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THE FUTURE OF NATURAL LAW

On the train the other day I ran into a friend, a lawyer from Vermont, whose grandfather had been chief Justice of the Supreme Court of the United States many decades ago. He had come from New York, and he looked sad and pale. "Well," asked I, "what is going on?" He sighed, "I simply don't know if they will allow us to live any longer in this country." This melancholy was due to his Republicanism. Then we talked about the bar, and he said, "Of course, the bar is on the defence. Everbody wants to earn a million dollars; that simply goes against nature. But lawyers don't deal with things as the people understand them. The language of the law sounds like the 'terrible story': 'I am telling a terrible story/ but it does not diminish my glory: that I had in elegant diction/ in dulged in an innocent fiction/ which is not in the same category/ as a regular terrible story.'"

These remarks induced me to formulate the question before us tonight: how far are the existing legal fictions sound craftmanship, how far are they the regular terrible story of any law at any time--the attempt to violate the laws of nature. And on the laws of nature, I feel free to speak, though coming from a different land and a different school of training. Natural Law's first advantage is that it is the law of all men.

Though being on a ground common for all, I first, however, must say a few words about my method as compared to the case method. I hope to make clear from the beginning

why this method seems to me the easiest way of raising the discussion to a scientific level. This paper, therefore, will try to make three points: 1) about my procedure of research as compared to the case method of which we would avail ourselves if we had to decide a case tonight; 2) about Natural Law as eternal and by no means identical with 18th century natural law; 3) our concept of nature as brought up to date by basing it on our present-day faith in nature. My method of research, the eternal authority of Natural Law, our present-day concept of nature, are the three items that must be stated clearly at the outset. Then labor's claims will have to pass the test as the crucial phenomenon of our times.

My first question on method may seem startling enough. Many lawyers and even more laymen think that there is no genuine research in the law--that the law is no science in any reasonable sense. All that I can say in so short a time is that the role of the German law schools always was to prepare legislation. They acted in this role for centuries and they held the place of amici curiae, friends of the court, under the privilege that an opinion sent in from a University Law Faculty was binding as to the legal principles. When, at the end of the 18th century, Natural Law emancipated itself from common law all through the Western world, this faith, through the German Universities, was introduced in Prussia, Austria, Bavaria, and all the other territories in the form of great codifications. The system of these codes follows in its architecture, the Table of Contents developed by the academic jurists in

the reasoning process on Natural Law.[1]

No wonder, then, that Natural Law is treated as a philosophy that deserves systematic treatment in all the regions of the continent of Europe where it is revived today. As a system, it is discussed in law schools and theoretical books. These systematic books don't decide cases: they are prophetic. Their doctrines always, through the centuries, became the law after twenty or thirty years, that is, as soon as the students of these men became judges or legislators in turn. Mr. Haines, in his Revival of Natural Law Concepts, does not quote the same sources in American and in Europe. In Europe, his citations are from monographs of public teachers of law. In America, it is the case in court that comes under his consideration. I don't think that it is an exaggeration to say that the case method is influential in every way of American science. Economics, sociology, psychology especially, logic, all, it seems to me, are operating by methods derived from the peculiar legal thinking in this country. The book by Commons on Capitalism is an example in point.

The American lawyer sees the one case before him, even when he is not a judge. This case shall be decided. The continental lawyers are like bacteriologists, like Pasteur or Koch. With a sort of cruelty, they let the people die. They themselves turn aside to work out a method that some years from now will prevent people from catching the disease. Please, then, be indulgent with my method which, as all methods, should not be looked upon

1) This was demonstrated by Andreas Bertalan Schwarz, 1953.

as exclusive in itself or to be excluded. Many roads may lead to Rome.

It follows that you may not expect so-called practical results tonight. I am not deciding the case of Mr. Lewis or Mr. Martin against Mr. Sloan, or or Mr. Morehead against the People of New York State. I wish to indicate a method and a means by which I think the new disease of labor problems will have to be discussed between lawyers, scientists and states if people sincerely ~~with~~ want to get under the surface--a sincerity which sometimes is, of course, doubtful per se.

Tonight I am bringing together good old Natural Law with the claims of Labor because Natural Law is an ingredient of every legal decision we make. I have always believed this, even in the dark age of legal positivism. Our faith in Nature helps us to discover injustice. Natural Law is a negative, restricting category of thought. It shows what is impossible, what is unjust--anything that is against man's nature. When I see that the students here are working a seven-day week, I remember the decision of the New England Synod in 1680 where the Saturday afternoon and Sunday were shown to be holidays on the basis of Natural Law. Natural Law loses dignity when it is confined to it's worship in the 18th century. Mr. Haines in his excellent Revival of Natural Law Concepts or the Supreme Court occasionally relying on them, both obviously limit themselves to a very narrow and restricted area of meaning within the great realm of Natural Law. T o them the safety of life, liberty of contract, inviolability of private property, are the essence of Natural Law.

Natural Law is, however, an eternal category of social justice. It is three thousand years old. It is an element of law in every age. The special contribution of the American Revolution was to fix it at a certain moment of history as prevalent and superior to all other elements in the creation of laws. America isolated Natural Law and made it into a rock. American did not create, and of course never intended to create, Natural Law. But in her vast new continent, the impression of its importance was all imposing. The immigrants from Europe brought over their lives, and "nature" offered them a lawful chance in America. One did not become an American by landing physically on these shores. One became an American by taking one's chances in land or trade. And the law had to look out that one should get his chances in land or trade which would make the newcomer a citizen. Life plus the acquisition of property was the natural right of an immigrant. All further contracts were social processes between citizens. They came later. But life plus property both produced the complete citizen of the New World. No contract, then, was legal which took away the chance to acquire your share in the exploiting of America.

The constitutional sanctions around the natural rights of man, made the clear distinction between the fundamental chance and all legislations by statute, or transformations by contract that should be built upon this common situation for all. Come here and get your share! On the basis of so complete an equality of chances, all inequality creeping in later may be easily forborn.

Though in a new continent this principle had particularly

great economic scope, it was the idea behind the concept of Natural Law at all times. In 1150 the authority of nature was looked at by writers on Natural Law in not so very different terms, as I hope to show in a comparative study on Scholastic and American Natural Law. Only they derived from this authority of nature different consequences.

If this is true, the concept of Natural Law may have exhausted its special American usefulness in securing land and a first chance of holding property and investing capital, but it will be a necessary element of our futures politics just the same. With the American frontier disappearing, one most emphatic argument in favor of Natural Law in America is exploded. This does not mean that the use of Natural Law in the world, in industrial society in general, is refuted. Only, the future revival of Natural Law in America will not take up primarily the questions of the American frontier with its ideals of grants of land and private property in forests and mines. This, then, is my reason for calling the attempts of the courts or of Haines rather narrow aspects of a revival of Natural Law. They think of a return to the 18th century formula. Let me repeat, then, that Natural Law concepts of 1776 was one among a long series of interpretations, all believing passionately in the authority of Natural Law, yet all advancing different claims upon this authority. Their success depended on the sincerity and faith which went into their concept of nature. Man cannot help trying to be faithful to his nature. Even old Polonius knew that when he spoke to Laertes.

Here, then, is the cornerstone for our rebuilding of

of Natural Law in an industrial society today: What is our concept of nature? If we have such a concept as a burning conviction, it will overcome all obstacles of precedent and statute law and the resistance of all the orthodox fundamentalists of the common law, as surely as evolution is going to conquer Tennessee. On the other hand, if human nature is actually believed to be what it looked like in 1800 and if we have only Communistic or pink wishful thinking, utopian desires, without a glowing faith in man's nature, labor's claims will only produce new tyrannies worse than any existing before.

Now, I sincerely believe that our concept of nature has changed completely even in the mind of lawyers and laymen. Labor's claims as to collective bargaining, as to child labor, as to the right to work, the CCC, relief, are not dependent on Marxian or Fascist lust for power. They may be illustrated and they may defined in terms derived from our new concept of nature. Let us try this, then.

Nature, to us, is not a mechanical system of independent atoms or of mutually impenetrable entities as it was to the men of the Enlightenment. It is a living universe, exploding, changing, transforming. Radioactivity shows that the very elements of nature decay in any second. Every animal is a biological form that runs its course in an autocatalytic process to its predestined end. Last but not least, life is no longer one; each partial phase of human life, each hour, so to speak, contains the whole secret of life, its ups and downs. In 1750 divorce was unheard of. In 1937 you may marry upward til you try a king. Each of these marriages is treated as a complete married life though it only lasts a few years and is

ended by a divorce. Now this, though it is accepted by the bar, is not natural even today. It is the result of labor's new industrial situation. The root of our divorce laws is labor. A man has not one profession today, as he had, by the nature of man, in most cases in 1750. He goes through an unlimited number of jobs. What does this mean? The nature of man to us contains many lives, each of them incessantly either rising or decaying. We die many natural deaths before we die. No stability is possible except through perpetual change. Man is not, he flows. His nature, as the slogan has it, is dynamic, not static. Take the sabbatical year of a professor. It is something that would have sounded ridiculous in 1700 that any man in a profession should take a year off for pilgrimage to the Holy Grail. A man was a doctor for fifty or sixty years. Today life is recognized as moving by phases, as being like the week, a rhythmical unit of tension and détente. It cannot be stored up and stored away like property in a virgin forest the grant of which may be treated ~~as as good~~ in 1937 as in 1637 by the law. Nature is passing rapidly from aggregate status into ~~another~~ one. And this is by no means incidental. To be a transient being is the fundamental nature of man.

Of course, this is a very inadequate sketch of our new concept of nature. It omits the great idea of functioning. In 1750, each particle in the universe seemed to be, to stay, to remain just the same. Today, we look at the individual as a functioning part of one great interplay of forces. Even in Hanover, we are not what we thought we were yesterday. We incessantly are made over by our environment, incessantly besieged or impressed or pushed into the background or the foreground

of the scene simply because our own functions, by this meaning, depend on other people's functioning that might be quite unexpected. Our nature is pressed in so narrow a space and time, as compared to 1750, that our functioning is no longer of our own making. For example the eventual end of the Christian missions in Africa reacts sharply on the church situation in a New England village, because it throws this church into local finiteness; it actually kills its spirit.

Now we get our rights and obligations by the law with regard to our functioning in society. As long as we thought of each function in terms of unimperiled permanence, we were granting gladly permanent rights. In a nature that is a correlative system of myriads of interferences, nobody can claim that his functioning will be required eternally in the same way. Hence his rights and duties are no longer defined in terms of property rights. The change might be illustrated by the language of two members of the Supreme Court in the Morehead Case. Mr. Butler spoke of the contractual and civil relationships of women: here we have the property and liberty of contract idea. Chief Justice Hughes replied by speaking of the distinctive nature and function of women to preserve the strength and vigor of the race. (1936,629)

"Nature" and "function" are indeed the two great terms that our modern concept of the universe reconciles. Our functioning creates or changes our nature. This is true in the physical and in the social universe, for there is but one world. The bodily processes and the social processes are no longer different, because the physical body, too, is recognized as a system of energies in process. It is a planetary system rotating at top speed. Even the cells of our skeletons are in as vivid a motion as

a presidential convention, swinging, dancing, dying and rising by the millions in every moment.

The Nature of man, then is looked at, first as a rhythmical process of quanta of energies, now spouting, now lying low, and secondly, since the rhythmical process needs an axis around which to turn, the difference between the physical and social processes of human bodies is in the fact that with his physical processes we look for the axis inside the individual, the social process has the axis outside the individual. The physical world means, we fall dead to the ground when we lean too far out of the window. We must keep our center of gravity. As in any system of moving bodies, the center of gravity is outside each simple body. We, in our one-sided idea of nature as a collection of things have modelled our institutions often to this one sided idea. The easy chairs in an Anglo-Saxon Club are the perfect expression of a collection of bodies every one of which preserves its own center of gravity. However this is not the real world. In any important social process, a man can do no team work when an outside axis is denied him. Being a dancer in a Scottish Sword Dance--and people imitate real life by dancing--a worker off the assembly belt, or a salesman touring New Hampshire, means being caught in the rhythm of a system. It is the nature of co-operation that cries out for the recognition of a group that has a center of gravity inside itself but outside any one member.

Now let me approach the special question of labor on the basis of our present day concept of nature. Let us apply this concept of nature to the worker. Let us do it quite unsentimentally. Natural Law is not soft to the touch: it is getting at justice.

We may approach his natural rights in two ways. First, we may start with his property. Second, we may deal with his life. Both ways will contribute something to the understanding of the claims of labor in the here light of nature.

A man sells, according to the natural law formula, his labor across the counter--fifty cents an hour. If this is true, a man sells his time. And it is true, my time is my greatest property. Man's unmistakable field and realestate is his time. Some great poems were written about this fact and as all great poetry, they are telling the truth. A man's time is his property. And though it may be borrowed and lived by others, it cannot be confiscated without compensation. As long as we hired hands, we were asked by the common law lawyer to treat the hand as a commodity like salt or sugar. But now we have changed eyes; we know that we are living energy like electricity. We are not able to buy a commodity, labor we are tapping a current of energy for a certain time. This current is spouting in rhythmical intervals. A child, a boy, a man, a woman, an old man, all underly rhythmical curves in the regulation of their energy.

Tapping energy for a time is not permissible when it destroys the energy, when it misuses or soils the source. During work, then, hygiene is required. It is confiscation without compensation when I hire a man's stream of energy and misuse his health during that time. The rhythmical reproduction of energy being all-important, and man's whole property being nothing but a process in time, a gold-mine of time, the employer may not dismantle the gadget by which the current is turned on again and again. This is done when an employer is allowed to dismiss a man after thirty years of work on short notice. In telling a man,

after thirty, years, on a Saturday that he need not come back on Monday, he confiscates his property without compensation. For he breaks the man's courage. He takes advantage of a surprise moment. After thirty years, a man is lulled into feeling safe. No statute law, no law of contract that declares the right of an employer to dismiss a wage-earner by the hour, may alter the nature of things, and the natural law is that a man by renting his labors for thirty years, entrusts his courage for re-beginning to his employer. When I am working one week only, I shall have the stamina of looking out for a new job over the weekend. When working for 29 weeks, I may still remain on the alert watching for something to happen. But when a man hired my work for thirty years, he hired more than my working time, he also hired my "being on the alert", my contrivance for turning on my faucet of energy also. And since my time-property consists of these two things, energy itself and its rhythmical reproduction, the employer buys something for nothing. Instead of buying energy only, he also has occupied the faucet for turning on the energy. It is a demand of natural law that a man may not be dismissed after thirty years on two days notice. Time is a part of nature. Time-spans of different lengths create different rights and obligations. Take a CCC, unemployed: his property must be left fit. Any rasberry farmer is protected against germs, and the unemployed should not be protected against the germs ruining his best property? Perhaps these only casual remarks may suffice to explain the trend in modern legislation.

This is all said by classifying labor as property, as the property of man because it is a portion of his life time, a part of his stream of energy, and a man's time is his most valuable property. Now let us look at labor from the viewpoint of life. Life, we said,

has become many lives, lived in different environments, dances in the Months of society each time around an axis outside himself. A modern worker is definitely asked to live in short periods. Nowhere is he asked to work a life-time as professor are. The sequence of lives, of life-situations, of temporal jobs, is the very nature of his life. Industrial society is based on this adaptability. It exploits this side of human nature, that it is eminently capable of passing through many stages, Industry is unworkable except for this raw material of labor. And this makes a worker into an atom of labor. The very term labor is of recent origin. It is a new concept of man. It does not exist as a keyword in the decisions of the courts. Workers there were at all times. Labor comes in with the industrial revolution. A worker, a day-laborer, a hired hand--these are all industrial concepts which describe a man's temporary situation. With labor, a new phase is reached, because now the industrial society is based on temporary work by establishment. The worker, the hired hand, the day-laborer, were exceptions, frequent exceptions, yet exceptions in the order of things for which our laws were framed. With labor it is different. It is the difference between a river or a brook on one side, and the Tennessee Valley Project on the other. The brook certainly gave water power to the miller, but it was a brook with trout in it, with many other sides to it that made it important. In a power plant, the power resulting from water dammed and piled up is isolated. The brooks and the rivers feeding the reservoir, are merely water now. As labor, a man is considered a unit in a general reservoir of energy. He is unemployed not because he is lazy or a bad worker, but because the reservoir of labor is kept closed. He is employed because the faucet for the generalization that is called 'labor' is turned on.

The risk of being unemployed, then, is not a personal risk any longer. By establishment, Society puts people to work and puts them off again. Industry would be unable to function without a reservoir of unemployed on which to draw.

Where have we heard this before: They also serve that only stand and wait? This line, indeed, can help us on. The unemployed are turned into a reservoir of power. The potentiality of being unemployed and the actuality of being employed are two situations of the same incessant stream of human energy, called labor. The question of employment and unemployment is one. There is much talk today, in international relations about the undivided peace. Labor requires an undivided peace, too.

I am dropping here the particular issue of unemployment and shall turn to collective bargaining. In our present day natural law, an employers union and an employees union are the same legal thing--an association of free citizens for a common purpose that exists beside their particular interests. Everybody feels that a union is dealing with the central particular interest of a worker. The union is not an association of his making. It is a means of reaching a worker in a danger-spot and in times of unrest. A union is not labor's mouthpiece only, it is much more its eyes and its ears and its power of reasoning. It completes labor's consciousness. Jean Jaurés has called the union the worker's mother.

Now this sounds all like mere poetical metaphor and how shall law be built on metaphor? We cannot. But a distinct natural process is behind them. Well may I quote Dr. Little. ~~In~~ His exclamation induced, from wartime experiences, the ideal of an

army. "The war developed among us a new Bushido, another Samarai class pledged to service. Its membership included those who toiled for the common good in a supreme emergency: devoted women, our youth who on land and sea and in the air dared the impossible and achieved it. Shall we permit this unity of purpose, this capacity for cooperative effort to become dissipated? (Arthur D. Little, Handwriting on the Wall: a Chemist's Interpretation. Boston, 1928. p. 251) Let us analyze the rules for a soldier in an army. He is concluding an individual contract when he joins the army. Yes, but for what does he contract? He is not fixing an individual contract, with individual rules set up between employer and employee as the fiction is between parties to a labor contract. In the army, everybody thinks that the individual will stops at his volunteering to join the army under certain general conditions. Volunteering and contracting is not the same action of our will. When I volunteer to do this or that, the scheme is set. My will accepts a standardized frame. A soldier is not a contracting individual, he is a joining volunteer. The conditions are framed by martial law. Modern business is in conquest of markets, it is campaigning with unforeseen success, it is taking risks, and it uses necessarily soldiers in its battle of prosperity and depression. It asks for volunteers. Labor, the stored-up energy or a nation, may choose the batallion in which it serves, Chevrolet or Ford, Western of General Electric. However it must rent itself. A worker is not in a position not to work. Out society is based on the assumption that three quarters of the people must volunteer for the conquest of markets and in the army of labor. It allows us to volunteer as to the particular contingent which we think best to join, but serve we must. In 9,999 cases of 10,000 the matter rests here: that a man must volunteer, his energy must flow. He cannot wait.

And since his choice is not; Shall I work or farm, ? but, Shall I rent myself to X or to Y? he is not a party to a contract between two, but a volunteer to conditions valid for an army or a regiment. A hundred years ago, flogging was a part of the situation before the mast. When a Harvard man discovered this condition, flogging was thrown out from the labor conditions on a ship. Do you think that the individual seaman could have traded about flogging? The nature of a ship is just that man embarks without a personal will, he joins an organism that is like a monstrous machinery of energy. All labor conditions are like (this: "before the mast" flogging). In swapping horses or trading in an old Model-T, both parties are in a position to cheat. A volunteer of labor who joins a factory plant does not mold the conditions of his contract. by meeting the will of his employer in a real match. The check on the employer cannot come from the millions of individuals who are compelled to say "yes", who flow, run, seek, roam, migrate, join and leave industry. It must come from the part of labor that is able to wait, to sit down, to dwell, to argue and to say "no". Paying their men by the hour, industry itself erected a symbol to remind the workers how short of breath they were. The symbol (of the hourly wage means just this: you cannot wait. If this is so, the man cannot say "yes" or "no". He accepts the job with the mental reservation that he as a joiner is not responsible for the conditions. He never accepted them when he entered the place. He accepted the place because there was work, not because he approved of the conditions. And he accepted work because his energy is wasted when it does not function. Where my whole capital is my life-time, I waste not only that part of my capital during which I don't work. By not working, I may mortgage my whole real state of future working time by becoming unfit, by losing ability. The union is not an association like a chamber

of commerce. The union completes labor so that it can say "no" to certain conditions since a man who must sell his time cannot say "no" on his own behalf. And a man who must say "yes" is not free. As Justice Stone says, "There is grim irony in speaking of the freedom of contract of those who because of their economic necessity give their service for less than is needful to keep body and soul together."

Of course there is as in the case of flogging the same objection to collective bargaining that it only deals with minimum problems. Its "no" is always aiming at erasing conditions that are unreasonable. This may not be very much. But someone must deal with the unreasonable since we know already that the individual is unable to do it. It will be easier to understand labor's claims when we understand that a union is as much a restriction on the reasoning worker as it is his help. We reach the reason of a worker through the union. In the union question, then, there is much more involved than to get at an overeaching employer. Government has to reach the masses. A union is a godsend for any government in trouble, to impose on the reason of labor. One mostly considers the affair as a one-sided one. But 10,000 men on strike are an ocean. When on strike, you can't argue with them at all when there is not built up before in tenacious battle a confidence, a [illegible] a moral telephone line to the ear of each striker. Because the union works as a receiver in cases where it is important to dispense the well and deeply grounded suspicions of the masses, she must have an opportunity to practice in the other direction as a mouthpiece.

The function of a union, then, not its rights, must be considered. Rights and obligations are reflections on nature and functions, as Chief Justice Hughes puts it. The worker is as much a

citizen, a free man, a reasonable being as we are, as a soldier or a sailor. But flogging he cannot abolish. He is impotent in argument in factory, army, on ship~~board~~ (on board) as an individual. The men, therefore, were made normal by unions. Women are different. It is practically impossible to organize women in unions. Since a reasoning organ for them must be found, the legislatures of the states stepped in and did for the women what the unions do for men. When these laws were passed, the courts denied both ~~and~~ the complet-ing function of unions and the right of the states to pass on minimum wages. They put reason and freeom of will where it does not exist in labor problems--on the individual woman worker. What did they do? Chief Justice Hughes, with an audacity that I would not have, declared that they destroyed the very freedom of opportunity which the liberty of contract is designed to safeguard. (1935, 627)

I could go on and show the implications of the group in industry. But I may point there to the new books of A. North Whitehead. He describes the leaning toward a common axis outside the individual in all the processes of work. In any working group the axis is inside the group but outside any one individual. And this leaning, a part of man's physical nature, is trampled down or destroyed in many cases by modern management.

Let me end here this ~~lecture~~ paper and only add these few words. Nature is a better teacher and master than dreams of labor or visions of capitalists. Justice is not to be derived from the desires of the masses or the interests of corporations but from the concrete functions which we fulfill. The rightening of our laws is dependant on our change of convictions about natural processes. My abhorrence of wishful thinking in the far too serious affairs of mankind has turned my eyes to the new nature built

around us by science and the new eyes given us by science. I may be wrong in ~~every~~ any particular explanation of the phenomenon. What I invoke is the method which ascertains continuity and which would restore the honor of the bar at a moment when the country feels that lawyers have nothing to offfer and are given to the famous innocent fictions which are not in the category of a "regular terrible story".

No lawyer can have a poorer understanding of chemistry, physics or machines than I do. I am a test case of a man who is void of any technical skill. If even I am living in a changed nature, if I am compelled to feel a part of a living universe, then it is obvious that most lawyers in all their other ways of life have adopted this faith for good. We cannot live either in watertight compartments or in watertight departments. The same nature that is worshipped by the judge when he steps into his car must be respected when he sits in his courtroom.

Natural Law empowers the organs of the law with the great power that carries authority: inner unity. Division is the weakness of man. The interest groups in society--employers, employees, farmers,--have this advantage before the judges that as parties they are allowed to be partial. They come into court pleading their rights, their desires, their interests. Plaintiff or defendant in a case they may be, or petitioners to the legislature. At all events, they don't wish to be objective. They sing their own praises, and the other fellow is from their point of view no part of their own concern. Stupid as their partisan interest may look, it has the great merit of being

whole-hearted. Our modern sociologists and psychologists are making it their trade to study the astounding mechanisms which parties and interests are inventing to justify their claims. All our modern debunkers are so many experts in party representation of cases. Between these battlefronts the law is in a precarious position. How can the judge decide when a Homeric concert of shouting battlecries is filling the air? How can the parties feel that he did his twofold duty of hearing the one side and the other side and still himself remained undivided, whole-hearted, neutral, superior to passion? The reinforcement of our party struggles by sociologists and psychologists on the party's side asks for a reinforcement of the moral and intellectual energies that enable the judiciary to function. Sociologists and psychologists confuse power and justice precisely as the ancient sophists. The New Sophists cry: The party in power makes the law: justice is an empty word to them. They don't see the simple two facts that show the existence of justice even in parties. First of all, that a man may commit a crime and denounce himself voluntarily to the authorities of the law. This is not rare, though it is rarely understood. If it were only one in a thousand--as it is one in ten--it would prove that the guilty one is not convicted of his guilt by the attorney general but is convinced of his own unrighteousness by his own conscience. Secondly, that the victor in a social struggle is never satisfied with his victory if it is not based on justice. Any unfair victory is either followed up by follies of revenge or by attempts to make up for the victor's injustice by certain amnesties, mitigations, etc. The justice of a case that is victorious is proved by leaving no scar that asks for permanent reactions from within the victor's own conscience. Our modern debunkers

who assure us that they know all the secrets of psychoanalytic scars suddenly forget their own knowledge when it comes to social justice. Justice is precisely that compromise between parties that eradicates the real violation, the deepest scar, and therefore ends a certain struggle definitely so that the passions that were kindled again and again may be allowed to quiet down.

Once more, then, let us ask for the moral reinforcement of that level in society that is entrusted to the judges. Being obliged to listen to both side, a judge is apt to be less undivided within himself than the passionate and naive parties before him. In fact, the judge's real contribution to society is his willingness to undergo the pressure of two parties. Whereas the maladjusted groups or classes in society remain undivided in their self-consciousness, the judge is appointed for that one purpose--due process of law. And process and procedure literally means exposing the judge to dividing points of view. The judge undergoes the procedure. He is divided and pulls himself together after the division was made by the two briefs read to him by the counsels for plaintiff and defendant. Due process of law is a process taking place in a judge or a court from stormy argument to peaceful judgment, from division of opinion to re-union of opinion.

The deeper the division, the greater the task to produce re-unification or compromise which does not evade the issue , and reaches down to the breeding-place of the passions displayed in the struggle before the court of the legislature. When King Solomon heard the two women talk about the child they both claimed for themselves, what did he do? He inserted

a short phase of life, he turned a phase in the legal process into an act of unconscious natural reaction on the groups of society which shall have and keep opposite interests, opposite horizons, opposite tendencies.

Modern socialists, sociologists, utopians are like scientists who would settle down in the midst of a human body with one purpose--to watch the digestive processes going on between stomach, liver, kidneys, and bowels. He, to be sure, can discover nothing but warfare of everybody against everybody inside his cave. The organs are meaning battle, the cells are moving ferociously. The voracity of every party to struggle knows no bounds. This man, after a time, will see nothing but destruction and dissolution, and lose all faith in beauty, peace or order. It is only when he leaves the cave, lays down the microscope and realizes that a man stands before him, with a skin comprehending all these atrocities of warfare, that he sees these inner passions of all his organs as vital to the process of organized life. And once he observes the unity of the human body, he has little difficulty judging normalcy and health and disease or illness. Whenever the relative passions still allow the unity of purpose, health is possible. Where unity of purpose is definitely destroyed or obstructed, a disease is getting hold of the system.

Judges are the organs of society to obtain unity of purpose between antagonistic interests. The stupid social philosopher sees a social danger in any differentiation of interest. He prophecies the end of the world because here are conflicts. The judge takes the opposite point of view.

He knows that neither party is completely conscious. As a party it is their business to function, not to know. As long as the functioning organs take orders from the judiciary and the legislature, they are allowed to remain partly ignorant of the whole.

When, as today, sophistic propaganda and the tribe of debunkers whispers into their ears, "The judges are parties also; they are equally blind, equally ignorant", something has to be done to put the bar on a candlestick again. Yes, we shall say, the judge is passionate. His passion is for process. He will move heaven and earth to get you for a look out of your ~~window~~ pettisau. He will dig up all that is common to you and him, so that he might convince you that he hears and understands your plea perfectly, and in order to do so, in order to re-establish your confidence, he appeals to the world outside society and to the common faith that you have in nature. Fortunately, here are things outside our own makine. Society and laws are man-made. My own decision which I am going to make in half an hour will be man-made. But by these thirty minutes we are in a realm of a particular quality. This realm is a phase of suspension of judgment, of detachment from society, of locking out of the window. These thirty minutes occur again and again during any due process of law. They are the respite from social conventions granted to all those involved in the process of the law. It is on this respite that we shall concentrate our efforts. For this is the time ~~that tries~~ Hightjesmen's souls. In these thirty minutes we either regain unity of purpose or we succumb to the passions of parties. These thirty minutes must clean

our lungs of the carbon acid left by your violent speeches. We must take in a breath of fresh moral air. We must get a fresh inspiration that overcomes your poison-gas. And the judge, turning to the plaintiff and defendant, solemmly says: "Turn about where you can't see each other, where you don't stare at each other, where both you eyes look into the same direction. I shall join you and by looking all three into one new direction outside this courtroom for a moment, you will give me strength for my decision, my restoration of peace. You will support my conviction that unity of purpose is by no means impossible because interests are irreconcilable. This is the character of interests. The case does not rest with interests. It rests with right and wrong. Interests and power, and complaints and desires are the helpless fragments which never harmonize. Right and Wrong, on the other hand, are the scissors that adjust these fragmentary elements of social life into a relatively natural unit."

The strengthening of the judge for regaining his own undivided unity is the purpose of Natural Law. Being exposed to the hearing of both sides, the judge is tempted to say to one party:"You are right," to the other party:"You are right," and to the first party that will exclaim: "But, Judge, we cannot both be right!", the poor wretch will smilingly say: "In that you are right, too." This farce of the judge seems the fate of the bar today ~~being~~ under the fire of the sophists of all colors. It is against the division within the bar's own thinking that the remedy of a natural philosophy was discovered. Nature restores to her children a common ground when ever society destroys it too completely. Any man divided within himself is doomed. The united soul is always victor over the schizophrenic weakness. A bar which is

in earnest with all the facts of their creed and which integrates their natural and their social beliefs honestly, is invincible. But quoting two gods of nature--one of dynamic nature for one's automobile, and one of static nature for one's legal decision--is immoral and will lead to complete moral breakdown.

The crisis of the merely positive law is universal. But now, we have gained the understanding why positivism , for the tragic interval between 1865 and 1933, could reject its referee, Natural Law.

The new scientific concepts during that period, overthrew the old imagery and terminology of nature. Eigteenth century nature was so unlike modern physics that the appeal to the obsolete nature became obsolete, too.

As soon , however, as the modern layman is instilled with the new concepts of natural science, this hiatus is over. Nowadays, the positivists of the law are faced with an insight into nature compared to which their own positive laws look unduly archaic and isolated. Positivism is justice out of context. Natural law is justice within a context which is much larger than human society, which is universal.

If and in as far as the ancients sometimes did contrast physis and nomos, nature and law, they never forgot that physis embraced and comprehended and contained within itself the laws of the cities. Hence it would be a total misunderstanding to say that law and nature, in Greece, ever were mutually exclusive . Yet, this nonsense, has been derived from the ancients in the logic of legal positivism for the last decades. No wonder that laws now are written, which have no relation to justice but scorn justice in the mere external form of legality. This tyranny of the legality of the secretaries, the mittlere Beamten, is the horror of the Hitler Regime. It is the end of justice. Nature comprehends the positive laws of society. What we know or believe of nature determines our laws. And it looks as if nature and society may come to terms about the living , fluid, passing character of man's labor in society , and thereby rescue man's lasting qualities from destruction.

31. 3.1955.

Lieber Herr Thieme, Diesen Vortrag von 1938 schicke ich Ihnen als depositum fidei. Ich habe erst jetzt die Anzeige von dem Verleumder Schönfeld gelesen, und wundere mich doch, dass eine anstaendige Zts , solche Lügen zulässt. Sie konnten doch von ihm den Nachweis verlangen, dass ich so unmögliches behaupte, wie dass Hegel unrecht habe, ich aber Hegelianer sei! Schon das Motto meines Buches widerlegt ihn doch. Nirgends steht ein Wort, dass ich meine Methode in Büchern längst dargelegt, dass ich 1938 siebenhundert Seiten zum Thema auf Englisch gefruckt, dass ich 1931 dies Buch zuerst veröffentlicht. Nennen Sie also das eine dem Niveau Ihrer Zätschrift genüge tuende Anzeige,? Stutz hat nie gezögert, seinen Rezensenten die höchsten Massstaebe aufzuzwingen, wenn - - er wollte. Weshalb wollten Sie Nicht ??? Ihr

Eugen Rosenstock Huessy.

Freiburg, 2. Mai 1955.

Lieber Herr Rosenstock!

Nehmen Sie Dank für Ihren schönen Naturrechts-Vortrag, der mir Ihren Standpunkt um vieles klarer macht. Er erreicht mich in einem Augenblick, wo ich ganz stark mit anderer Arbeit beschäftigt bin, sodaß ich ihn erst einmal auf die Seite legen muß. Aber ich wollte Ihnen doch gleich sagen, daß mich Ihre Vorwürfe wegen der Schönfeld'schen Rezension sehr betrübt haben. Zwar bin ich dafür garnicht zuständig - wie auf der Rückseite des Titelblatts zu lesen, fallen die Besprechungen in das Ressort von Herrn Bader, und ich habe diese wie alle anderen erst zu Gesicht bekommen, als sie längst gesetzt war. Aber ich möchte mich doch für die Zeitschrift wehren, zumal Sie mir ausgerechnet Ulrich Stutz als Muster vorhalten, über den Sie mich so oft beklagt haben. War er nicht für die Platzhoffsche Rezension verantwortlich? Man kann gewiß gegen diejenige von Schönfeld vielerlei einwenden, schwerlich aber, daß sie dem Niveau unserer Zeitschrift nicht Genüge tue. Ist ein Motto beweiskräftig für den Inhalt eines Buchs? Und ist es Pflicht des Rezensenten, dessen Vorgeschichte darzulegen? Über dieses alles kann man wohl verschiedener Auffassung sein, und auch darüber, wie Hegel zu verstehen, und wer ein „Hegelianer" ist. Deshalb von „Verleumdung" zu sprechen, ist doch wohl nicht angängig. Ich begreife, daß die Rezension nach dem vorangegangenen Briefwechsel eine Enttäuschung war; man konnte sie darnach wirklich nicht erwarten; es wäre nach den tieferen Gründen zu fragen für diese Folge der Ereignisse. Andererseits ist mit der Kritik aber auch wieder so viel Anerkennung verbunden - sie ist ein Gespräch zwischen zweien Autoren von hohem Rang und wäre anders garnicht möglich gewesen - daß sie auf den Unbeteiligten ganz anders gewirkt hat, als auf den Betroffenen. Und endlich: ihr Urheber ist ein schwer kranker Emeritus. Lassen wir ihn in Frieden! Ihr

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