Jerome Frank, as one of the most representative figures of American Legal Realism in the early years of the twentieth century, is known for not only his extensive legal practice experiences, but also his radical theories. The sharp and unique style of his theory, gives people enduring impression so that the other scholars refer his Legal Realism as “Frankification”. Regardless how the later scholars praise or derogate from him, they cannot annihilate his contribution to American Jurisprudence enough, and even, the western legal thoughts.

In general, it is believed that Frank’s contributions to legal theory are mainly used for reference and introducing the theory of Freud’s psychological analysis. Yet in fact, Frank’s thought originally is widespread, far more than Freud’s psychoanalysis theories, from legal to physicals, from politics to economics. In fact, he just depends on Freud’s theory on analysis of the mode of a judge in judicial activities. This seems to make a lot of legal scholars just focus on Frank’s psychoanalysis which he relies on and his famous proposition, “basic legal myth” and “fact-skepticism”. When such a version is gradually formed, people tend to label him as “Iconoclast”. It is certain that he has compressed other aspects discussed in his own system of thought. (it will be discussed in following sections.) However, it is undeniable that Frank’s theory and its influence are still having significant impacts on American jurisprudence in the 21st century. As a result, despite it has been almost 60 years since his death, it is still necessary to discuss his theory in-depth.

In this paper, based on such judgments, I will try to point out that the “constructive skepticism”, which includes absolute truth skepticism, absolute causality skepticism and fact-skepticism, is of systematic and mature rather than fragmentary and temporary in his legal philosophy. Furthermore, I will try to make a comment on Frank and his constructive skepticism.

I. The Background of the Constructive Skepticism

It is well known that United States is established on the basis of freedom and democracy. However, it was unfortunate that Frank worked mainly from the 1930s to 1950s, at the time that
the Absolutism, the sworn enemy of liberalism, prevailed the world widely and made impacts on the founding faiths of the U.S.\(^6\) As a result, for Frank, the core proposition of his political and legal thoughts, with all his force, was to keep American society and the people away from the Absolutism. And it run throughout all his writings. For example, in his book *Law and the Modern Mind*, he said, “I felt that, in a democracy, the citizens have the right to know the truth about all parts of their government, and because, without public knowledge of the realities of court-house doings, essential reforms of those doings will not soon arrive.…. Man can invent no better way to balk any of his ideals than the delusion that they have already been his ideals than the delusion that they have already been achieved. If we really cherish our ideals of democratic justice, we must not be content with merely mouthing them."\(^7\) In the book *Fate and Freedom, a Philosophy for Free Americans*, a book that represents his political ideas, he emphasizes again that, “I am not a philosopher but an ordinary person humbly reflecting on some of man’s major problems. A more correct sub-title would be this; some materials for and some gropings toward a philosophy for Americans who believe in freedom.”\(^8\) In the book *Courts On Trial: Myth And Reality In American Justice*, a book that concentrated on his legal thoughts of his later years, he kept addressing the importance of democracy. He affirmed that, “I am—I make no secret of it—a reformer, one of those persons who (to quote Shaw) ‘will not take evil good-naturedly.’… I repeat that, in a democracy, it can ever be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children, who are unable to accept the inescapable shortcomings of man-made institutions…. It is the essence of democracy that the citizens are entitled to know what all their public servants, judges included, are doing, and how well they are doing it.”\(^9\)

Rather than keeping silence or conniving on potential dangers to Absolutism, which did exist in judicial authority, Frank decided to “provoke constructive skepticism” in order to “arouse you, to call attention to some court-house government activities which are less adequately performed than they could be, largely because they have been too little publicly discussed.” The approach he used is quite modest instead of negative or radical. He explained constructive skepticism in the *Preface to Sixth Printing* to his book, *Law and the Modern Mind*. Originally, it is intended to substitute the label “fact-skepticism” and “rule-skepticism”. In Frank’s opinion, the “realism” in philosophic discourse, “has an accepted meaning wholly unrelated to the views of the so-called ‘legal realists’”, and they have “a negative characteristic already noted; skepticism as to some of the conventional legal theories, a skepticism stimulated by a zeal to reform, in the interest of justice, some court-house ways.”\(^10\) That means that “constructive skeptics” and “constructive skepticism” may be a better choice than “Legal Realists” to explain the substance of “Legal Realists”.\(^11\) Although, his proposal had no response from his colleagues, it showed more clearly and accurately the attitudes and substances of Frank’s theories.

Furthermore, it seems that the abstract doctrinal label and the doctrinal contents should remain the same. Prejudiced doctrinal label is apt to prejudiced doctrinal evaluations. Frank had pinpointed issues on human cognition that “conclusions determined their reasoning.”\(^12\) It is a universal thesis without exception, no matter what they are, either judges or layfolks. We ignore easily the theoretical integrity and practical functions of Frank’s legal philosophy if we were restricted to his academical skepticisms and criticisms. That is why we find that image of Frank in nowaday common views is split into
the iconoclast in academics and the pragmatist in practice. Skepticisms are not just the empty or esoteric deconstructions, but the legality of the necessity of constructions.

What’s more, there are several differences between constructive skepticism and fact-skepticism. In Frank’s legal philosophy, fact-skepticism just stands out his philosophical views on judicial process. But Frank expounded much more than judicial process. Besides, his famous fact-skepticism is based on the criticisms of the absolute truth, which I name it as absolute truth skepticism. And on logics, he questioned the absolute causality skepticism, which should give way to free will when they conflict with each other. Because free will, to Frank, was the core of the philosophy of freedom and American social values. The law in modern society should protect this value from every potential erosion.¹³

But above all, whether from Frank’s intentions or academic rigours, constructive skepticism may be a better label to summarize Frank’s core ideas.

Constructive skepticism consists of three aspects, “absolute truth skepticism”, “fact-skepticism” and “absolute causality skepticism”. Among them, “absolute truth skepticism” constitutes the main idea of Frank’s legal thought system.

II. “Absolute Truth Skepticism”

Walter E. Volkomer had pointed out that the core theme carried out by the works of Frank was skepticism, and that Frank denied the validity of all creeds which claimed to be the absolute truth.¹⁴ Suspicion and denial of absolute truth continues to be the core of Frank’s constructive skepticism, and became the premise for the establishments of “fact-skepticism”. We call such attitudes and views “absolute truth skepticism”. However, due to fact that the words Frank used were abstract and obscure, the viewpoints were often associated with Frank’s critics on Platonist. His attitude to absolute truth skepticism was difficult to understand and, therefore, was misunderstood by American traditional jurisprudence. So it usually submerges under the attention of fact-skepticism.

Frank’s criticisms and doubt on the absolute truth started from the critique of modern science. Frank suggested that, with the industrial production technology extensively being used, modern science had been altering several aspects of American society. Not only did it produces great social material wealth and set up a continuous progress of human civilization, but also made significant influence on traditional areas of knowledge, which could not get the legitimacy as a new and modern subject without the foundation of “science”. Law seemed to be no exceptions. “It became the mode that law should be made scientific.”¹⁵ In spite of keeping optimistic to science and its influence, Frank retained the anxiety and high degree of cautions to the possibility of negative influences of science.

Firstly, the Platonism, hidden in the core of modern science, pursues for the eternal truths. He suggested that Plato followed the origin of the modern science, to illustrate, the atomic theory in ancient Greeks, relativity and pragmatism, “Plato, in his youth, was taught and was greatly impressed by the views of the earlier scientific-minded Greek thinkers. From their teachings he became acquainted with doctrines which would now sound modern, for the atomic theory, relativity and pragmatism then had their beginnings.” However, it is a regret that Plato “did not help to foster those beginnings. On the contrary he was the
great leader of the reaction.” It is because Plato was against the earlier scientific-minded Greek thinkers, who took an open-mind to the real world instead of insisting on the Idealism.

To Frank, the reason why the modern science was able to reach such achievements was that it succeeded to the ideas of earlier scientific-minded Greek thinkers’ and operated it in the real world. However, according to the idealism, sensible things “are ever-changing, ever in flux, that there is no absolute, and that all standards are relative”. Therefore, sensible world was not real, while it is also secondary and subordinate to the Universals, “which are Eternal, True and Real”. In other words, once the modern science abandoned the ideas of earlier scientific-minded Greek thinkers, but to the direction of Idealism of Platonism, it was inclined to be far away from the scientific method of observations, lost ourselves in the studies of abstractive idealisms, and finally ruined the achievement we had.

Secondly, in the seeking process of Platonists for the absolute truth, it constrained the desires and impulses of the explorers from exploring the unknown world. And, because of the blindly worship of scientific rationality, the mathematical reason “could work out flawless solutions of every problem arising from the multitude of factual occurrences.” As time went by, negative consequences occurred. The mathematical rationality would gradually become an unshakable authority, leading to a new Absolutism in scientific community.

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

What’s more, although the mathematical reason itself was neutrality, once the lawyers manipulated it, it is possible to become a new Absolutism. “The emphasis in legal science is the exact reverse of that in natural science, it is not on observation of the particular but on the attainment of universals which are above and independent of experience. Not novelty, but fixity, is the goal. Certainly, stability, rigidity is to be procured by reason. And this is to be accomplished through the overlordship of arid abstractions. With the lawyers, the reign of Reason becomes a new Absolutism.”

In addition, due to the traditions of Common Law, it was the lawyers who monopolized the litigation. In other words, the lawyers tend not to reveal the actual operation of the law to non-lawyers. Therefore, in Frank’s opinion, constructive skepticism would challenge the monopoly status of the lawyers who operated on the truth of law.

III. Absolute Causality Skepticism

If the reason why Frank assailed the absolute true skepticism, was the similar pursuit of absolute true and absolutism for absolute authority to suppress pluralism, then, in the next step, Frank tried to
prove that freedom was outside of causality. Then, after criticizing the absolute truth, Frank turned his criticisms to absolute causality. We take Frank’s demonstration on this part as absolute causality skepticism.

The questioning of the absolute causality was originated from the criticisms and doubts of Inevitabilism. To Frank, free will had been the metaphysical expression of human freedom. Yet for a long time, free will was strangely used to express Inevitabilism, which had opposite meaning. In Frank’s point of view, behind this misrepresentation, actual human cognitive abilities were implicitly questioned. That was why we “believe that man has a will separate and apart from his intelligence and emotions, or that human beings escape from a regime of complete determinism while everything else in the universe is governed at every point by inflexible laws, or that any man is ever free to act wholly as he pleases, regardless of circumstances.”

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

However, it was possible for us to change this situation. We could manifest “determination” as distinguished from “determinism”, “[T] he point is that those who disbelieve in determinism believe that human purposes, guides by human intelligence, ‘have a chance’, that in the universe there is sufficient contingency — chance — to make some human freedom possible.” This limitation on philosophy also reflected in our cognitive process of law, and these showed a positive correlation. If the absolute causality was established in philosophy, then it also should be established in law and practice. So, if it could be proved that absolute causality had not been established in philosophy, it also should be applied to the situation in law beyond question.

As it is mentioned above, freedom is everything for Frank. When there is a conflict between freedom and determinism, then the latter must give way to the former. That means that absolute causality in legal had to make a concession to freedom. Hence, the term “absolute causality skepticism” plays a role in transition from absolute truth skepticism to fact-skepticism.

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

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

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

### IV. Fact-Skepticism

The fact-skepticism begins with Frank’s observations on the process of judging. In the trial, with the help of the conclusions of the psychologist, “[T]he process of judging… seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around — with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it.”  

Then, if judges are human beings, there is also no exception for judges. This means, the logics of traditional justice theories, which could be called as “from the norms to decisions”, following the formal logic of syllogism strictly, are not tenable. “Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.”

Frank also points out that when we associate with others and comment on events, emotions would affect our judgment on affairs. The same thing occurs for the judges. Not only would the view of political and economic policy of people around them influence judges and the judgments they made, but also the experience of judges contact with witnesses, lawyers and litigants, and even the particular preferences or bias of the judges, nasal, cough or position would affect the result of the trail. Therefore, the different results of judges in a particular case are the differences of the recognition facts instead of the differences on legal point of view. From the perspective of cognitive theory, when the judges face a particular case in trial, he is also a specific “witness”. Judges must determine what the facts of the case are and this depends on what he heard and saw from the other witnesses’ statements, positions and actions in court. Thus, special characteristics, prejudices and habits of a particular judge are the determining factor in his decision process. Finally, Frank points out that “if the law consists of the decisions of the judges and if those decisions are based on the judge’s hunches, then the way in which the judge gets his hunches is the key to the judicial process. Whatever produces the judge’s hunches makes the law.” A judgment is the portrayal of whole life experience of a judge.

Then, Frank advances the fact-skepticism. He believes that legal uncertainty is not only for the uncertainty of the law, but mostly for the uncertainty of facts, which is determined on trials. Differences of the judges’ judgments appeared in similar cases, because the judges found it difficult to decide the facts of the cases. In trials, the judges’ personality and psychological qualities would make differences in determining the fact.

The fact ascertained in a judgment is neither based on the fact actually happened nor the fact expressed by the parties, but the fact that what the judge thought had happened. The judges “must
determine whether to fit a particular case into the terms of some old rules (either because they are working well, or because men have acted in reliance upon them and he considers the protection of such reliance socially valuable) or to ‘legislate’ by revising and adjusting the preexisting rules to the circumstances of the instant controversy.”

In short, causal factors which relates to the judge’s personality or the psychological once has changed, the fact in decisions would get changed. According to “fact-skepticism”, Frank summarizes the myth and reality in judicial decisions for two different formulas. The myth formulas is “R (Rule) plus F (Fact) = D (Decision)”, but the real formulas is “S (Stimulus) plus P (Personality) = D (Decision)”. Then, for the latter formula is lack of prediction function, he proposes another formula, which is “R (Rule) plus SF (Subjective Fact) = D (decision)”. He believes that the latter formula expresses the characteristics of Legal Realism clearly, which emphasizes the facts which relates to the judgment are subjective facts (the fact found by judges and jurors). The actual situation happens in the particular time and place before the first instance is called “objective facts”. Those aspirations that judgments depended on objective facts are “myths” which could not be achieved. On the issue of uncertainty of the facts, Frank maintains that the subjective facts occurred not only to the judges but also to the witnesses. Frank suggests that the witness not only states the fact he went through, but are still reporting his judgments of the facts.

V. Conclusion

For individuals and human society, both freedom and democracy are not only the most basic value for the American society, but also the most appropriate guarantee for human being to pursue stability and happiness. Frank continued the tradition of keeping vigilant watch over power in every possible erosion and damage, and he made every effort to defend such value of the cornerstones of the American society. As the old saying goes, “Power corrupts, Absolute power corrupts absolutely.” The power inherently has self-expanding nature in every form and appearance. While the reforming desire, which was originated from goodness, has the risk of degenerated into absolutism of violence as well. In addition, when facing the danger of the erosions for freedom and democracy, we have reasons to be vigilant, not any exceptions for any system or desires, though they would be settled up for goodness at the beginning. Remember, “Revolution devours their own children”. Therefore, for the tasks of political-law theories, which play an crucial role of a guidance to social practice, it seems that it is more desirable to pay attentions on the guarding against possible risks, take note of the possibility of the system degenerate and make perspective predicts and designs for it. The Constructive skepticism is the theory we need. It is a theory that keeps reflection-reform- reflection by itself, or, in other words, it is a core political and legal theory for soundly social developing. There is no beginning or ending in such theory, while it seems that it would be handed down from generation to generation in the form of a movement. Perhaps, for this reason, in the waves of critical theories and ameliorative movements after Legal Realism, we could find the trace of Legal Realism and the shadow of Frank.

On the other hand, in his time, Frank observed keenly that the modern life, which had kept advocating process, science and technology since it was born, probably would breed Absolutisms in
some anonymous form or another. Modern meant not only advanced and convenient but violations of freedom. It got worse than before for its deeper disguise of science, as well as a whole set of philosophical theories. Frank worried about it, kept an eye on signs of law being invaded by science, and tried to boycott the influence through criticizing the contexts of modern mind and constructive skepticism and waking up the pursuit of free will. It might be Frank’s special contribution to American legal theories.

These are the reasons why Frank and his constructive skepticism should still be remembered by people today. From this perspective, Frank’s intense and acidulous words and radical points of views should be critically understood.

References
Frank, Jerome 1945) Fate and Freedom, A Philosophy for Free Americans, at vi.
Green, Steven M. (2005) Legal Realism as Theory of Law, 46 Wm. & Mary L. Rev. 1915.

Notes
4. Though some jurists think little of Jerome Frank and his theory, but they still admit that “the Basic Legal Myth” dominates the legal culture”. Brian Z. Tamanaha, Beyond the Formalist-Realist Divide, at 14, (2010).
5. Robert Ferome Glennon’s Supra note 1.
10. Frank’s Supra note 7, at xxii, 2009 (1930).
11. Id. at xxii.
12. Id. at 110.
15. Frank’s Supra note 7, at 102, 2009 (1930). Early in the 1910s, Roscoe Pound, the Dean of Harvard Law School, had been appealed for introduction of scientific methods and the object of studies, such as the facts that related to the norms or the decisions, to the Sociology of Law. Besides, he suggested that the lawyers should take the validity of legal norms as the standards of laws. In all, Pound tried to make jurisprudence Scientific for the purpose of social control through the legal approach. See Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, 24 Harv. L. Rev. (1911) and 25 Harv. L. Rev. (1912).
16. Frank’s Supra note 7, at 100, 101.
17. Id. at 105.
18. Id. at 103.
19. Id. at 105.
20. Id. at 105.
21. Frank’s Supra note 9, at 2.
22 Frank’s Supra note 8, at 145.
23 Id. at 145.
24 Id. at 145.
25 Id. at 157.
26 Id. at 160.
27 Frank’s Supra note 7, at 108.
29 Frank’s Supra note 7, at 109.
30 Frank’s Supra note 7, at 111. Frank’s Supra note 9, 159-163.
31 Frank’s Supra note 7, at 112.
32 Id. at 130.
34 Frank’s Supra note 7, at 109.