerned with the value of introspection than with empirical observation. He was less concerned with measuring judicial prejudices and biases

216. See, e.g., JEROME FRANK, COURTS ON TRIAL (1950); JEROME FRANK, FATE & FREEDOM (1945).

than he was with overcoming them. It is thus perhaps not surprising that as the legal academy has become more enamored with the prospect of applying empirical methods to legal institutions, scholars have tended to focus on the empiricist aspirations of the Realists as a whole, while dismissing Frank's contributions as idiosyncratic and peripheral to the core of Realist thought.²¹⁷

But there are grounds for hope. Recently, scholars of various stripes have once again become interested in studying the personality and character of judges.²¹⁸ So it may be that the Legal Realist for whom that topic remained front and center will again get the attention that he deserves. Furthermore, given that Frank was long considered to be a central and leading figure in Legal Realism, it is worth considering whether scholars have not only overlooked Frank, but have been blind to a whole other dimension of Realist thought—one that emphasizes the importance of human character to just adjudication and that endorses the use of more “humanistic” methods in legal theory.²¹⁹ Certainly, there are elements of such a view in

217. See LEITER, *supra* note 3, at 15-58 (calling for the “naturalization” of jurisprudence and interpreting the Realists (except for Frank) as early exponents of the view that the law can be studied most profitably using the empirical methods of social science); Torben Spaak, *Naturalism in Scandinavian and American Realism: Similarities and Differences*, in UPPSALA-MINNESOTA COLLOQUIUM: LAW, CULTURE AND VALUES 33, 66-72 (Mattias Dahlberg ed. 2009) (endorsing Leiter's interpretation of Legal Realism); see also SCHLEGEL, *supra* note 2 (pointing to the Realists' interest in the empirical social sciences as one of the movement's unifying features), Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2008) (endorsing and describing as a type of “new legal realism” the recent empirical work of scholars who seek to fulfill the ambitions of the original Realists by measuring judicial behavior using techniques borrowed from political science and economics that are far more sophisticated than the Realists had at their disposal); Victoria Nourse & Gregroy Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?* 95 CORNELL L. REV. 61, 100 (identifying empiricism as one of the common elements of new Realist scholarship).

218. See *supra* note 11.

219. Interestingly, Critical Legal theorists seemed poised to develop further this line of thought. See Tushnet, *supra* note 2, at 626 (noting connections between Realist thought and Critical Legal Studies). Like Frank, Critical scholars (“Crits”) were not persuaded that the empirical social sciences were the key to legal progress. For instance, G. Edward White observed that a central feature of Critical Legal thought was the “suggestion . . . that empirical research

some of the later work of Karl Llewellyn,²²⁰ and there may be in the work of other Realists as well. This essay has not defended such an ambitious claim, nor has it set out to. My hope has been merely to suggest that we ought to attend to some long-ignored insights of the movement known as Legal Realism.

legitimated the status quo by implying that the 'facts' of the research were somehow inevitably 'there' as part of a permanent 'reality' of American culture." White, *supra* note 2, at 834. But the Crits apparently took little interest in the one Realist who would have been most sympathetic to their philosophical worldview, perhaps because they had different intellectual ambitions or political goals. See Duxbury, *supra* note 21, at 198 (noting that Critical Legal theorists found in Frank "little apart from an enduring iconoclasm").

220. In 1960, Llewellyn wrote:

The place to begin is with the fact that the men of our appellate bench are human beings And one of the more obvious and obstinate facts about human beings is that they operate in and respond to traditions, and especially to such traditions as are offered to them by the crafts they follow. Tradition grips them, shapes them, limits them, guides them; not for nothing do we speak of *ingrained* ways of work or thought, of men *experienced* or case-hardened, of *habits* of mind.

KARL LLEWELLYN, THE COMMON LAW TRADITION 53 (1960).