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# NATURAL LAW DEMYTHOLOGIZED: A FUNCTIONAL THEORY OF NORMS FOR A REVOLUTIONARY EPOCH

*E. F. Roberts*†

*Jurisprudence can afford us some insight into whether a particular system is functioning effectively. To do this jurists must extrapolate the aims of the society and then evaluate how efficiently its legal system functions to structure social activity so that those aims are realized in an orderly fashion. Jurisprudence is seen, therefore, to be a form of time and motion study on a grand scale. Judgments about the ultimate worth of a given society's aims are excluded from jurisprudence, however, on the ground that such emotionally charged and ethically relative conclusions cannot be proved by any empirically verifiable scale of values.*

This article does not purport to set forth any accurate mirror image of reality. It does formulate a way of looking at some value problems as they arise in law and society. Some will find this view to be anathema and, hopefully, others will find that it accords with their own feelings toward these phenomena. This is necessarily so, because in dealing with ultimate value systems we are entering a realm where emotions rule the day. We are not dealing in the realm of reason: we are appealing to feelings, and only for those whose feelings are similar are we engaged in ratiocination. This essay, then, is like a symphony which, if its major theme strikes a responsive chord, the balance of its message appears reasonably to fall into place. If its opening movement does not appeal, however, the rapport necessary for meaningful communication has never been created and there is no more to be said.

## I

### INTRODUCTION

Practical needs and our vital and psychic economy demand absolute (i.e., unqualified) answers, and make us cling to what sounds or seems to us simple.\*<sup>1</sup>

All of us, or so I suspect, tend to regard "time" and "distance" as constants. True, when it is 10:00 A.M. in Ithaca, New York, it is 2:00 P.M. in Nottingham, England, but an hour remains a decent sixty min-

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\* A footnote to these footnotes is in order. These notes are not designed to prove the statements to which they are affixed since it is the author's contention that their proof lies in each reader's reflections upon his own experiences in the world. The notes do refer to sources and they often cite diverging lines of inquiry. Perhaps they are best described as a counterpoint to the major theme.

<sup>1</sup> Cohen, Reason and Law 64-65 (1950).

ute interval and a yard measure stays a proper three feet long in both climes. Like Major Blimp, I can't help but think these concepts are fundamental because it is in terms of them that I order the rest of my existence. The very suggestion that what to me is an hour might appear to be an hour and a quarter in Nottingham, or that my yardstick might look like only three quarters of its length from there, causes me to doubt either my own sanity or, more likely, the sanity of whomsoever should suggest such nonsense. Nonetheless, some phenomena in physics must give me chance to pause.

Taking advantage of the age in which we live, let us posit a rocket, the length of a football field, hurtling through space at three-fifths of the velocity of light. From a space platform, presuming it to be stationary for a moment, the rocket will measure only eighty yards long. If a spaceman on the platform were to hold a rod, which to him measures fifteen feet, parallel with the path of the rocket's flight, an observer on the rocket will calculate that the rod measures only some twelve feet long. Even allowing for the time the light rays needed to pass between the quickly separating objects, a perceptible retardation in time would still remain. An hour of life on the rocket would appear to the platform dweller to be an hour and a quarter, and, conversely, to the rocketeer an hour of life of the platform dweller would appear to be proportionately longer.<sup>2</sup>

Similarly, all of us once managed to come to some rough appreciation of molecules and atoms by visualizing bits of matter arranged like those models in elementary text books. Disturbingly one discovers that the idea of the atom as the basic building block has given way to the idea of sub-atomic particles, until even the "reality" of these particles has dissolved. That is:

[T]he atom of modern physics can be symbolized only through a partial differential equation in an abstract space of many dimensions. . . . *All* its qualities are inferential; no material properties can be directly attributed to it. That is to say, any picture of the atom that our imagination is able to invent is for that very reason defective. An understanding of the atomic world is that primary sensuous fashion . . . is impossible.<sup>3</sup>

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<sup>2</sup> Einstein, *Relativity* 135-36 (Lawson transl. 1947): "We already know from our previous discussion that the behavior of measuring-rods and clocks is influenced by gravitational fields, i.e., by the distribution of matter. This in itself is sufficient to exclude the possibility of the exact validity of Euclidean geometry in our universe. . . . Such a universe might fittingly be called a quasi-Euclidean universe." For a verbal approach to this material, see Russell, *The ABC of Relativity* 33 (Mentor ed. 1959). For anyone with some recollection of mathematics, an excellent little book is Durell, *Readable Relativity* (Harper ed. 1960).

<sup>3</sup> Heisenberg, "Zur Geschichte der physikalischen Naturerklärung," quoted in Cassirer, "The Goals and Methods of Theoretical Physics," *Philosophy of Knowledge: Selected Readings* 245, 278-79 (Houde & Mullaly ed. 1960).

And, of course, while statistical analysis of atomic behavior has become commonplace, the behavior of single units of energy still successfully escape prediction.<sup>4</sup>

I must admit to myself that my ideas about "time" or of "distance" do not necessarily reflect any universal truth. My picture of the atom is hopelessly naive. In point of fact, my concepts of time and distance are not mirror images of reality but are mental constructs or concepts *imposed on the world by me*. It is in these terms that I order the world around me, but I must pause before I jump to the conclusion that the world necessarily conforms to my picture of it. I may, in fact, have to admit that my ways of looking at the world are merely hypotheses and that, while I can order my affairs in terms of these ideas, order may not exist in the world of things outside of my mind.<sup>5</sup>

Certainty erodes still further when I realize that man exists as a distinct species only in terms of his consciousness. The first and most obvious distinguishing characteristic of man is his capacity for abstract ideation. A wit put it very aptly when he commented that man is dis-

<sup>4</sup> These intriguing phenomena in the vast reaches of space and inside the atom bring to mind Pascal's description of man's disproportion. Pascal, *Pensees*, Fragment 72 (Everyman ed. 1948):

Let man then contemplate . . . . Let him gaze on that brilliant light, set like an eternal lamp to illuminate the universe; let the earth appear to him a point in comparison with the vast circle described by the sun; and let him wonder at the fact that this vast circle is itself but a very fine point in comparison with that described by the stars in their revolution round the firmament. . . . The whole visible world is only an imperceptible atom in the ample bosom of nature. No idea approaches it. . . .

But to show him another prodigy equally astonishing, let him examine the most delicate things he knows. . . . Perhaps he will think that here is the smallest point in nature. I will let him see therein a new abyss. I will paint for him . . . all that he can conceive of nature's immensity in the womb of this abridged atom. Let him see therein an infinity of universes, each of which has its firmament, its planets, its earth . . . .

<sup>5</sup> See Holmes, "John Marshall," in *Collected Legal Papers* 266, 270 (1920): "We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it." Compare Lewis, *Mind and the World Order* 29-30 (Dover ed. 1956): "The world of experience is not given in experience: it is constructed by thought from the data of sense. This reality which everybody knows reflects the structure of human intelligence as much as it does the nature of the independently given sensory content;" Montagu, *Man in Process* 73 (Mentor ed. 1962): "The law and order that man sees in Nature he introduces there, a fact of which he seems to have grown quite unconscious. Natural systems of classification work so well that, following an unconscious pragmatic principle, they are assumed to be true . . . ."

This particular approach finds itself reflected in the poetry of Wallace Stevens, particularly in the "Idea of Order at Key West," *Whicher & Ahnebrink, Twelve American Poets* 107 (Oxford ed. 1961). "A final clue to Stevens . . . . The world we inhabit is one we 'half create'; we make the order we perceive." *Id.* at 100. For an interesting diversion read in conjunction with Stevens the following dictum from T. E. Hulme: "Why is it that London looks pretty by night? Because for the general cindery chaos there is substituted a simple ordered arrangement of a finite number of lights." Hulme, *Speculations* 221 (Routledge ed. 1960). Consider also that the same author put forth the ideas that: "The aim of science and of all thought is to reduce the complex and inevitable disconnected world of grit and cinders to a few ideal counters, which we can move about and so form an ungritlike picture of reality—one flattering to our sense of power over the world." *Id.* at 224; and "animals are in the same state that men were before symbolic language was invented." *Id.* at 229.

tinguished from animals by his ability at lying and literature. In a sense this is true because man is a symbol-functioning creature, language and its verbal concepts having become interposed between his reactor and effector-systems.<sup>6</sup> As a result, while an animal lives in harmony with nature, man no longer reacts to phenomena about him first hand; the medium of language and his self-awareness interject themselves. Epictetus rightly observed that what alarms man are not things, but his opinions and fancies about them. The key to understanding his struggles is a realization that each man seeks a system of mental orientation adequate to the facts he encounters in everyday life. There is a good deal of truth, therefore, in the assertion that "man exists in a world of his own creation."<sup>7</sup>

There is a point, moreover, to the Kantian idea that the human mind is able to orient itself to raw phenomena about it because inherent in the mind itself is a certain scheme of classification. It would now appear, however, that this basic postulational matrix is relative to the particular society in which the mind is trained. While "time" to Kant was a priori, we now believe that time, as an organizing device, is relative to particular societies.<sup>8</sup> The very basic ideas which are the starting point of knowledge—the "animal, vegetable or mineral" components seemingly inherent in the mind—are merely the product of the culture in terms of which the child is reared so that the way a person comes to understand his environment is relative. Thus, "the picture of the universe shifts from tongue to tongue."<sup>9</sup>

The real difficulty with the study of jurisprudence is that there is no "legal system" in any society. What passes for the legal system is only a high-level abstraction, a hypothetical average of individual outlooks about the legal system held by members of the society. That this subjective atomization does not lead to chaos is testimony to the fact that

<sup>6</sup> See, Northrop, *The Complexity of Legal and Ethical Experience* 108-12 (1959).

<sup>7</sup> Johnson, *A Treatise on Language* 29 (U. Cal. Press ed. 1959). "Language usurps thus, to an astonishing extent, the dignity which truly belongs to creation. I know we usually say that words are signs for things. Practically, we make things the signs of words." *Id.* at 40.

<sup>8</sup> Whorf, *Language, Thought and Reality* 57-58 (M.I.T. ed. 1964):

After long and careful study and analysis, the Hopi language is seen to contain no words, grammatical forms, constructions or expressions that refer directly to what we call "time" . . . .

At the same time, the Hopi language is capable of accounting for and describing correctly, in a pragmatic or operational sense, all observable phenomena of the universe. . . . Just as it is possible to have any number of geometries other than the Euclidean which give an equally perfect account of space configurations, so it is possible to have descriptions of the universe, all equally valid, that do not contain our familiar contrasts of time and space. The relativity viewpoint of modern physics is one such view, conceived in mathematical terms, and the Hopi Weltanschauung is another and quite different one, nonmathematical and linguistic.

<sup>9</sup> *Id.* at vi (foreword by Chase).

the mental outlooks of the constituents of any society have been formulated by reference to the same set of mental constructs which pass as the "culture" of the society. Indeed, the apparently objective legal system is in reality the accidental by-product of the more or less uniform mental constructs which have been transmitted to its constituents by the community's educational processes. Their remarkably similar subjective conceptualization about the legal system is, therefore, inevitable.<sup>10</sup>

Men do possess a system of logic, but its actual use is much more limited than the educational organs of the society care to, or can admit.<sup>11</sup> This is so because most basic ideas are not propositions, as the term is understood in logic, but are in fact propositional functions. That is, while the statement of an idea appears to be a proposition *in form*, its *content* is such that it is not one in fact, because it contains high-level abstractions susceptible to a wide variety of meanings. It is so variable as to be empirically meaningless standing by itself. Thus, "All men are created equal" is not a proposition and is, therefore, neither a true nor a false statement. "Men" may mean white or colored, or both; adult or child, or both; or citizen or foreigner, or both. "Equal" may include "before God," "before the courts of law," "in size or shape," "in intelligence," etc. Until the variables are replaced by specific items susceptible to validation by empirical methods, it will be seen that the statement can have only emotional significance; it sums up a particular way of ordering the cosmos around the observer.<sup>12</sup>

If one stops to think about it, geometry is premised upon several fundamental propositions which are tautological and, perforce, are neither true nor false but simply given.<sup>13</sup> Once these basic axioms are accepted

<sup>10</sup> See Mr. Justice Frankfurter's Opinion in *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 596 (1940): "The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. 'We live by symbols.'"

Jaspers, *Man in the Modern Age* 110 (Anchor ed. 1957): "Man is not what he is solely by virtue of inheritance, but also, and much more, thanks to what tradition makes him. . . . Through . . . purposive education to which he is subjected . . . he acquires . . . his culture, which becomes for him, so to say, his second nature."

<sup>11</sup> Holmes, "The Path of the Law," supra note 5, at 167, 180: "The fallacy to which I refer is the notion that the only force at work in the development of the law is logic;" Phillips, *Felix Frankfurter Reminisces* 10 (1960): "[Scholars] . . . haven't learned how much in this world is determined by nonsyllogistic reasoning, or without conscious exploration of a problem with a view to reaching a logical conclusion."

<sup>12</sup> See, particularly, Keyser, "The Nature of the Doctrinal Function and Its Role in Rational Thought," 41 *Yale L.J.* 713 (1932).

<sup>13</sup> Einstein, supra note 2, at 2:

A proposition is then correct ("true") when it has been derived in the recognized manner from the axioms. The question of the "truth" of the individual geometrical propositions is thus reduced to the "truth" of the axioms. Now it has long been known that the last question is not only unanswerable by the methods of geometry, but that it is in itself entirely without meaning. We cannot ask whether it is true that only one straight line

as "self-evident" and the balance of the system logically deduced therefrom, a "rational" description of affairs is created. Similarly, any legal system is deduced and developed rationally from a limited set of basic axioms. Yet these fundamental axioms are again neither true nor false, in this instance because they are so hopelessly vague that they escape validation. These self-evident truths are accepted because they afford the observer an orientation which appears to him, at his particular time and place, to be an adequate explanation and ordering of the facts of existence. Being neither true nor false, the attachment to these basic postulates which form the very base of the legal structure, is primarily a question of *emotion*.<sup>14</sup>

## II

### GENESIS OF LAW

The products of social life, which may be conveniently summed up in the label "culture," are inventions.<sup>15</sup>

In primitive society, in order for the species to survive, an accommodation had to be made with the world as it was. In order for the tribe to function, arrangements had to be made for, *inter alia*, the sharing of political power, the distribution of wealth, the organization of the family, modes of sexual conduct, and the methods of settling intra-societal disputes. Since there were innumerable alternatives available for the handling of each problem, it was inevitable that the doctrine of chance, even apart from the accident of environment, made it impossible that any two tribes would settle on exactly the same set of expedients. Variety then was the most obvious phenomenon of primitive society.<sup>16</sup>

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goes through two points. We can only say that Euclidean geometry deals with things called "straight lines," to each of which is ascribed the property of being uniquely determined by two points situated on it. The concept "true" does not tally with the assertions of pure geometry, because by the word "true" we are eventually in the habit of designating always the correspondence with a "real" object; geometry, however, is not concerned with the relation of the ideas involved in it to objects of experience, but only with the logical connection of these ideas among themselves.

<sup>14</sup> Haskins, *Of Societies and Men* 206 (Compass ed. 1960):

How far such mental specialization of the individual to his culture society has gone, and how markedly the culture society takes on the typical aspect of an integrated organization in this regard, is brought vividly home when one reflects on how difficult it is to accept a radical change in one's cultural milieu when it concerns elements which are regarded as vital. Every great war has demonstrated that there are many millions of human beings who would prefer death to a compulsory shift of this sort.

<sup>15</sup> Cairns, *The Theory of Legal Science* 53 (1941).

<sup>16</sup> For a succinct statement of this variety, see Goble, "The Mutability of Law," 11 *Hastings L.J.* 95, 101-02 (1950):

Among many groups human sacrifice was widespread. It was a breach of filial duty for Eskimo children to fail to kill their parents when they became useless because of age. Infanticide was practiced with children who were born crippled or diseased, or even with those born during stormy weather or during certain times of the year, or when the parents already had a specified number of offspring. At various times and among many groups polygamy, polyandry or complete promiscuity between the sexes was practiced.

Exactly how the primitive tribes formulated their accord with the universe remains, and probably will continue to remain, an enigma.<sup>17</sup> That the tribe formulated at a primitive town-meeting some form of "social contract" seems quite unlikely. But as a propositional function akin to an axiom of geometry, the theory of the social contract has afforded a point at which to begin the examination of the idea of the state as a mechanism of society.<sup>18</sup> The existence of the state when history begins can be explained *as if* men had gotten together to formulate such a compact. As a matter of history, however, we can only surmise that certain ways of going about doing the things necessary to social existence were hit upon by accident and became habitual with primitive folk.

Once a particular solution did become habitual, however, the process of language began to operate upon the society. Even primitive societies were more than a mere aggregation of creatures interacting: the very

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Frequently these practices turned upon the relative number of men and women in the group. In some tribes groups of men collectively married groups of women. Monogamy was sometimes looked upon as shameful, apparently on the theory that it was wrong for a man to have a monopoly of one woman. In patriarchal systems wives were slaves of their husbands. Marriage by purchase prevailed in many areas. In some places women would sell themselves to raise money for temples and other philanthropic causes. Among some tribes virginity among girls was held in contempt. Chastity was relatively a late development in society. In some localities it was regarded as inhospitable for a host not to offer his wife or daughter to his guest as a companion for the night, and it was an insult to the lady if the offer was refused. Cannibalism was almost universal among primitive tribes, and slavery was widely recognized and approved. Among some groups parents sold their children into slavery. Mutilation of the human body, especially of the ears, nose, lips and teeth was regarded as proper, and sometimes required even by the most advanced primitive peoples, until as recently as 15,000 years ago. In many groups certain persons became untouchable, or were to be shunned because they were "tabu." Trickery, deception, dishonesty, greed, cruelty and violence were not only approved of, but they were regarded as indispensable to survival. "Primitive man," says Durant, "was cruel because he had to be." Almost every vice that one can think of was once a virtue.

<sup>17</sup> Fortes & Evans-Pritchard, *African Political Systems* 5 (1940): "We do not consider that the origins of primitive institutions can be discovered and, therefore, we do not think that it is worth while seeking for them;" *Times*, May 12, 1961 (Literary Supp.), p. 290, col. 5: "We can investigate, though still with great difficulty, the theology of the Nuer, for they can tell us what they believe and can give some explanation of the rites they perform. But in the case of prehistoric man such direct and indispensable communication is irretrievably lost, and concerning his gods we 'know,' and can know, absolutely nothing."

<sup>18</sup> Cassirer, *The Myth of the State* 218 (Anchor ed. 1955):

The objects of geometry must be constructed in order to be fully understood. Obviously this constructive act is a mental, not a temporal process. What we are looking for is an origin in reason, not in time. We try to analyze geometrical objects into their first elements and reconstruct them by a synthetic process of thought. The same principle holds for political objects. If Hobbes describes the transition from the natural to the social state, he is not interested in the empirical origin of the state. The point at issue is not the history but the "validity" of the social and political order. What matters alone is not the historical but the legal basis of the state; and it is the question of this legal basis that is answered by the theory of the social contract.

Hoebel, *The Laws of Primitive Man: A Study in Comparative Legal Dynamics* 276 (1954): No culture has a specific starting point in time; yet in the operation of the first function it is as though men were getting together and saying to each other, "Look here! Let's have a little organization here or we'll never get anywhere with this mess! Let's have a clear understanding of who's who, what we are to do, and how we are going to do it!" In its essence it is what the social-contract theorists recognized as the foundation of social order.

idea of a human society signifies that it is made up of sentient creatures who *communicate* their ways to each other and to succeeding generations. Once society evolved man ceased to be an instinctive animal; his capacities became learned ones.<sup>19</sup> Indeed, what is distinctive about *human* society is the very fact that it is based upon symbolic communication. Man perforce exists in a physical world, but he lives in a symbolic one. Once such a society is posited, moreover, man knows nothing except through linguistic symbols. Each society entertains a process whereby its statistically most frequent methods become mores, *i.e.*, norms become normative with verbal transmission from generation to generation. "Cousins *do not* intermarry here" with time becomes "Cousins *ought not* intermarry" and finally "Cousins *shall not* intermarry." Order then seems to have originated out of crystallized conduct, the description taking on the quality of a command.<sup>20</sup>

The influence of this verbal order on man cannot be emphasized too much. "Language is cardinal in rearing human young, in organizing human communities, in handing down the culture from generation to generation."<sup>21</sup> At all levels, thinking depends on language. Simple, individual *conduct*, for example, is inextricably interwoven with verbal forms. People behave more carelessly near what are called "empty" gasoline drums than near what are called gasoline drums, even though the explosive vapors contained in the former make them more dangerous.<sup>22</sup> In organizing a project on the grand scale of a TVA, aid has had to be channeled in terms of "loans" rather than in terms of "gifts" lest the local mores be offended and the whole plan falter.<sup>23</sup> In point of fact

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<sup>19</sup> See Berger & Kellner, "Arnold Gehlen and the Theory of Institutions," 32 *Social Research* 110 (1965).

<sup>20</sup> Hoehel, *supra* note 18, at 15: "In society what 'is' takes on the compulsive element of 'ought.' The folkways are the "right" ways.' The norm takes on the quality of the normative. What the most do, others should do."

<sup>21</sup> Whorf, *supra* note 8, at vi (foreword by Chase).

<sup>22</sup> *Id.* at 135:

Thus around a storage of what are called "gasoline drums," behavior will tend to a certain type, that is, great care will be exercised; while around a storage of what are called "empty gasoline drums," it will tend to be different—careless, with little repression of smoking or of tossing cigarette stubs about. Yet the "empty" drums are perhaps the more dangerous, since they contain explosive vapor. Physically the situation is hazardous, but the linguistic analysis according to regular analogy must employ the word "empty," which inevitably suggests lack of hazard.

<sup>23</sup> Arnold, *The Symbols of Government* 16 (1935):

The Tennessee Valley Authority is conducting a great experiment in the utilization of power by government for the benefit of a large number of poverty-stricken people. The direct way would be to furnish the power to the people and to give them the equipment with which to make it useful. In effect this is what is being attempted, but it must be accompanied by the most elaborate make-believe. . . . Yet the complicated make-believe by which this is accomplished is, curiously enough, not for the benefit of the purchasers who are unable to understand it . . . but for the moral comfort of others who would regard as unsound any system of distribution which does not follow the forms to which they are accustomed.

almost all human conduct and social activity occurs in the arena of verbal forms.

As a pattern of culture develops, therefore, behavioral patterns undergo a metamorphosis and become themselves order through the agency of verbal forms. Norms, once crystallized, become a cultural matrix which typifies and sets apart the society from other societies. Since the details of conduct of each society differ, it is obvious that the verbalized norms derived from these patterns of conduct will differ. And as the more intelligent, or at least the more intellectually inclined, elders in the community begin to summarize their accunulated "wisdom" of the tribe, in order to transmit it, an abstracting process seems naturally to occur. The very nature of the educational process required that first principles, or basic norms, be ferreted out and succinctly stated. In time a body of "self-evident truths" grew up, a body of doctrine sacred to the tribe. This matrix then becomes a conservative force in society, channeling future conduct into conformity with its precepts. In short, "ideas restrain and canalize the lusts of men."<sup>24</sup> Indeed, it is fair to observe that, commonly, "even the most radical member of a commnnity is, and cannot help being, in the greater part of his convictions in accordance with the basic presuppositions of the social order of his community rather than in rebellion against it."<sup>25</sup>

Within a society, therefore, the postulates or "self-evident truths" provide a *Weltanschauung* orienting people to the flux around them. Postulates necessarily must be found, because the sanity of the human mind seems to depend upon belief in some supposedly rational ordering of the phenomena about it.<sup>26</sup> Most men cannot afford to withstand the irritation of doubt for any appreciable length of time. As a mental construct, *i.e.*, a postulate as opposed to a valid psychological principle, there is much to be said for Jerome Frank's description of the law in terms of a search for a father-image.<sup>27</sup>

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<sup>24</sup> Weigel, Faith and Understanding in America 21 (1959).

<sup>25</sup> Nekam, The Personality Conception of Legal Entity 4 (1938).

<sup>26</sup> Cohen, A Preface to Logic 15 (1944): "We all need some ground from which to start and on which to light after our short swallow flights of doubt and critical reflection."

<sup>27</sup> Frank, Law and the Modern Mind 19 (Anchor ed. 1963): "That is, the desire persists in grown men to recapture, through a rediscovery of a father, a childish, completely controllable universe, and that desire seeks satisfaction in a partial, unconscious, anthropomorphizing of Law, in ascribing to the Law some of the characteristics of the child's Father-Judge." Later, Frank asks: "Why do men seek unrealizable certainty in law? Because, we reply, they have not yet relinquished the childish need for an authoritative father and unconsciously have tried to find in the law a substitute for those attributes of firmness, sureness, certainty and infallibility ascribed in childhood to the father." *Id.* at 22.

Frank himself very carefully observed that this was but one cause of the urge to find certainty in the law. See Rumble, "Jerome Frank and His Critics: Certainty and Fantasy in the Judicial Process," 10 J. Pub. L. 125, 126-27 (1961).

Belief is the absence of doubt.<sup>28</sup> Indeed, most persons never have reason to doubt the self-evident truths of their particular society, and their acquired orientation to the world suffices. Professor Nekam has observed that "this tendency of man to regard the values he accepts, the set of conditions he is familiar with, as absolute and the only natural ones seems to be one of the basic phenomena of social life."<sup>29</sup> It is here, in fact, that the key to the legal system is to be found. Rather than derive its sanction from the state, or from force at all, the law ultimately derives its effectiveness from the very fact that, as Professor Fuller has stated it, the law "imperceptibly becomes a part of men's common beliefs, and exercises a frictionless control over their activities which derives its sanction not from its source but from a conviction of its essential rightness."<sup>30</sup>

### III

#### CHANGE IN THE LAW.

To be sure, these man-made structures can never be as firm as those of the animal world. They must be continuously produced and re-produced in human activity. As a result, they are inherently precarious and predestined to change.<sup>31</sup>

Under normal conditions, a legal system will maintain its predominant characteristics over a period of generations. In its details, however, change is a constant activity. The evolution of a new technology, the shift to a new form of commercial enterprise, an altered equilibrium in the class structure, a radical demographic shift—all these must result in changes in the legal system which purports realistically to regulate society.

Any system of social science, including law, tends, of course, to be stated in an oversimplified manner. Mr. Justice Cardozo's exclamation that "they can do this better with logarithms" accurately depicts the

<sup>28</sup> This, of course, is a thesis of Charles S. Peirce. See his "The Fixation of Belief," originally published in 12 *Pop. Sci. Mo.*, Nov., 1877, p. 1, reprinted in *Values in a Universe of Chance* 91-112 (Anchor ed. 1958).

<sup>29</sup> Nekam, *supra* note 25, at 6; see Montagu, *supra* note 5; Shepard, "Law and Obedience," 33 *Am. Pol. Sci. Rev.* 783, 798-99 (1939):

Wener holds that a "dominant need projects certain stimulus-objects into metaphysical absolute—higher laws, which are believed to be objectively true." . . . Certainly individuals manifest a remarkably persistent feeling of necessity to act, in Vaihinger's pregnant sense, "as if" such a standard does exist, as a beacon illuminating the pathway to a dim and far-off event.

<sup>30</sup> Fuller, *The Law in Quest of Itself*, 134 (1940). Compare Shepard, *supra* note 29; see Olivecrona, *Law as Fact* 17 (1939): "The 'binding force' of the law is a reality merely as an idea in human minds. There is nothing in the outside world which corresponds to this idea." See also Hoebel, *supra* note 18, at 181, where the author criticizes Malinowski because "the reader is definitely given to believe that law operates without the aid of physical force, although it does bind behavior." But see Northrop, *supra* note 6, at 97-101.

<sup>31</sup> Berger & Kellner, *supra* note 19, at 112.

practical situation. Simple sentences and cause-and-effect reasoning do not accurately mirror phenomena functioning in extremely complex systems of mutually dependent variables. In any human situation, even the simplest, there are more variables than the human mind can properly take into account. The reality must be more complex than any verbal statement about it. Consequently, an element of uncertainty must persist in respect to what verbal statement will be applied in a given situation. "And how could this well be otherwise?" asked Jerome Frank. "The law deals with human relations in their most complicated aspects."<sup>32</sup> But because the law is uncertain—each person's idea of it differing in its details—the system is flexible enough to allow for change.

A reformer concluding that a certain detail no longer works effectively to achieve a certain end may believe he is being properly pragmatic in suggesting a change. In fact his proposed modification is meaningless unless it is put into the context of his perception of the society's self-evident truths and his philosophy of how they should be achieved.<sup>33</sup> And, in order to have the change adopted, the reformer must convince persons of influence in the society that it will better effectuate the society's ends. The change, however, as Professor Nekam insists, must inevitably be effectuated by manipulating verbal forms in order to persuade the society that the proposal is "more just," "fairer," "better" than the old rule.<sup>34</sup> Indeed, while man may be a symbol-functioning creature, unique

<sup>32</sup> Frank, *supra* note 27, at 6.

<sup>33</sup> Not even a minute detail of law exists in a vacuum, since the value to be attributed to it depends upon the context in which it is used. This is also true, for example, in physics. Cassirer, *supra* note 3, at 275:

What a physicist gives as the outcome of an experiment is not a report on the isolated facts that he has ascertained but an interpretation of these facts, or in other words their transposition into an ideal, abstract, symbolic world constructed on theories that he regards as established. A law of physics is a symbolic relationship, whose application to concrete reality demands a knowledge of a whole system of theories which one assumes to be valid.

This phenomenon found reflection in anthropological research into the legal systems of primitive peoples. See, e.g., Northrop, *supra* note 6, at 36:

After many years of such observing and the writing of scientific reports, a few anthropologists suddenly awoke to the fact that they had been misunderstanding the facts which they observed and described. They discovered, moreover, that this occurred because they had been describing and conceiving of what they saw the native people doing in concepts brought to the observed facts by the anthropologist himself, instead of in the way these facts were thought of and, hence, understood and ordered by the native people.

Whorf, *supra* note 8, at 58: "Thus, the Hopi language and culture conceals a Metaphysics, such as our so-called naive view of space and time does, or as the relativity theory does; yet it is a different metaphysics from either."

<sup>34</sup> Nekam, *supra* note 25, at 4:

[W]hen for reasons peculiar to him man comes to consider certain parts of the accepted legal order as unjust or oppressive, as outgrown or unreasonable—it is again not merely because of the seeming expedience of a proposed rule or institution that he accepts and advocates it, but rather because of his personal conviction that the new conception is the one which is natural, obvious, and absolute, and that that of the community is based either on misunderstanding, prejudice, or usurpation of power. And we find that his

because of his capacity for propositional language, the basic stratum of his thinking is still the language of emotions.

#### IV

#### A FUNCTIONAL THEORY OF NORMS

The problem of law's nature is tremendously complex, and if a few categories and definitions are here hesitatingly advanced, that is because no analysis is possible otherwise.<sup>35</sup>

Assuming the material just stated reflects in some degree social phenomena, it remains to be seen whether a system of order can be imposed on these sundry factors, a matrix which will afford a plausible explanation of the functioning of norms within the legal order. Such a theory, it must be remembered, is itself a mental construct, an effort to impose order on chaos. The theory neither purports to be exhaustive, nor does it purport to describe accurately every detail of legal phenomena. It is offered merely as a vehicle which may provide some insight into the existential situation.

*Function of the Establishment.* The basic task of the establishment<sup>36</sup> ideally is to channel the activity within a society into orderly modes whereby drives and forces within the society can attain peaceful realization. The legal system contains one set of forms which the establishment may manipulate to maintain order, but there are other devices available. Instead of regulating the market-place, for example, the establishment may choose to allow commercial activity to seek its own level according to "immutable laws" of the market-place. Instead of legislating a system of morality the establishment may see fit to rely upon the religious convictions current in the community, leaving the function of channeling them to the persuasive talents of churches. In order to encourage a policy of thrift as part of an austerity program, the leaders of the establishment themselves may choose to persuade, by setting an example to be emulated, rather than to legislate a new economic program. It will be seen therefore, that the devices available to the establishment operating in a political arena include *more* than the legal forms.

The most fundamental fact in the nature of government, of course, is

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success as a reformer will be limited to the degree in which he succeeds in awakening in others the same feeling.

<sup>35</sup> Shepard, *supra* note 29, at 783.

<sup>36</sup> I use the word "establishment" rather than "government" so as to include those persons, groups, and classes who effectively share in the actual process of governmental decision-making and in influencing decision-making. In the Soviet Union, of course, it is obvious that the Communist Party is the establishment. In the United States the establishment includes, among others, the decision-makers of both political parties, the leaders of the largest industrial corporations, and the owners of the major news media. The word is a variable, but I think the idea behind it is essentially obvious.

that whoever it is, the establishment wants to remain in power. Part and parcel of its desire to remain in power is a manifest interest in maintaining order in the community. To maintain order without resorting to force, however, the establishment must function within the established symbolic forms of the community: it must not shatter the illusion that the existent forms are universal "rightways." Any changes it makes in the details of the formal patterns of conduct in the community must be made after carefully persuading the constituents of the community that the change more efficiently realizes the goals set forth in the society's matrix of self-evident truths. In turn, it must change the formal or positive law to reflect evolving patterns of conduct in such a way that the law itself appears to remain, not a whim of the establishment, but a reflection of immutable norms. The establishment's problem on the purely domestic scene, therefore, is to maintain a dynamic equilibrium of order—at once maintaining the existing order through the maintenance of traditional legal and other forms, while at the same time creating new forms and modifying old ones to take into account emerging and changing drives within the community. In constantly manipulating legal and other forms in order to regulate evolving patterns of conduct within the society, the establishment must keep in mind Thurman Arnold's dictum: "Men believe that a society is disintegrating when it can no longer be pictured in familiar terms."<sup>37</sup>

The establishment, therefore, cannot remain static once new ideas and drives gain credence in the community. During the Great Depression, for example, a labor-capital class war could easily have developed had the establishment remained inactive and not tried to impose some form of order upon what Walter Lippman dubbed the "realm of disorder." As it was, sit-in strikes and mass-picketing, riots and violence gave way to *controlled* economic warfare between unions and management. This was accomplished by devising legal forms to channel the drives of the labor force toward a peaceful and orderly realization, first into the structure of a new union and then into ordered competition with management.<sup>38</sup> Indeed one contemporary observed astutely:

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<sup>37</sup> Arnold, *The Folklore of Capitalism* 121 (1937).

<sup>38</sup> See, e.g., Lerner, *America as a Civilization* 323-24 (1957):

In this decade something like a revolution took place in the trade-unions. . . . The New Dealers found that they needed a strong labor movement also to give a new vitality of bargaining and purchasing power to the depressed economy. But they could not get the labor base they needed without in a sense creating a new frame for the trade-union movement. That is why the New Deal became, as the quip put it at the time, a "government in search of a labor movement."

Eventually labor responded to this stimulus by forming the C.I.O. in 1938 . . . . The healthiest thing about this upheaval in labor was that it did much to heal the sense of alienation of the workers. Lacking access to governmental power and a voice

Governments often introduce novelties only very gradually. If they do make great changes, they often act under color of old forms and symbols, long habitually respected. Innovations appearing merely as improvements or extensions of existing usage, or which are not felt as such, are usually the most likely to succeed. The present Administration abhors new and repellent symbols like "socialism," yet introduces much that savors of socialism under the more attractive tags of individualism, justice, and a new deal.<sup>39</sup>

In short, the traditional verbal forms were maintained so that the transition from laissez-faire to welfare state was accomplished without shattering the illusion of the eternal, immutable "rightways" of the American polity.<sup>40</sup>

There is a manifest correlation, therefore, between the effectiveness of the rule of law and the subjective beliefs of the community. The degree of force necessary to maintain order depends upon how "obvious, right, fitting and proper" a particular law appears to be. A piece of social legislation, for example one commanding that a minority group within the community be afforded equal status, illustrates the point. Persuasion by the churches on moral grounds, examples set by leaders of the establishment, high pressure propaganda disseminated by the communications media—all proclaiming that integration better realizes the high ideals of the society—may expedite a peaceful transition. If, however, the idea that the particular minority is tabu is an idea basic to the orientation of the community, it may require a battalion of paratroopers to effectuate the minority's admittance into the majority's schools.

The failure of the eighteenth amendment is often cited to illustrate the point that the establishment cannot legislate patterns of conduct which conflict with the established traditions of the community. Indeed, lawyers generally insist, for example, that the law's commands cannot be

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in the big governmental decisions, they had necessarily felt like outsiders. . . . In this sense the revolution in labor deflected the potential energies of a sullen working population from more destructive revolutionary channels . . . .

<sup>39</sup> Shepard, *supra* note 29, at 808.

<sup>40</sup> Cf. Schumpeter, *Capitalism, Socialism and Democracy* 142 (Harper Torchbook ed. 1962):

The capitalist process, by substituting a mere parcel of shares for the walls of and the machines in a factory, takes the life out of the idea of property. It loosens the grip that once was so strong—the grip in the sense of legal right and the actual ability to do as one pleases with one's own; the grip also in the sense that the holder in the title loses the will to fight, economically, physically, politically, for "his" factory and his control over it, to die if necessary on its steps. And this evaporation of what we may term the material substance of property—its visible and touchable reality—affects not only the attitude of holders but also that of the workmen and of the public in general. Dematerialized, defunctionalized and absentee ownership does not impress and call forth moral allegiance as the vital form of property did. Eventually there will be "nobody" left who really cares to stand for it—nobody within and nobody without the precincts of the big concerns.

Schlesinger, *The Vital Center* 27 (1949): "In the end there will be no one ready to go down swinging for institutions so abstract, impersonal and remote."

divorced from the accepted patterns of community behavior. In the short run, of course, the application of force can be increased so that a particular minor adjustment may be made. But in the *long run*, a broad program maintained by force against the will of the community by its establishment may lead to revolution.

In so far as the law is concerned, the establishment can manipulate legal forms in any way it sees fit to achieve the ordering of patterns of conduct within the community. The only checks upon the activity of the establishment are its own and the society's concepts of what is natural. Thus, the establishment in the United States might increase the size of the Supreme Court to one hundred and fill it with "judicial activists," thereby openly creating a kind of House of Lords. The parliament in England might legislate the execution without benefit of clergy of all Roman Catholics found within the realm. The presidium of the Soviet Union might enact prohibition and order the execution of every blue-eyed citizen. The parliament of India might decree that henceforth untouchables will be objects of public veneration. All of these acts might be said to be "legal;" all would lead today to chaos, shattering the repose acquired by thinking of the social order as natural and immutable "rightways."

The check, therefore, on the degree of manipulation of legal forms allowable to the establishment is found in the self-evident truths of the particular society. The *legally possible* in any community is measured by the content of its postulational matrix, the enactments which can be "logically" inferred therefrom as "natural," and the point beyond which the forces available to the establishment cannot hold down a revolution. Man being psychically dependent upon the postulational matrix of the society—his very sense of security being dependent upon it—it represents the limits of possible action by the establishment. The "possible" then is the limit of legal activity—the possible being at the same time the brink of chaos.

*Natural Law Demythologized into a Functional Tool.* Law has its roots in the problem of order; it is basically concerned with canalizing the emotions of men in such a way that they can live together in relative peace. A legal system is not the *source* of change: it is a flexible matrix of vague verbal forms which can be changed to modify the flow of societal activity as permutations occur in the patterns of conduct. Changed economics, altered demography, new ideas about politics—these are the roots of change. The legal system is merely a set of verbal directional signals manipulated by judges and legislators bent upon regulating these

drives in order to maintain orderly development within a dynamic society. How change should be channeled and in what direction it should be deflected, if not directed, is the policy problem of the manipulators and, to the extent that they can channel change in directions of their own choosing, the manipulators are actively engaged in affecting the evolution of society. Whether the manipulators can direct the course of change, or whether they must be content merely to construct new rules designed to introduce order into the new situation depends upon how strongly the populace at large are bent upon achieving any new desired goal.

The factor of the "possible" is dependent upon the exigencies of the moment; the stability of the society is a variable and the content of the self-evident truths defining the society's sacrosanct beliefs is culturally relative. There is, however, a more traditional limiting factor thought to be operative upon the establishment's choice of expedients. These are the hard-core "natural laws" revealed by recent anthropological investigations. Some control of killings, some provision for personal property, and some regulation of sexual conduct, relative in detail but universal in their minimal rudiments, are an apparent *sine qua non* of order. That is, certain rudimentary rules do exist. The killing of at least certain persons is thought of as "murder" and is said to be wrong, certain incest relationships are recognized and are tabu, and the right to possess at least a few personal items is recognized.<sup>41</sup>

The apparent difficulty arises when persons begin to speak about this rudimentary order and begin to verbalize and transmit it. Natural law is often summarized as follows: (1) Murder violates the natural law; (2) Men have a right to own personal property; and (3) Incestuous relationships violate the law of nature. Once formulated in this fashion, however, the natural law at once engenders terrific argument. Some persons will see in these statements the distillation of man's wisdom. Others will see in them so much pious humbug, because they are at once able to cite, for example, innumerable killings countenanced by society or marriages countenanced in one society and condemned as incest in another. In fact, the entire argument is a waste of effort, because the propositional summary of the natural law in abbreviated form is neither true nor false, the summaries being *collections of propositional functions* so fraught with variables as to be empirically meaningless. Such statements, how-

<sup>41</sup> Mead, "Some Anthropological Considerations Concerning Natural Law," 6 *Natural L.F.* 51, 53 (1961):

Effective use of case studies from primitive cultures requires a recognition that no matter how primitive the people under discussion are, rules concerning the sacredness of life (under some circumstances), rules concerning the prohibition of incest in the primary familial relationships in most circumstances, and rules governing an individual's rights over some differentiated physical or cultural items will be found.

ever, may be converted into true or false propositions in two ways. *First*, with adequate particularity a true *description* of the basic ordering principles of a given society can be stated, a statement which can be empirically verified. *Second*, again with adequate particularity, a *description* of the minimal order found in all societies can be made. The result of either step, however, is to provide an almost useless body of knowledge about society because there is an element of tautology involved, *i.e.*, these norms exist in all societies and are so rudimentary that they are not "violated" in any society simply because, without them, *there is no society* in the sense in which we understand it.

Apart from anthropology, however, there is an axiom generally attributed to natural law systems to the effect that "An unjust law ought not be obeyed." Over the centuries, of course, this assertion has been the subject of constant debate. Like the postulate "social contract," this assertion is *not* valuable for its empirical content but for the idea it symbolizes. That is, it represents the idea that at some point the population will rebel at the excesses of any establishment which has gone too far in manipulating legal and other forms, or will rebel because the establishment has tried to maintain by force forms which are no longer adequate to order the existential situation. Properly considered it will be seen that this assertion is simply the converse of the proposition that the "possible" is the limit of legal activity, that is, that no amount of force can maintain order if an alien or obsolete system of ideas is imposed or maintained upon a society by its own establishment in contravention of existing "self-evident truths." Concomitantly, there is another axiom of natural law to the effect that "The good ought to be done." This axiom has existential meaning at two levels. *First*, it signifies that all changes in any legal system must appear to effectuate better the ends of society, *i.e.*, they must be rationalized within the context of the society's self-evident truths. *Second*, it symbolizes the ever-present force of change within any society, forces which must be channeled toward peaceful realization by the legal system, lest if they be very strong forces, they overturn the system. There is a correlation between the two axioms, therefore, because what is seen as good will be done, those in control of the legal system having the choice of either channeling the drives toward the good or being disobeyed.

*For the lawyer interested in the practical order*, therefore, the anthropological hard-core of norms and the two functions just described represent a kind of natural law of legal science. These phenomena are not "law" in the sense of a set of hard and fast, precise and clear rules, but instead are working hypotheses which seem in the light of present knowl-

edge to afford an insight into the functioning of any legal system. The legal system must guarantee the minimal order of the hard-core norms; if it does not, no system of law will exist, because no orientation to phenomena adequate to guarantee even minimal peace of mind will exist. Without the subjective belief that the local structure of society is natural, no rightways of conduct, binding on men's minds through the aegis of symbolic forms, will exist: where convictions of essential rightness do not exist, law and order will not exist.

Assuming that rudimentary order exists because a viable postulational matrix of self-evident truths is present to orient the society, the legal order must be constantly manipulated to keep pace with changing social, economic, moral and political conditions. If belief in the legal system as "the rightway" is to be maintained, however, these changes must appear as logical developments growing out of the existing postulational matrix. Verbal manipulation of forms—of necessarily vague forms—will be necessary if the apparent coherence of the postulational synthesis is to be maintained. The urge to achieve the "good" must be reflected in a legal system which constantly is modified to channel these urges into orderly forms. At the same time, the urge of the establishment to impose what it sees as "good" on the society must be restrained lest the imposed "good" violate local preconceptions and lead to disrespect for the legal system. In any system of order, therefore, the two functional axioms attributed to the natural law are in fact *counsels of moderation*, distillations, so to speak, of accumulated wisdom with regard to the functioning of imposed systems of order.

In recent years there has been a tendency to argue that the excesses of the Nazi regime never would have occurred had the "Natural Law" been a viable force in German legal thinking. Such a thesis misapprehends the nature of society and posits a nonexistent formal, legalistic natural law in a vacuum. This thesis omits the fact that Hitler ruled with the consent of the society and that the society itself believed in a system of "self-evident truths" which made possible the excesses of the regime. The army, the courts, the bureaucracy, indeed, the *people believed*, for example, in the idea that the Germans were a superior race. The other sources of orientation, particularly the churches, seem curiously to have been powerless to counteract the Nazi spell with any viable synthesis of their own. Particularly interesting is the fact that there was no real effort at rebellion until Hitler began *to lose* the war, and then only by a rather miniscule clique. The real key to the German tragedy is rooted in the fact that order is to be found in the traditional mental constructs of the society and in their adequacy as a workable orientation

to existing phenomena. The old German order was destroyed by the first war and depression, and rather than try to modify existing forms, the victors imposed an alien order at the same time that they created economic conditions bound to further the chaos within the German society.<sup>42</sup>

George Kennan has aptly summarized this phenomenon:—

Man, we must remember, is a creature of habit and tradition. Much of his ability to lead a civilized life has been the product of a long habit-forming process, closely linked to a respect for tradition, for ancient custom and outlook, for the accumulated wisdom of the past. More than most of us realize, especially in this country, man has been psychically dependent on the authority of his ancestors and on the legacy of custom and ritual he has received from them. Consciously or unconsciously, it is to this continuity of experience from generation to generation that he has looked for his sense of security, his inner confidence, his serenity of spirit; and it is from precisely these qualities that the capacity for self-restraint and orderly behavior has largely been derived. Wherever the authority of the past is too suddenly and too drastically undermined—wherever the past ceases to be the great and reliable reference book of human problems—wherever, above all, the experience of the father becomes irrelevant to the trials and searchings of the son—there the foundations of man's inner health and stability begin to crumble, insecurity and panic begin to take over, conduct becomes erratic and aggressive.<sup>43</sup>

The German debacle, therefore, involved more than the failure of German scholars: it involved the collapse of the entire body of subjectively known self-evident absolutes conceived to be the source of all unity and order in the society.<sup>44</sup>

Across wide stretches of the world today, old forms adhered to by archaic establishments no longer reflect the aspirations of their people—the official forms no longer orient society. “Nationalism,” “democracy,” “industrialization,” “a share of the national wealth”—new ideas are loose throughout the world: establishments unable to modify existing forms to channel these drives toward reasonable realization will be swept aside. Indeed:

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<sup>42</sup> See, e.g., Keynes, *The Economic Consequences of the Peace* (1920); Holborn, *The Political Collapse of Europe* 28 (1951): “A peace treaty cannot create new historical forces; it can only place the existing ones in a relationship most conducive to the maintenance of mutual confidence and least likely to lead to future conflict.” See also Churchill, *The Gathering Storm* 10-11 (1948):

The victors imposed upon the Germans all the long-sought ideals of the liberal nations of the West. . . . The Weimar Republic, with all its liberal trappings and blessings, was regarded as an imposition of the enemy. It could not hold the loyalties or the imagination of the German people. For a spell they sought to cling as in desperation to the aged Marshal Hindenburg. Thereafter mighty forces were adrift; the void was open, and into that void after a pause there strode a maniac of ferocious genius, the repository and expression of the most virulent hatreds that have ever corroded the human breast—Corporal Hitler.

<sup>43</sup> Kennan, *Realities of American Foreign Policy* 34 (1954).

<sup>44</sup> The ruin of a culture, moreover, will be reflected in the degradation of its language. For a superb analysis of the effect that the Nazi experience had on the German language, see Steiner, “The Hollow Miracle—Notes on the German Language,” *The Reporter*, Feb. 18, 1960, p. 36.

[I]t is accepted that, in all non-industrialised countries, people are not eating better than at the subsistence level. And they are working as people have always had to work, from Neolithic times until our own period. Life for the overwhelming majority of mankind has always been nasty, brutish and short. It is so in the poor countries still.

This disparity between the rich and the poor has been noticed. It has been noticed most acutely and not unnaturally, by the poor. Just because they have noticed it, it won't last for long. Whatever else in the world we know survives to the year 2000, that won't. Once the trick of getting rich is known, as it now is, the world can't survive half rich and half poor. It's just not on.<sup>45</sup>

In the same way that order collapsed in Germany, traditional order threatens to collapse in many places. What have come to be seen as "unjust" laws will not be obeyed; what is seen as "good" will be done. It has become simply a question of who comes forward with a new synthesis, a new system of orientation which appears to people in the throes of chaos to be adequate enough to orient them to life around them. Only one thing appears certain: if the traditional forms of order do collapse, the transition will not be a peaceful one.<sup>46</sup>

*For the lawyer interested in justice* in its broadest sense, the functional axioms attributed to the natural law take on a different significance. The "possible" may be the limits of the establishment's power, but the scope of the possible depends upon the religion, morals, customs and habits of the particular community. The notion that an unjust law ought not to be obeyed here symbolizes the tension between the efforts of the establishment to impose order and the ideas of order and justice current in the community. In an open society the community's ideas may largely be generated by institutions and persons other than the government, al-

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<sup>45</sup> Snow, *The Two Cultures and the Scientific Revolution* 39-40 (1959); see Olivecrona, *supra* note 30, at 167:

In order really to gauge the influence of the essentially moral feelings on the law, it is necessary to ask how far they have left their mark on the law when they have come into sharp conflict with the self-interest of those who are in power. History gives us an answer to this question. Self-interest has always been dominant. When have, e.g., the rich and powerful prompted by moral reasons introduced laws aiming at a more equal distribution of property? Never. So long as they have been able without risk to keep their wealth to themselves, they have done it. Only under pressure from below has another policy been adopted.

<sup>46</sup> See Kennan, *supra* note 43, at 34-35:

And if the price of adjustment to rapid population growth is to cut man's ties to the past and to catapult him violently across centuries of adjustment into some new and unfamiliar technological stratosphere, then I am not sure that the achievement is worth the price.

All of these circumstances seem to me to point to a single conclusion. Whatever else we may expect from our noncommunist environment in this coming period, we should not expect that it is always going to be marked by stability and an absence of violence. Compare Professor Holborn's description of the view of the British Foreign Office immediately after 1815: "Social and political change did not frighten British statesmen, who knew already that the new forces could not be submerged, but could only be guided and channeled." Holborn *supra* note 42, at 30.

beit perhaps identified with the establishment. In a closed society the philosophy or religion may be largely state-controlled, giving the establishment a much greater degree of control over the scope of the possible, such as in a theocracy or in a society wherein the establishment exercises priestly powers over an ideology.

Again, the judge or the legislator will attempt to direct the activity of the society—by making “bad acts” crimes, by creating social relationships which are “good,” by drafting economic plans which forward “social justice”—against the background of the axiom that the good ought to be done. The actual content of the good, however, depends upon the religious and philosophic concepts of the establishment and the society. That content, moreover, derives its juices of life from nonlegal sources—religious institutions, philosophic systems, in an open society, or from the theologians or dialecticians in a closed one.

Regardless, therefore, whether the members of the legal system accept as empirically valid any system of traditional natural law, a system of demythologized natural law is a viable force in society because it orients the community's outlook. That outlook must be taken into account by the manipulators of legal system. If the law must appear rational and self-evidently just in order to be viable and thereby effectively *induce* obedience, it must appear rational and self-evident *within the context of the society's particular orientation*. The judge or legislator, therefore, is trapped in that, regardless of his own beliefs, he must manipulate legal forms in the context of the community's prevailing notions of what is right. Being members of the community themselves, most of them will not chafe under this restraint, because they cannot escape the fact that in large measure they derive their own orientation from the same sources.<sup>47</sup>

## V

### DENOUEMENT

This statement of jurisprudence is, at best, the enunciation of what for many is a sterile *Weltanschauung*. The objection, of course, is self-evident: this view excludes ultimate values from the ken of jurisprudence. That is, after cataloguing the myths, aims, desires and “can't help” of a particular society, one can only make a judgment whether its

<sup>47</sup> T. S. Eliot grasped this in his Utopian essay, *The Idea of a Christian Society* 26-27 (1940):

What the rulers believed, would be less important than the beliefs to which they would be obliged to conform. And a skeptical or indifferent statesman, working within a Christian frame, might be more effective than a devout Christian statesman obliged to conform to a secular frame. For he would be required to design his policy for the government of a Christian Society.

legal system is expediting the achievement of those objectives. Jurisprudence is thereby reduced, so to speak, to a time and motion study of the relative efficiency of various legal systems. This is only to say, however, that the jurispude tries to remain within the confines of the scientific method and does not, in so far as he is humanly capable, bring to his workbench the values of his own system.

Within his own system, of course, the jurispude remains as free as he ever was to pursue "justice" or "order," whether his frame of reference is theologically, ideologically or culturally determined. Here the jurispude can function actively in the creation of new values or the implementation of current ones. He is free to give vent to his personal predilections since, as we have seen, change in law turns largely on emotions. Outside his own system, however, the jurispude must content himself with examining states of affairs as he finds them. Once he substitutes his own catalogue of "goods and bads" as a measuring stick of another legal system he ceases the study of it as a question of jurisprudence and dons the robes of self-appointed judge and jury in the moral and philosophical arena. Since the techniques of maintaining order seem to have something in common in any setting, a jurispude is competent to assay the relative efficiency of various systems. Until the dawn of some brave new world, however, passing judgments on the relative goodness or badness of the values actually being implemented by these systems, while it may be a fair political or moral pastime, is distinctly not part of the science of jurisprudence.