

REALISM AND NATURAL LAW

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THE 1920's were a time when variety, change, novelty, and evolution were elements in a skepticism which at its best was part of a mood as cheerful as any the world has ever known. There were, of course, as in every culture, features of American life which no one would care to look at. Nevertheless, we see the time somewhat darkened by intervening depression and war, and we too often forget the high spirits, imagination, and adventure of those days. With these characteristics went a sense of multiplicity and change which in its superficial manifestations seemed opposed to such ancient wisdom as that referred to by the phrase, "Natural Law."

This sense of change found expression in the thought of the '20's and '30's. Anthropologists knew that the organism is part of an environment which drives it in different directions, and were preoccupied with the differences. From the conditions of stone age Australia to the towers of Manhattan, differences of behavior go with differences of condition. The stone age had given a place to the stone axe in the world of the Australian aborigines. It belonged to the father, it had a position among the ancestors, its control and use were part of an ancient tradition. When a missionary gave a woman a steel axe, this was a disruptive factor.¹ So in Middletown the automobile molded the American way of life.²

While anthropologists were thus stressing the differences in man's condition, we were finding that concealed psychological factors contribute to the variety of human behavior. We were discovering the unknown in each of us. We were not what we had thought. The "drives" of desire and hostility are repressed in childhood. They work in the unconscious, or "below" that, in the subconscious. They are subject to partial control by the conscious man, the "ego." Reactions to drives and control produce the savage conscience, the "super ego," and the law. The community puts its guilts, as ancient communities have done, on individuals, who are hated as criminals; and we are prepared to attribute wickedness to foreigners. We identify hostile parents, or siblings, with other figures in the daily drama. To achieve security, on the other hand, we identify the good parent with the stable and eternal law.

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¹ Consult Lauriston Sharp, *Steel Axes for Stone Age Australians*, in Spicer (ed.), *Human Problems in Technological Change* (1952).

² Robert S. and Helen M. Lynd, *Middletown* (1929) and *Middletown in Transition* (1937).

It was Jerome Frank's particular contribution to draw attention to this feature of experience as it expresses itself in law. The child's need for certainty and control persists in the adult. The need is served by religion and by our ideas of law. These ideas take different forms. As an evolution or a response to need or simply as a pattern, the law is the good and bad parent.

The law is also partly rational, so we found it changing to adapt itself to the needs of differing forms of society. The kin-organized world is replaced by the feudal world; the feudal world by the commercial world; then comes the industrial world. The results are property, as we know it, contract, the corporation. These devices serve interests, which are the subject of cool appraisal. The interaction of appraisals results in adjustment and adaptation. In the '30's came depression and a new set of fears and hopes. The corporation, as the pervasive legal influence, was replaced by the government budget.

Throughout the period the steady influence of American pragmatism made itself felt. A philosophy composed of ancient elements, it had a place for science and for the warmth and hope of democratic life. The "relativism" of the age appeared here, too. Trial and error, adjustment, were the basis of social life; but, while ends are also always means, ancient ideas of permanence appeared in an evaluation of the constant attempt, always succeeding in part, to achieve the end of harmony, in the individual and in the relations between environment and men.

With the "relativism" that went with the times, pragmatism combined a recognition of the constant features of experience. Humanity expresses itself in communication. Communication is an attempt to share experience, to find in the multiplicity of individual experience common elements which may be shared. Communication is not only a means of manipulation and control. It is an instrument of learning and good will. It is concerned with human interests, but also with the human sense of purpose that reconciles interests, with the order that is as much a part of experience as the disorder and the conflict.

Four "new realists" stand out particularly in our recollection of the 1920's and 1930's: Walter Wheeler Cook, under the influence of Dewey; Karl Llewellyn, under the influence of Max Weber; Thurman Arnold, who shows the influence of Pareto; and Jerome Frank, who dealt with the influences associated with Freud.³ It is doubtless an indication of my own interests in recent years, but in my own judgment the new insights of the times which remain most useful to us are those which come from Freud and so—for lawyers—from Jerome Frank.

While Jerome Frank in the high spirits of his first work seemed to us preoccupied with attack on the rigidities that may appear in an idea of order, we should have seen the other side of his statement. The confidence and

³ It is curious that no well known legal writing of the period corresponds to such an economic interpretation as that of Turner or that of Marx.

pleasure, which he has since made clear, were combined with his scorn and skepticism, and depended in part on ideas of order implicit in his own thinking. If we proceed with reactions to his themes, instead of talking about him, it may be taken as a tribute to his place in the thought of those days, and in the changed thought of the post-war times. Yet my theme is not a restatement of his insights, but a recollection of the interaction of ideas and a suggestion that the thought of Jerome Frank contained in modern form elements of the ancient natural law wisdom which he at times appeared to be attacking.

Jerome Frank appreciated Aristotle the biologist; Plato the metaphysician was a personification of the view of law which he criticized. The contrast between Aristotelian and Platonist ways of thought is illustrated in a fascinating way by the contrast between Athens in the century before Plato and the same community in the century of Plato. In the earlier century the biology of Hippocrates, the first identifiable physician in western history, is related to the psychology of his contemporary, Thucydides. In one aspect Thucydides belongs with the tragedians, in another with modern psychological novelists. He was neither unbiased nor perfectly objective in his history. Like his older contemporary, Herodotus, he was, however, interested in man as a natural phenomenon. There is a difference in Plato, express or explain it how we will. He did not, of course, reify his ideas, but in his thinking the influence of biology was superseded by the old Greek influence of geometry; and a passionate longing for permanence appears in countless symbols in his subtle work. Aristotle, Plato's student, the son of a Hippocratic doctor, was, on the other hand, interested in the changing natural phenomena of zoology, and Darwin has paid tribute to his contributions to natural history. It is not surprising that Jerome Frank was interested in Aristotle's contributions to modern thought.

Yet the insights called Platonist have also had many expressions, suitable to the variety of times, including our own, in which they appear. Features of Platonism appear in John Dewey's philosophy, perhaps partly explained by the influence of his teachers. It is hard to read the last chapter of his *Logic* without seeing the close kinship between his own system and the superficially different system which he criticises. Marred though it seems to be by a use of the analogical argument whose limitations he knew, Dewey's persuasive essay on ethics in the *International Encyclopedia of Unified Science* is in praise of the psychological harmony which was the characteristic human ideal of Plato. We have been taught to think that the Platonic harmony is static and the pragmatic harmony dynamic; but anyone who reads the *Dialogues* with any sense of their setting will, at least, wonder about the supposed difference.

An effective correction of some of the excesses related to new realism is associated in my own mind with my teacher Alexander Meiklejohn, that

brilliant Platonist. The '20's and early '30's were, indeed, not unlike the Athens of Socrates' time. The issues between the "Sophists" and Socrates, argued in Athenian law schools (or schools for orators) had parallels in our own law schools. The great Sophists, Protagoras and Gorgias, were treated respectfully by Socrates; and it was the lesser ones who rashly got themselves into indefensible positions. So it was in our own law schools, and Mr. Meiklejohn's Platonism was for some of us at least a healthy influence.

Platonism is perhaps at its weakest if its political structure is taken too seriously, and if its relations to the governments of the Church and Russia are emphasized. On the other hand, Mr. Meiklejohn, in response to such observations, has many answers. Among others, he reminds us not to overlook the importance of the element of consent in the "Republic."

Whatever may be said of Plato's politics, his psychology is extraordinarily modern, once its somewhat special language is understood. The interaction between Plato and Freud was not exhausted by Jerome Frank, who nevertheless deserves the credit for bringing out the interest of their common problem for lawyers. The Greeks were relatively undisturbed by sex, but the perpetually warring society in which they lived made all the great Greeks observant of the hostile "drives" in human beings. It is the angry "part" of the "soul" which creates the critical problems for both the individual and the community in Plato's thinking. If we see him in his time, we shall sympathize with Plato's over-compensation for its violence, which expresses itself in what Jerome Frank decried as rigidity and what others have admired as serenity.

St. Thomas has also been a symbol of opposition to the new realists as he was explained by Mr. Adler, with whom I taught for a while at Chicago in Mr. Hutchins' time. Again, as so often in the history of philosophy, pre-occupation with differences and peculiarities obscured the supplementary effects of different statements about the nature of man and the universe. St. Thomas' probing and modern objections were often as searching as any modern skeptic's, and one must give him credit for realizing the element of paradox and profundity in the apparently simple answers which he so confidently gave.

Explaining the "Objections," "that it was not useful for laws to be framed by men," St. Thomas said, in his third "Objection":

Further, every law is framed for the direction of human actions. . . . But since human actions are about singulars, which are infinite in number, matters pertaining to the direction of human actions cannot be taken into sufficient consideration except by a wise man, who looks into each of them. Therefore it would have been better for human acts to be directed by the judgment of wise men, than by the framing of laws. Therefore there was no need of human laws.⁴

After some persuasive arguments in answer to this position, St. Thomas makes only a somewhat ironical Reply to the particular Objection. "Certain

⁴Summa Theologica, II-I, Q. 95, A. 1.

individual facts which cannot be covered by the law *have necessarily to be committed to judges*, as the Philosopher says. . . ."

For St. Thomas, natural law (which was distinguished from the eternal law and the divine law, as well as the positive law) was as biological as any modern psychologist could ask.⁵ The great needs of life and reproduction must first be served. Their importance was not underestimated. Thereafter, for some at least, the work of reason must be given its place.

St. Thomas cogently states the test of law as a form of rule. He says that it is a regulation rationally designed for the common good and promulgated by authority.⁶ This may seem at first banal. Take, however, two of its terms. One term is "good." It is, of course, possible to use the word "good," like the word "pleasure," in a variety of ways. One may speak of taking pleasure in pain or of achieving the ultimate good in unconsciousness, or something of the sort. Pleasure, however, is a mark of quite a different biological situation from that which is indicated by pain, in its ordinary sense; and there is nothing the healthy animal wants less, as a good, than to sleep forever. It is nevertheless true that in every society there are manifestations of the desire for pain, for oneself or others or both, and of the regressive desire for death. The apparently simple statement of St. Thomas is an expression of opposition to these desires, and their great variety of open and hidden expression.

Another term is "common," or general. This excludes the protective tariff and similar legislation from the definition of law. For generality requires rational classification, the need for which is apparent to courts dealing in their day to day work with everyday economic affairs. A persuasive statement of this need appears in a dissenting opinion by Jerome Frank written when he was a member of the Securities and Exchange Commission:

It is true that administrative agencies can and should learn from experience and can sometimes justifiably require less of citizen Jones in one year than, because of intervening educative events, they require of citizen Smith in a later year. But it is no less true that, as far as possible, like treatment should be accorded all citizens in like circumstances.⁷

Although St. Thomas, like Thomas Jefferson, says that in the interests of order one should obey authoritatively promulgated rules which do not meet the test of law, unless they become too evil,⁸ the possibility of practical appli-

⁵ *Id.*, Q. 94.

⁶ *Id.*, Q. 90, A. 4. ". . . law . . . is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated."

⁷ *Matter of North American Company*, 4 S.E.C. 434, 469 (1939). Dr. Ranyard West finds the "prejudice" which is fatal to generality a critical indication of the absence of any law governing the most important relations between nations. *Conscience and Society* (1942).

⁸ Pragmatically viewed, St. Thomas' doctrine was, among other things, his careful formulation of a doctrine already used, with other more material weapons, by the great Hildebrandine Popes in their struggles with the Roman "Emperors" of their time, and with vari-

cation of the test of law to everyday affairs shows that it may be useful at any rate to know what law is.

We have been considering the relation of Jerome Frank's writing to the interaction of apparently opposed philosophical ideas. We need to say something more on the contribution of the new realists to thinking about rather more limited problems of law. At five points I should say that Jerome Frank and his fellows have made lasting contributions to our way of thinking about judicial activity, whether on the part of lawyers, administrators, or judges.

First, there is observation and description of the part played by "magic" in the law. My last correspondence with Jerome Frank, last autumn, was about our common interest in this theme. I had to say, in response to his inquiry about a seminar, that I was dealing with other forms of magic, particularly the magic entities that appear for example in property, contract and taxation. I had the opportunity, however, to acknowledge my indebtedness to him for his account of the part played by magic in fact-finding and our attitude toward fact-finding. As I understand it, Jerome Frank's position was that it is only a sense of unverified causation, like the ancient sense that trial by ordeal would cause survival of the innocent only, that enables us to view the processes of fact-finding in courts with equanimity and confidence. It may be that the jury study here at Chicago will correct some of Judge Frank's searching doubts about juries and judges alike as fact-finders. Nevertheless, the records of some of our great cases, as diverse as the Touhy case and the Sacco-Vanzetti case, are warnings of what may also go on in everyday litigation. Whatever the average level of performance may turn out to be, if it can be discovered and expressed, there will be room for "fact skepticism" about a great deal of our litigation. Jerome Frank's view was that when we speak about legal doctrine we maintain our composure only by an attitude toward the judicial process like that which some primitive folk have toward agricultural charms. They are confident that charms produce desired results, and are unconcerned with what, when we are modern, we recognize as critical verification.

"Rule skepticism" is another contribution, in which Jerome Frank joined with other new realists. Here they drew attention to the importance of the great and admitted error of over-generalization. Over-generalization is an obstacle to the recognition of practical distinctions and to regard for justice in a particular case.

ous sets of kings, princes, and barons. We may remember that Innocent III annulled Magna Carta. It is ironical that St. Thomas stated his version of the doctrine at a time when both Papacy and Empire had destroyed whatever remote chance either had of ruling Europe; and when France was preparing for the ultimate appearance of the more effective national state.

In the third place, Judge Frank joined other new realists in attacking verbal manipulations. The great object of their attack in the '20's and '30's was substantive "due process of law." It is a mark of their success that law students of this generation hardly know what it was. The minimum tests for "law" stated by St. Thomas, if we had known them, might have warned us that the doctrine, itself, was not quite as foolish as we came to think. As we see in the desegregation cases and the free speech cases, as well as in some of the cases protecting foreign corporations against discriminatory treatment,⁹ the doctrine may deserve and experience a limited revival under the somewhat restricted categories of "privileges and immunities" and "equal protection of the laws." Nevertheless the skill shown by judges in the fifty years or so beginning in 1873, in constructing an argument for regarding the Court as a Senate, does not appear even now to have been justified by the results.

A fourth contribution of the new realists was to reinforce the teaching of others about the kind of "logic" used by judges and the place of logic in the law. Here one is sometimes inclined to think that the new realists themselves fell at times into verbalism, stimulated perhaps by Mr. Justice Holmes' famous witticism, "the life of the law has not been logic; it has been experience." It is not easy to see how logic can be treated as anything but a kind of experience, or an aspect of experience; and complete disregard for logic leads simply to an asylum. Too rigid a regard for consistency, on the other hand, leads also to an asylum, and it is one merit of the new realists that they remind us of that fact.

Finally, a fifth contribution is "fact skepticism," with which the name of Jerome Frank is particularly associated. We have mentioned it already in connection with his treatment of magical ideas of causation, though magic appears at many other points in the law, and what Judge Frank said about it is not limited to devices for fact-finding. "Fact skepticism" is a healthy and important reminder of the extent to which teachers (and Judge Frank tells us appellate judges as well) disregard the hazards of fact-finding, whether by jury or by judge. Together with his study of the general relation of Freudian doctrine to the law, and, of course, related to it, Jerome Frank's great contribution is his elaborate and emphatic treatment of this subject in *Courts on Trial*.

Jerome Frank's study reinforces the work of so different a man as Dean Wigmore in urging upon law teachers the importance of training in drawing inferences from admissible evidence. This is something that can be done free from the hazards of inventing life-like trial situations. Apart from law, a lawyer's principal instruments today are language, arithmetic (with taxes what they are), and inference. The two worst unmistakable errors made by

⁹ Consult Sharp, *The Old Constitution*, 20 U. of Chi. L. Rev. 529, 534 n.12, 540 n.20 (1953).

lawyers which I have ever seen were made in English and arithmetic; and both were fortunately corrected before harm was done. More problematical, but to my mind almost equally unmistakable, more dreadful in their consequences and quite uncorrected, are some of the errors of inference which seem to me to have been made, under the influence of passion, in the trial of great criminal cases.

Jerome Frank's underlying concern for order and justice appears constantly, as in his other works, in *Courts on Trial*. He insists constantly, and he never gets over being disturbed by it, that a contract may mean something quite different from what one would expect, if at the trial of fact the drawing of inferences is unskilled. The enthusiasm with which he elaborates and propounds his thesis is a mark of his devotion to traditional and perhaps to "natural" ideas of justice.

As we have indicated, interaction is our theme, and the interaction between the original insights of the new realists on the one side and traditional natural law insights on the other leads continually to mutual corrections. The extraordinary variety of human reactions to various environments first impresses anthropologists. Then, as they say, they are more and more impressed with the uniformities in all the diversity. Pathological features of our psychological experience appear in baffling variety, but when seen in relation to other features of life they throw light on uniformities of experience. Similarly, changing economic conditions produce changing responses, but in ways which we find have a certain order and good sense of their own.

The working idea of responsibility, indispensable in the law, undergoes variations. But these variations are not innumerable or unordered; consistency and generalization are as necessary for sanity as is some flexibility. The generalization that human life should be preserved is flexible and yet may be not simply a summary of diverse interests, but a coherent statement of purpose which human beings can usefully keep in mind.

As the '30's were succeeded by the Second World War, and that by the Cold War, the test of institutions seemed more and more to be their tendency to promote life rather than death. This was Freud's phrasing of the critical test of human activity. As this test is applied to human institutions, Jerome Frank's relation to Freud and the great natural law tradition of European thinking becomes more noticeable.

The natural law tradition re-appears, subject to subtle and interesting changes, in post-war philosophical reflections about the law. Among all the younger American philosophers of law, an acknowledged student if not a disciple of Jerome Frank, Mr. Edmond Cahn, stands out. It is significant that an early chapter in his most ambitious book, *The Moral Decision*, is a study of an episode in the interaction of sexual love and law. Here a cheerful

relationship between two simple people was treated by a court as unaffected by an ambiguous statute. Mr. Cahn eloquently takes his stand on the side of Freud and in favor of love as a feature and symbol of life against death.

The elementary biological need to preserve life, as a minimum standard of government, has been emphasized again by the modern resurgence of violence in domestic and foreign politics. Thus the Hitler regime, expressing its passion for destruction in paper "laws" that a teacher of law could hardly find it in his heart to call law, produced an intense and passionate attachment to natural law ideas among some German thinkers who survived Hitler without supporting him. The most striking case, which Professor Lon Fuller has called to our attention,¹⁰ is the case of Gustav Radbruch. In pre-war days Professor Radbruch had expressed a philosophy in which ethical relativism, although combined with a sense of a minimum requirement of consistency in law, went with an insistence on the importance of rules promulgated by established authority, however far they might fall short of the Thomist ideal of law. After the wartime excesses of established German authority, Professor Radbruch recognized that not all authoritative rules survive the test of law. Thus, for example, he approved the conviction, as an accessory to murder, of one who had denounced a German for speaking critically of Hitler, with the result that the person denounced had been executed by the Hitler regime.¹¹

Radbruch's problem of judging people whose actions pursuant to a paper "law" have been morally offensive appeared acutely in the Nuremberg cases, which remind us of the overwhelmingly important problem of natural law presented by the lack of a supreme rule-making authority in international relations. Professor Kelsen, who has said that there is an international "law," however primitive, in the "sanctions" imposed by nations for the "delicts" of other nations, seems to have abandoned this positivist position, for a moment at least, when considering the Nuremberg cases. Not because the Nuremberg "legislation" and decision were *ex post facto*, nor for any of the other reasons often given by critics of the cases, but because the judges imposing the sanctions were victors and therefore parties, Professor Kelsen found it impossible to treat the cases as an expression of "law."¹²

In our own country, a destructive period has been followed by a reaction expressed in natural law ideas. Our period of bi-partisan neo-fascism surrounding the Korean War brought sharply to our attention the limitations of what may pass for law. We observe a tendency to correct the situation by

¹⁰ Fuller, *American Legal Philosophy at Mid-Century*, 6 *J. Legal Educ.* 457, 481-85 (1954).

¹¹ *Rechtsphilosophie* 347-350 (4th ed., 1950). Cf. *Bernstein v. Van Heyghen Freres, Societe Anonyme*, 163 F.2d 246 (C.A.2d, 1947), Clark, J., dissenting, cert. denied 332 U.S. 772 (1947).

¹² Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law? 1 *Int. L. Q.* 153, especially at 170-71 (1947). And consult note 7 *supra*.

reference to minimum standards of freedom and procedural decency. We observe also the influence of another natural law ideal, the ideal of racial equality.

Whatever form of words we use, most of us will find a way of condemning, even in quieter moments, the internal policy of the Hitler regime. However critical we may be of western policy in relation to Germany between the wars, we shall doubtless find subjects for condemnation in the external policy of the Hitler regime. It is this kind of condemnation which reminds us of the deep emotional and intellectual sources of the ideal of a minimum at least of natural law.

Jerome Frank, though he would doubtless have acute and thoughtful objections to this way of stating things, would, it seems to me, nevertheless have had as deep a feeling for it as anyone who could be named. His expressed ideas can be put into a pattern very much like that of the pre-war writing of Professor Radbruch. Yet the passion he expressed at what he took to be the ineptitude of fact-finding in particular cases, is an indication that Judge Frank, as one would expect, was as concerned as anyone could be with the minimum essentials of justice.

When one turns from such questions, often largely concerned with "procedure," one finds more problematical and difficult issues raised by modern attempts to find a "natural" test for the "law" concerning economic and social matters—issues on which it is hard to be sure of Jerome Frank's final position.

The doctrine of the withering away of the state, expressed again in Russia during the war years by Mr. Golunskii in a general book on the law,¹³ while it may have been originally a concession to the anarchists among nineteenth-century radicals, expresses a "natural" principle among the anarchist elements in Christian teaching. For Mr. Golunskii, the state must not wither away until people are persuaded to act according to this principle, formulated once before in the Acts of the Apostles: "To each according to his needs, from each according to his abilities."

The most interesting post-war attempt I know to derive a picture of the good society from a general moral principle is Professor Léon Husson's *Les Transformations de la Responsabilité*. The book, introduced to me by an unfavorable review by Mr. Edmond Cahn,¹⁴ applies a sophisticated Catholic and Bergsonian philosophy to problems of civil liability, arguing that the idea of Christian charity achieves its social manifestation in a society totally insured at the expense of employing groups.

There was a time, during Jerome Frank's period of close association with the New Deal, when he would have found the social democratic philosophy

¹³ In *Soviet Legal Philosophy*, translations by H. W. Babb (1951).

¹⁴ 24 N.Y.U.L.Q. Rev. 245 (1949).

of M. Husson exerting a strong attraction, although at that time he would surely have been as critical as anyone could be of its derivation from a general moral principle. In Judge Frank's later work, however, there is an indication that his studies of psychology showed him a need for what I should call corrections of the social democratic philosophy.

My own doubts about M. Husson's economics and politics I should express in a way which, if we could talk about them, I should expect to find congenial to Jerome Frank. As Professor Frank Knight has pointed out, though it seems to me with exaggerated criticism, the Christian ideal, like the socialist ideal, contains a regressive element.¹⁵ It is the same regressive element that Jerome Frank drew attention to in *Law and the Modern Mind*, or at least a very closely related phenomenon. It includes a strong reaction formation to the normal hostilities of family life. It includes also over-dependence on the one hand, and excessively protective impulses on the other. As Mr. Ernest Bevin said while the British Socialists were in power, the Government proposed to act "like a reasonable father and mother."¹⁶

The phenomenon has been recognized and appraised by psychoanalysts, however much as a group they may be bemused by the appeal of "central planning." If one follows their professional conclusions, they may supplement M. Husson's teaching about the Christian ideal, with a corrective recognition derived from modern psychological observations. Over-protecting a child can virtually destroy him, and there is no reason to doubt that somewhat comparable effects may follow from other practices with adults of which the danger can be recognized by any qualified social worker. The Christian ideal, understood in relation to modern knowledge and experience, requires not mutual protection, but mutual respect. This, as I understand it, is not only a part of our democratic dogma. It is also a result of the best studies we have of nature. It is thus, and without a forcing of historical meaning, a maxim, however provisional, of natural law.

Jerome Frank, who was fully alert to the significance of the relevant psychological observations, came close, it seems to me, to saying the same thing. In *Courts on Trial*, in a chapter on "Natural Law," appears the following concluding passage:

Erich Fromm outlines a universal ethics which prizes spontaneities and represents a goal, not a certified destiny. He says that man's nature gives rise to universal ethical norms of conduct; their "aim is the growth and unfolding of man," the achieving of all the "unique potentialities" of each person "which it is the task of mankind to realize"; the "ethical systems of all great cultures show an amazing similarity in what is considered necessary for the development of man, of norms which follow from the nature of man and the conditions necessary for his growth." He gives as examples,

¹⁵ Consult especially *Freedom and Reform*, c. IV (1947).

¹⁶ Jewkes, *Ordeal by Planning* 135 n.1 (1948).

"Love thy neighbor as thyself" or "Thou shalt not kill." But the universal norms will not prevail until "mankind becomes united culturally" and until humanity "has succeeded in building a society in which the interest of 'society' has become identified with that of all its members." For, presently at odds with the universal norms, are relative ethical norms, "socially immanent" norms, i.e. necessary for the functioning and survival of particular societies as they now exist. These norms express what is good or bad for men within each society. These "historically conditioned social necessities clash with the universal existential necessities of the individual."

Fromm's conception points to what might be deemed a sort of Natural Law. It is profoundly wise. Dynamic, broad in its premises, and laying a foundation for individual uniqueness, it affords valuable tests for justice. But those tests are too vague to furnish much aid in deciding specific lawsuits or in evaluating most specific decisions.¹⁷

Yet I suggest that these tests will yield a strongly favorable result in evaluating two decisions, and doubtless others as well, by Jerome Frank.

In one case he concurred in setting aside a release of a personal injury claim by a dining car waiter made to the Pennsylvania Railroad, on his lawyer's advice, given when the waiter's injuries made him unable to read, that it was in terms a release of claims on account of lost earnings, when in terms it was a general release. The waiter was paid \$750 for the release and won a verdict for \$7500, which was upheld by the United States Court of Appeals, with Judge Frank concurring specially.¹⁸ In his opinion, Judge Frank based his decision on the propriety of relief for unilateral mistake, at least where the mistake cannot possibly have caused a prejudicial change of position on the part of the party seeking to uphold a transaction. In a passage which has seemed to me more doubtful, Judge Frank observes that relief of this sort is particularly appropriate where the mistaken party is in a position of "inequality." Judge Frank in making this argument relies partly on cases in which courts have been particularly solicitous to protect seamen against the influence of their employers when they enter into personal injury releases.

Later, in deciding against an argument for an implied "dividend credit" provision in non-cumulative preferred stock shares, Judge Frank observed: ". . . the preferred stockholders are not—like sailors or idiots or infants—wards of the judiciary."¹⁹ The decision was against the preferred stockholders, but it expressed respect for them. I have found this decision useful, for exam-

¹⁷ Judge Frank cites, as the source of his quotations, Erich Fromm, *Man for Himself* 238-244 (1947). Frank, *Courts on Trial* 373 (1950).

¹⁸ *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757 (C.A.2d, 1946).

¹⁹ *Guttman v. Illinois Central R. Co.*, 189 F.2d 927 (C.A.2d, 1951), cert. denied 342 U.S. 867 (1951). For related observations in opinions to the same effect, compare Learned Hand, J., dissenting, in *Barclay v. Wabash R. Co.*, 30 F.2d 260, 268 (C.A.2d, 1929), followed by Mr. Justice Holmes, reversing, for the Court, 280 U.S. 197 (1930). Compare in turn Learned Hand, J., and Clark, J., concurring, in *Gaunt v. John Hancock Mutual Life Insurance Co.*, 160 F.2d 599 (C.A.2d, 1947), cert. denied 331 U.S. 849 (1947).

ple, in teaching insurance, and dealing with the arguments—of which the results are often defensible—which proceed on the assumption that buyers of insurance are “wards of the judiciary.” There are other reasons in many cases for giving buyers of insurance the protection often afforded them, and the principal one of these other reasons is a systematic application of principles applying to freedom of contract and the meaning of contracts—principles expressing respect, rather than special solicitude, for the parties. Laymen have been surprised, with reason, by the traditional “strict” rule concerning the breach of insurance warranties. It is an important function of contract law to prevent such surprise, and to do so it is not necessary to treat the “common man” as a “ward of the judiciary,” but simply to respect his reasonable expectations. Like mortgagors,²⁰ sureties, working people, “subcontractors,” suppliers of “great corporations,” dealers for “great corporations,” and consumers generally, buyers of insurance, particularly life insurance, have elicited inaccurate observations about the economy and psychologically unsound observations about freedom, which are not necessary for their protection, and which are conducive to regressive attitudes in the community. It seems to me fair to read into Judge Frank’s observations a recognition that our knowledge of nature does, indeed, guide us not only in legislating, but in contributing to the judicial treatment of new problems. His conclusions here depend on a sound judgment about the relative psychological values, the life giving functions, of protection and respect.

Perhaps, however, this is going too far. It would be presumptuous for anyone to insist on reading his own ideas into the writing created by that sensitive and brilliant mind. What can be said is that Jerome Frank, as he knew, was related affirmatively to the great currents of thought about the law. His philosophical achievement is the more remarkable in view of the heavy pressures felt by him first as a trial lawyer, then as an administrator in new and pioneering agencies, and finally as a judge of a busy court. He expressed himself with wit and charm. He was serious but never overly solemn. As a companion and a teacher, he extended the range of his influence. His wisdom was perhaps as great as that of any American student of the law, and he showed how poetry, modern science, and the humane spirit can be effectively combined in the rough-and-tumble workaday activities of a practical man.

²⁰ Controlling a West Indies planter’s sale of his equity to his London money lender mortgagee, a Lord Chancellor condensed psychological and economic errors into a famous phrase: “. . . necessitous men are not, truly speaking, free men. . . .” *Vernon v. Bethell*, 2 Eden 110, 113 (1762). If this observation were correct, as of course it is not, the outlook for freedom would be unfavorable indeed.