Volume 12 | Issue 2 Article 2

1967

# Edmond Cahn and the Search for Empirical Justice

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# EDMOND CAHN AND THE SEARCH FOR EMPIRICAL JUSTICE

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## I. THE LEGAL PHILOSOPHY OF EDMOND CAHN

THE LEGAL PHILOSOPHY of Edmond Cahn represents one of the most original approaches to the problems of jurisprudence to be found among American writers. Departing from the dominant tradition of sociological jurisprudence, Cahn sought to supply moral guidelines to the law, to redefine the concept of justice, and to avoid the relativistic shortcomings of most American jurisprudence. In so doing, Cahn wished to avoid a return to natural law. His search for an alternative to natural law is instructive but, ultimately, unsatisfactory.

Various writers have sought to classify Cahn, but few agree on the proper category. Professor Cowan considers him a legal idealist,[1] while Professor Bodenheimer claims that Cahn "is in many important aspects of his thought connected with the realist movement in American jurisprudence" because of the emphasis placed by Cahn on the intuitive responses of judges to concrete fact situations.[2] Professor Davitt considers Cahn unrealistic,[3] while others hold that Cahn is worthy of only minor footnote treatment. Cahn defies easy classification because, as an experienced scholar of jurisprudence, he has attempted to avoid many prior errors of overstatement.

That Cahn presents some alternatives to the insights of sociological jurisprudence is unquestionable. He perceives that the standards of that school are quite vague and rather disquieting. All jurists are familiar with the "balancing-of-equities" approach; Cahn says that it is only a slight advance on reactionary natural law nomenclature because "the truth of the matter is that even if two conflicting or competing interests could somehow be weighed against each other, a judge might 'fix' his own scale in half a dozen different ways before the alleged 'weighing' began."[4]

Professor Cahn attempts in his writing to create a new attitude in jurisprudence which would make it less disdainful of the mass of the

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1. THE AMERICAN JURISPRUDENCE READER 26 (Cowan ed. 1956).
2. BODENHEIMER, JURISPRUDENCE 143 (1962).
3. DAVITT, THE ELEMENTS OF LAW 148 (1959).
4. Cahn, *Firstness of the First Amendment*, 65 YALE L.J. 464, 479 (1956).

population. Legal philosophies had been, in his view, traditionally contemptuous of popular judgment and indifferent to the aspirations of ordinary citizens. Cahn believes that democratic law is a definite area of jurisprudence.[5] In democratic law the distinguishing characteristic is its autonomy. Democratic man legislates for himself both by choosing representatives and "by intuiting the intentional value of jural situations as his private sense of injustice becomes progressively immanent in the public conscience."[6] The creation of a democratic jurisprudence is Cahn's self-assigned task.

Democratic jurisprudence requires a new perspective on law, a "consumer perspective," by examining a legal predicament from the standpoint of the individual affected by the outcome.[7] The traditional, classical theorists of law failed to face the legal responsibilities created by the adoption of political democracy. Those who "fear to turn the juristic world upside down and adopt the new democratic perspective" are confused.[8] A new factor in the nature of injustice has arisen since 1781, and it is that all democratic citizens are involved in criminal law because we are all identified with the district attorney. In a larger sense, representative government implicates us all so that "we are participants — accomplices, if you will — in the deeds that are done in our name and by our authority."[9] Without explicitly stating his premise, Cahn has made all democratic citizens morally accountable as principals for the acts of their legal agents, the officials of government. Democratic jurisprudence, then, creates new responsibilities not heretofore recognized in legal writing. Cahn is not merely saying that "all men are brothers" but rather that all democratic men are actively responsible for the condition of democratic law.

Cahn believed that law writers adhere too closely to written texts, whether they be statutes or cases. Cases themselves may turn on inarticulate policies, base prejudices, or noble flashes of insight.[10] These factors tend to be overlooked by scholars.

Cahn's attempt to create a democratic jurisprudence is buttressed by his reliance on fact-skepticism, especially as found in the writings

5. Cahn, *Goethe's View of Law,* 49 COLUM. L. REV. 904, 915, 920 (1949).

6. Cahn, *Freedom, Order and Law,* 23 N.Y.U.L. REV. 20, 70 (1948).

7. Cahn, *The Consumers of Injustice,* 34 N.Y.U.L. REV. 1166 (1959). See also, CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 31 (1961), where, speaking of Bartkus v. Illinois, 357 U.S. 121 (1959), Cahn praises Justice Black's dissent because of its employment of the consumer perspective.

8. Cahn, *The Consumers of Injustice,* 34 N.Y.U.L. REV. 1166, 1173 (1959).

9. *Id.* at 1171.

10. Cahn, *Some Reflections on Aims of Legal Education,* 11 J. LEGAL ED. 1 (1958).

of Jerome Frank. As Cahn says, the fact skeptic relishes the present with a special confidence.

> His very questionings and doubtings have earned him the right to declare that men possess an enormously wider and more diverse register of individual and social choices than they have ever exercised.[11]

Thus, fact-skepticism leads to a respect for the unique individual and the unique situation, as well as opening great ranges of individual choice. Cahn also calls on the fact-skeptics to reexamine familiar assumptions in law, such as those surrounding legislative review.[12] Fact-skepticism leads to the conclusion that capital punishment should be abolished in American law.[13] On the other hand, fact-skepticism should create a suspicion of evidence given by social psychologists and others whose facts are not subject to verification or examination.[14]

Edmond Cahn is most famous for his concept of "the sense of injustice." This important notion, which is an expansion of an observation to be found in Aristotle's *Politics,*[15] is another aspect of Cahn's democratic jurisprudence. From it "the democratic citizen and the democratic state find their best, eventual hope of cohesion and survival."[16] The sense of injustice is felt, typically, when officials violate common expectations of democratic society such as demands for equality, for human dignity, for conscientious adjudication, "for the confinement of government to its proper functions."[17]

It might appear that Cahn's sense of injustice is limited to the particular political and social values of a few nations. Yet he insists that the feeling is universal in character. Law in pre-democratic states may not be responsive to the sense of injustice, but as the state evolves from brutality to consent and eliminates primitive features it will accord more closely to the sense of injustice. The sense of injustice serves as a "prime evolutionary impetus" both in the development of law and of the democratic state itself.[18] It must be assumed, then, that the sense of injustice is in operation in all societies although its impact is most felt in the law of democratic states.

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11. Cahn, *Jerome Frank's Fact-Skepticism and Our Future,* 66 YALE L.J. 824, 831 (1957).
12. Cahn, *Fact-Skepticism and Fundamental Law,* 33 N.Y.U.L. REV. 1, 13 (1958).
13. CAHN, THE MORAL DECISION 264 (1956).
14. Cahn, *Jurisprudence,* in 1955 ANNUAL SURVEY OF AMERICAN LAW 655. See also, Cahn, *The Consumers of Injustice,* 34 N.Y.U.L. REV. 1166, 1175 (1959).
15. Cahn's legal philosophy is generally modelled after Aristotle, especially in the ETHICS, Book V. Cahn's conception of justice as being broader than law is definitely Aristotelian.
16. Cahn, *The Consumers of Injustice,* 34 N.Y.U.L. REV. 1166, 1181 (1959).
17. *Id.* at 1179.
18. CAHN, THE SENSE OF INJUSTICE 49 (1949).

Because of the inbuilt sense of injustice it is possible to identify the nature of justice in an empirical fashion. Previously, the notion of "justice" has become shrouded in metaphysical mists and confusions. It may be impossible to perceive justice, but it is demonstrably possible to perceive injustice.[19] That is the function of the sense of injustice — to render empirical guidance to those who seek to do justice.

Cahn insists that the sense of injustice is not merely a glandular intuitive reaction. It is both rational and irrational, using "empathy, projection and emotion, [and] simultaneously summons perception, reasoning, intelligence, and judgment. . . ."[20] Each democratic citizen exercises this sense whenever, in an existential fashion, he personally or vicariously experiences the impact of an act of injustice.[21] Justice is to be obtained as a result of an experiential reference to the immediate feelings common to all men. Accordingly, Cahn's major book, *The Sense of Injustice,* is devoted largely to cases which test the sensibilities of its readers. Not all the cases are resolved, but even a suspension of final judgment reveals the uncertain quality of justice in some fact situations.

In many ways Cahn's point of view is similar to that expressed in the French existential writer Albert Camus' novel, *The Fall,* in which the protagonist is forced to judge guilt in highly ambiguous situations.[22] Finding the task difficult to complete on a purely positive law basis, Camus' lawyer-hero searches into his conscience and is himself forced to recreate criminal acts.

The dilemma of Camus' lawyer, who is forced to become a criminal, indicates one of the possible deficiencies of the sense of injustice — that it is not always easy to respond directly to an injustice. One's feelings may be mixed, impure, ambiguous. In addition, how can one be certain that everyone's sense of injustice is identical? Are some more sensitive and accurate than others? However, in defense of Cahn, who does not confront these problems, it may be suggested that the moral corrective of the sense of injustice is still better than no corrective at all. It is better to attempt to do justice than to claim that justice is purely a philosophical fiction. Perhaps scientific study of sample reactions to legal situations will permit verification of the sense of injustice in operation, although Cahn would not approve.[23]

19. Cahn, *Justice, Power and Law,* 55 YALE L.J. 336, 341 (1945).
20. Cahn, *The Consumers of Injustice,* 34 N.Y.U.L. REV. 1166, 1180 (1959).
21. *Id.* at 1176–77.
22. CAMUS, THE FALL (1956).
23. Cahn seemed doubtful about statistical studies which "can test our assumptions, but only the ones that least need testing; and the values that really mark the problem as a moral one are somehow lost when we take the case out of a germ-laden world into an antiseptic and sterile clinic." CAHN, THE MORAL DECISION 256–57 (1956).

Cahn does not state that justice is the sole or primary ingredient of positive law. "There are," he says, "great realms of justice outside of positive law, [while] there are wide areas of positive law where justice is of weak or indifferent influence."[24] This declaration may seem rather startling since most jurists would like to believe the law to be intrinsically just. But it must be remembered that courts, juries, and other institutions, cannot have assigned to them the moral duties which belong to each democratic individual.[25] The sense of injustice is present in legislation, joining "the expectation of regularity to a co-equal expectation of progression."[26] It is present in such concepts as "due process of law."[27] But there are many interests other than justice which go to make law. Economic needs, professional demands for symmetry, and other social factors may play as great a role in establishing legal rules. Cahn does not even say that law will, except as a matter of democratic faith, move further in the direction of justice.[28] Indeed, certain species of injustice, such as racial discrimination or sexual assaults may be "inherently beyond the reach of reparation."[29] Justice is only one element in any legal equation, even to the extent to which it may be revealed by our sense of injustice. There will be times when law must bypass justice, but law should never ignore justice. What then is the use of the sense of injustice? Cahn believed that it supplied a dramatic emphasis to the law:[30]

> [T]he good may be modified when it makes its appearance as the good-in-law. . . .

| *Where the notion of good seems excessively:* | *The Good-in-law can supply:* | *But in law there is risk of:* |
|---|---|---|
| Abstract | Projection by virtue of drama | Contest of wits between trial lawyers |
| Vague | Precision | Absorption with technicalities |
| Neutral or Irresolute | Intervention and Decisiveness | Meddlesomeness, Attribution of Artificial Guilts |
| Utopian | Responsibility | Philistinism |

24. CAHN, THE SENSE OF INJUSTICE 28 (1949).
25. Cahn says "we cannot assign our moral duty to an institution. . . ." in speaking of social welfare legislation. CAHN, THE MORAL DECISION 197 (1956).
26. Cahn, *Justice, Power and Law,* 55 YALE L.J. 336, 357 (1945).
27. CAHN, THE MORAL DECISION 259–60 (1956).
28. CAHN, THE SENSE OF INJUSTICE 32 (1949).
29. CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 50 (1961).
30. CAHN, THE MORAL DECISION 56–57 (1956).

The sense of injustice is, then, one of the many useful tools for the fabrication of law. The sense of injustice should be studied "not as a product or effect, but as an operative cause in the law."[31]

Some judges have been especially sensitive to the community sense of injustice. Cahn singles out Justice Hugo Black for having an unsurpassed sense of injustice.[32] The Supreme Court has, year by year, brought "more intelligent analysis to the moral aspects of legal problems."[33] On the other hand, Judge Learned Hand is criticized for "subordinating his own moral principles to those of the marketplace," thus distorting "the function of the court as pedagogue and moral mentor in a democratic society."[34] In making this criticism Cahn indicates a serious inconsistency in his view of the sense of injustice; for if the sense of injustice is universal, it must be found in the marketplace, and if a judge must impose his moral views, then the sense of injustice is much less universal.

What are the merits of Cahn's theory of the "sense of injustice"? If one accepts the possibility of identifying injustice, then Cahn has removed the critical deficiency of contemporary sociological jurisprudence — its absence of consistent moral norms, its value relativism. In addition, the sense of injustice supplies an element of "higher law" by which current law and practice may be evaluated without resort to mystical natural law abstractions. The advantage of the sense of injustice is that it is concrete, immediate, and perceivable. Although Cahn appears not to have realized it, his moral philosophy closely parallels the conclusions of scientific philosophers of the logical-empiricist persuasion, a dominant philosophical persuasion. These writers, deploring abstract ethical notions, appeal instead to immediate moral insights of an intuitive order.[35]

Aside from Cahn's moral insights into legal philosophy, his general theory of law is also useful, if less original. Cahn defends the social compact explanation of the origin of legal obligation.[36] He does not adhere to a literal view of the compact, but regards the notion as indicative of the social sources of law. Cahn also attempts to present historical-sociological analysis of the development of legal rules in terms of the growth of individuation. Law begins by treating

31. Cahn, *Justice, Power and Law,* 55 YALE L.J. 336, 348 (1945).
32. Cahn, *Justice Black and First Amendment Absolutes,* 37 N.Y.U.L. REV. 549 (1962).
33. Cahn, *A New Kind of Society,* in THE GREAT RIGHTS 9 (Cahn ed. 1963).
34. Cahn, *Authority and Responsibility,* 51 COLUM. L. REV. 838, 844 (1951).
35. This view is clearest in MOORE, PRINCIPIA ETHICA (1922). It has been most recently stated in STEVENSON, ETHICS AND LANGUAGE (1944) and in AYER, LANGUAGE, TRUTH AND LOGIC (1948).
36. Cahn, *Ego and Equality,* 60 YALE L.J. 57, 64 (1951). Cahn finds that the concept of equality rests upon a social compact which, if rejected, gives rise to a general resentment and provokes the sense of injustice.

people as things, but as things change so will the laws regulating their movement. In this ingenious fashion Cahn explains the changing rules of contract law.[37] Law also controls the relative movement of economic groups.

Cahn's view of law as a means of social control of vertical mobility permits him to observe that the prohibitions of the criminal code affects the course of individual ascent in a negative fashion, while "the tenets and institutions of civil law show him the positive path."[38] In this attempt to account for change in legal rules Cahn does not draw from available historical and sociological research, thus presenting a sweeping and impressionistic overview which, while suggestive, is not penetrating. Nonetheless, Cahn does have a breadth of vision available to few other legal philosophers.

The greatest shortcoming of Edmond Cahn's legal philosophy is its lack of contact with trends in general philosophy. Cahn is very critical of two leading scientific philosophers, Nagel and Reichenbach, for their rejection of moral concerns,[39] which is a misunderstanding of their philosophical positions. Yet, Cahn perceives the monumental inadequacy of John Dewey as a scientific philosopher.[40] Cahn equates science with experimentation and statistical analysis. He feels that experiments may interfere with the spontaneity of law[41] and that statistical analysis tends to degrade the role of the individual.[42] But the most recent developments in philosophy have gone far beyond the crude notions of science alluded to by Cahn. The scientific enterprise has been aided by the analysis of the philosophy of science movement. There is no reason why the study of jurisprudence may not benefit in similar fashion, but Cahn ignores this possibility.

In the final analysis, Edmond Cahn's philosophy is another variety of legal pragmatism, leavened by the insights of Jerome Frank's fact-skepticism, but constructed with an awareness of the inadequacies of that approach. To the pragmatic flux of American jurisprudence Cahn seems to add the certainty of higher moral principles as derived from the "sense of injustice." In one of Cahn's last major essays this view becomes quite clear:

> [F]act-skepticism alone does not assure the advancement of justice . . . its capacities for application are morally ambivalent,

37. Cahn, *Freedom, Order and Law,* 23 N.Y.U.L. REV. 20, 24–26 (1948).
38. *Id.* at 38.
39. Cahn, *Jurisprudence,* in 1960 ANNUAL SURVEY OF AMERICAN LAW 593–94.
40. Cahn, *The Lawyer as Scientist and Scoundrel,* 36 N.Y.U.L. REV. 1, 6 (1961).
41. "I wish to suggest that, in the areas of scientific interest which impinge on government and law, there are limits to the permissibility of experimentation, that the limits are imposed by institutional factors on the one hand and moral factors on the other. . . ." *Id.* at 9.
42. Cahn, *The Consumers of Injustice,* 34 N.Y.U.L. REV. 1166, 1175 (1959).

> and . . . in order to serve the high purposes to which Jerome Frank was dedicated, it requires the extrinsic governance of a sympathetic intelligence and a humane conscience.[43]

Cahn assigned the task of carrying on the work of determining how far fact-skepticism may be carried to other philosophers.[44] He was aware that something was lacking in the analysis of Jerome Frank. Cahn supplied the moral factor as an improvement and addition, but there his enterprise terminated. It is to be hoped that still more work will be expended on this aspect of jurisprudence, because in it may be the future of legal philosophy.

Edmond Cahn has severely criticized pragmatism because it is amoral, lacking a base in ethical theory,[45] yet he has stated that "at its best — which can be superbly good — the whole legal process is pragmatic and empirical."[46] He has attempted to identify universal notions of injustice, but limits them to particular societies and special conditions. He has indicated the significant relationship of law and morality, but has separated the two more sharply. In raising doubts about the adequacy of sociological jurisprudence he has left a valuable legacy, yet more new questions are raised to which his beneficiaries must turn their attention. In another sense, however, Cahn seeks to return to an older philosophic tradition — to Aristotle who first indicated the relationship of law and morality. It was Aristotle also who claimed that there was a unique democratic conception of justice, which is the enjoyment of arithmetic equality.[47] Edmond Cahn has expanded upon a great master. Cahn is attempting to resist the most recent trends in philosophy and to return to absolute verities, as one of his latest articles indicates:

> As I see it, the single most important fallacy of twentieth century thought is that we have homogenized our relativism. Spurred by semantics and anthropology, philosophy has taught that all propositions and judgments are relative, and legal philosophy has echoed this teaching.[48]

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43. Cahn, *Fact-Skepticism: An Unexpected Chapter,* 38 N.Y.U.L. REV. 1034 (1963).

44. Cahn, *Jerome Frank's Fact-Skepticism and Our Future,* 66 YALE L.J. 824 (1957). Philosophers "will wish to consider how deeply and how far fact-skepticism may affect Peirce's doctrine that the meaning of a concept is to be found in its conceived consequences and James' doctrines that 'the true' is the long-run expedient in our way of thinking." Cahn, *supra* at 830. These allusions to general philosophy indicate Cahn's commitment to the philosophers of pragmatism.

45. See THE AMERICAN JURISPRUDENCE READER 23–24 (Cowan ed. 1956).

46. Cahn, *The Lawyer as Scientist and Scoundrel,* 36 N.Y.U.L. REV. 1, 11 (1961).

47. ARISTOTLE, THE POLITICS, Book VI, Chapter II, lines 6–10 (Modern Library ed. 1951).

48. Cahn, *Law in the Consumer Perspective,* 112 U. PA. L. REV. 1 (1963).

The culmination of Cahn's thought appears in *The Predicament of Democratic Man.* In this work Cahn carries his search for justice and morality within a pragmatic framework to its logical limit. While attempting to define the moral responsibility of democratic citizens for the immoral acts of government, Cahn simply rejects all views of collective guilt by delimiting an area of individual responsibility through a device which he calls the "citizen's self-search." The self-search not only specifies moral guilt, it also seems to limit and restrict it. "To the humane and decent citizen it offers a rational standard of judgment, a riddance of confusion, and an eventually serene conscience."[49] The self-search provides an alternative to natural law by smoothing over the difficult issues of political and social collective responsibility by posing and answering the following pragmatic catechism:[50]

> First. Did I incite the official to commit a wrong?
>
> Second. Did I authorize the wrong?
>
> Third. Was I reckless in helping to install a conspicuously dangerous public instrument?
>
> Fourth. Did I reman silent when I might have prevented a wrong about to be perpetrated?
>
> Fifth. Did I ratify the act of wrong or knowingly accept its fruits?
>
> Sixth. Did I suppress the truth when it came to my notice and thus became an accessory after the fact?
>
> Seventh. Before the wrong was committed, had I contributed to the vulnerability of the victim?

The highest morality conceived by this eminently humane legal philosopher is one of prudent, thoughtful, selfishness. Pressing common sense to the limit, Cahn has ignored the sense of guilt, of *angst,* of existential solidarity, of positive mutual moral responsibility. Cahn is no outraged moralist seeking to undo the wrongs of society, but, instead, a skillful lawyer seeking to narrow the moral liability of himself as a client. Cahn has reached the moral limits of pragmatism.

Edmond Cahn was bitterly opposed to the idea of natural law because "history shows us that natural law is a flag that anyone can nail to his mast" and "it has been used to justify slavery as well as freedom, persecution as well as fairness, exploitation as well as

49. CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 111 (1961).

50. *Id.* at 77–83.

equality."[51] He feared that natural law would confer virtually unlimited authority on the judge because "there is no authoritative secular text in which he can find the rules of natural law."[52]

Yet Cahn yearned for moral absolutes in the flux of a relativistic legal universe. He was certain that the Bill of Rights of the Constitution, and especially the first amendment, provided those absolutes in a textual form.[53] Other moral values were secular and of human creation. Moral standards were, generally, progressive and evolutionary so that men could "create moral standards superior to those their fathers evolved."[54]

Ultimately, however, Cahn's attempt to provide a substitute for natural law is a failure because of its contradictory character.[55] He attempts to provide a definition of injustice based at various times upon reason, common sense, raw emotion, a fixed written text, and history. Through the numerous writings of Edmond Cahn may be found numerous and divergent foundations for his moral system. Cahn does not foresee the possibility of conflicting standards derived from conflicting foundations. Cahn did not want to reduce morality to the level of the mores of the majority but he sought vainly for a permanent source of value which pragmatism was unable to supply. The flaw in the system of Edmond Cahn is not due to any lack of moral insight or fervor. In his anxiety to fly from the supposed weakness of natural law he missed an opportunity to add to the development of legal philosophy. The end product was a moral system lacking firm foundation, based upon a vague sense of moral unrest.

Edmond Cahn is among the first legal philosophers to attempt to find a moral basis for law outside the natural law tradition. On purely logical grounds it would seem to be a possible accomplishment. However, the burden of creating such a system is a heavy one, since some alternate source of value must be proposed and defended. An emotive basis for moral values could be such a foundation but Cahn hesitated to reach that drastic conclusion. If every man can "feel injustice" then every man is an equal and private source of judgment. Cahn retreated to a higher law found in the Bill of Rights. Others have found it in natural law.

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51. Cahn, *The Parchment Barriers,* 32 THE AMERICAN SCHOLAR 21, 26 (1963).
52. *Id.* at 34.
53. See Cahn, *Justice Black and First Amendment Absolutes,* 37 N.Y.U.L. REV. 549 (1962); Cahn, *Firstness of the First Amendment,* 65 YALE L.J. 464 (1956).
54. CAHN, THE MORAL DECISION 314 (1956).
55. Professor Norman Redlich rightly defends Cahn against the charge of being paradoxical in his rejection of natural law on the ground that there could be a moral system of law outside of the natural law tradition. Redlich, *Edmond Cahn: A Philosopher for Democratic Man,* 40 N.Y.U.L. REV. 259, 266 (1965). The question is whether Cahn has succeeded.

## II. THE SEARCH FOR AN EMPIRICAL NORM OF JUSTICE

Edmond Cahn has not been alone in his search for the meaning of the concept of justice. Prominent legal philosophers, both within and without the natural law school, have sought the elusive character of empirical justice. There is little agreement among modern writers, although there is less disagreement as to the quantity of justice which law could or should contain.

Among the most highly regarded legal philosophers is the British writer, H.L.A. Hart. Hart, more bluntly than Cahn, admits that he is searching for a kind of empirical natural law, lacking teleology, and based upon observable and fixed needs of human beings and society.[56] Bodenheimer agrees that normative legal postulates exist which are founded upon the physical or psychic constitution of man, and finds these in the need of food, sleep, sex and the love for his offspring.[57] Hart identifies five truisms of human nature: "human vulnerability," "approximate equality," "limited altruism," "limited resources," "limited understanding and strength of will."[58]

Other writers have emphasized the procedural aspects of "justice." According to John Rawls, the language analyst, every people possesses a concept of justice which requires procedural fairness:

> A practice is just if it is in accordance with the principles which all who participate in it might reasonably be expected to propose or acknowledge . . . when it meets standards which the parties could accept as fair should occasion arise for them to debate its merits.[59]

Ross insists that the words "just" and "unjust" cannot be applied to characterize a law or an order, but only to conformity or non-conformity with the rule or system of rules in force.[60] However, Ross is forced to admit that at times a judge may permit challenge of the rule itself, by applying the tool of his "material legal consciousness," which is an ultra-rational ground of legal criticism derived from the judge's professional perception of social needs.[61] This legal consciousness is different from a mere sense of morality because it

56. HART, THE CONCEPT OF LAW 187–88 (1961).
57. BODENHEIMER, JURISPRUDENCE 188 (1962).
58. HART, *op. cit. supra* note 56, at 189–95.
59. Rawls, *Justice as Fairness*, in PHILOSOPHY, POLITICS AND SOCIETY, 2ND SERIES 148 (Lasslett & Runciman ed. 1962). Equality of treatment is also emphasized by HART, *op. cit. supra* note 56, at 202.
60. ROSS, ON LAW AND JUSTICE 274 (1959). Injustice merely means that the judge allows himself to be guided by personal interest, friendship or some other motive apart from the legal command. ROSS, *op. cit. supra* at 284.
61. *Id.* at 138.

concerns the organized social regulation of the community, not the personal relations among men.

Cahn recognizes the necessity of a socially oriented moral system which "would emphasize the fears and devisiveness that results from men's distrusting their neighbors" and which would, to a considerable extent, be advanced by his model of "the equitable judge."[62] That there might be a conflict between the moral views of judge and jury was not explored by Cahn, although empirical evidence seems to point to that possibility. Judges and juries might differ in their conceptions of justice.[63] The problem of conflict between the judge's notion of justice and that of the community has never been adequately met by legal philosophers.[64] Even the jurors may disagree among themselves in their perception of the justice of the legal situation.[65]

Although Edmond Cahn assumes that the individual sense of injustice and the community sense of injustice would coincide, his approach is basically a projection of individual values of a democratic citizen whose feelings determine the community aspirations for justice. For many other scholars, as for Karl Llewellyn, there is no justification for emphasis upon the individual in the search for justice because of individual differences and the fact that individual values "exist only in the context of a society which is itself a context of groups and needs."[66]

If the search for justice (and the sense of injustice) leads us to the group, we should expect that the field of anthropology would provide jurisprudents with a purer form of justice embodied in primitive social institutions. In simple group structures one might hope to discover the basic character of "justice." Unfortunately, recent anthropological research fails to supply the unalloyed essence of justice. For example, justice among the Barotse usually consists of judicial bias in favor of accepted community norms.[67] The separation of law

62. CAHN, THE MORAL DECISION 298–99 (1956).

63. Judge and jury often do not agree on verdicts in criminal cases. Agreement, in one study, was found in 80% of the cases, with disagreement in 20%. In 18 (of the 20% total), the jury acquitted where the judge would have convicted, while in only 2% of the cases it is the other way around. Thus, it would appear that jurors might be more lenient than judges (based on a 40 entry questionnaire on a sample of 1200 cases). Zeisel, *Social Research on the Law,* in LAW AND SOCIOLOGY 138 (Evan ed. 1962).

64. Carter believed that the judge should follow community notions, while Gray believed that the judge should follow his own perception. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION 193 (1932); GRAY, THE NATURE AND SOURCE OF THE LAW 271 (1931). Cardozo felt that the judge "would be under a duty to conform to the accepted standards of the community, the *mores* of the time." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 108 (1925).

65. See MCCARTY, PSYCHOLOGY AND THE LAW 406 (1960).

66. LLEWELLYN, JURISPRUDENCE 204 (1962).

67. GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE 10 (1965).

and ethics, a starting point for most legal philosophers, is not accepted by many anthropologists.[68] Justice among African tribes might signify anything from self-help to the use of elaborate judicial procedures of a highly sophisticated order.[69]

In the absence of any better clue to the nature of justice, Edmond Cahn's concept of the "sense of injustice" may yet prove to be a fair point of departure for future studies. Bengler and Meerloo's psychoanalytic examination of justice and injustice is the one serious psychological study in the vein of Cahn's empirical ideas yet to be made.[70] These authors suggest that the ideal of justice is embodied in each man's ego ideal as a residue of parental admonitions. The concept of justice "brings 'order' into the chaos of a world ruled by capricious fate" and "humanity also uses the sense of justice as a means of preserving self-esteem in the face of incomprehensible adversity."[71] The authors penetrate beyond Cahn's superficial analysis to indicate that disturbed personalities may actually cherish injustice. The neurotic, the psychic-masochist and the criminal are all able to identify justice and injustice, although they may choose injustice over justice. Bengler and Meerloo provide a personal history of the sense of injustice in the child's "horror, outrage, anxiety, shock, and resentment at the way the outside world deals with him."[72] The authors add a further dimension to the sense of injustice by identifying its emotional relevance for the inner biological and psychological needs of the personality, permitting an inner mobilization against personal threats of deprivation and violation. However, pending further investigation, the idea still remains rather vague.

## III. RESORT TO NATURAL LAW

The pursuit of the path of empirical justice has led us to uncertain ground. Although many writers concur that there ought to be an adequate empirical description of justice, none, as yet, has found a satisfactory one. The very pursuit itself has been best exemplified in the writing of Edmond Cahn, but even there, it has come to little more than the older natural law affirmation, echoed by Bengler and Meerloo, "that there seems to exist in man a vivid and strong sense of right and

68. See TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW 68–77 (1939).
69. EVANS-PRITCHARD, THE NUER 164–65 (1940) describes a society built on a concept of ultimate self-help. EPSTEIN, JURIDICAL TECHNIQUES AND THE JUDICIAL PROCESS (1954) gives a good survey of elaborated procedure, including references to magical practices.
70. BENGLER & MEERLOO, JUSTICE AND INJUSTICE (1963).
71. *Id.* at 19.
72. *Id.* at 122.

wrong."[73] Increasingly, legal thinkers of many persuasions have come to the realization that a modernized version of natural law may be an indispensable critical tool of legal analysis. This realization has usually been reached reluctantly, even grudgingly, but the positivist tradition may have begun to wear itself out. Realist jurisprudence, however enlightening, cannot supplant older concerns for ethical jurisprudence. It has proved a healthy antidote for the sterile analytical school and the metaphysical approach to natural law, but it is incomplete without attention to basic ethical considerations.[74]

The jurisprudence of interests may be seen as but another side to the natural law, since it attempts to establish a connection between the law and the rational needs of men.[75] Natural law subsumes all human interests, including that of public policy, but possesses the advantage of providing a measure for interests. When differing legitimate social interests contend, which is to prevail? Only a larger social philosophy can supply the answer.

The realist error may be the excessive reliance upon the particular, the single case, the particular dispute. Thus, law is seen as a series of isolated judgments. Taken to the extreme, as in the writings of Jerome Frank, it implies that there is no law until the judge pronounces upon it.[76] The flight to the particular has, properly, focussed attention upon the concrete activity of judging, but fails to consider the universal aspects of that activity. Karl Llewellyn has recognized the need for a "lawyer's natural law," a natural law directed at specific legal disputes, but admits the existence of "natural law in the philosopher's sense . . . as a keystone and as a touchstone for his own [the lawyer's] labors while it leaves those actual labors still to be done."[77]

Edgar Bodenheimer is among those who believe that there are postulates of a normative variety beyond those of the positive lawgiver which provide "an element of necessity in natural law" derived from the empirical basis of human nature, a nature which may change and improve, causing a parallel change in natural law.[78] This observation has been amplified by Jerome Hall, who adds intelligence to the deeper instinctual drives of emotion as a principle of modernized natural law.[79]

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73. *Ibid.*

74. *Cf.* FRIEDMANN, LEGAL THEORY 257 (1960); Llewellyn, *On Reading and Using the New Jurisprudence,* 40 COLUM. L. REV. 581 (1940); McDougall, *Fuller v. the American Legal Realists; An Intervention,* 50 YALE L.J. 827 (1941).

75. PATON, A TEXT-BOOK OF JURISPRUDENCE 119 (1964).

76. FRANK, COURTS ON TRIAL (1949); *Cf.* BENN & PETERS, SOCIAL PRINCIPLES OF THE DEMOCRATIC STATE 84 (1959) for a criticism of the approach.

77. LLEWELLYN, *op. cit. supra* note 66, at 112.

78. BODENHEIMER, *op. cit. supra* note 57, at 192.

79. Hall, *The Progress of American Jurisprudence,* in THE ADMINISTRATION OF JUSTICE IN RETROSPECT 36-37 (1957).

There is, therefore, an attempt in modern jurisprudence to re-evaluate the natural law tradition in terms of the modern, scientific empirical bias. Some would claim that natural law jurisprudence on that basis could provide a scientifically verified theory of first order facts about nature and rational man.[80] While many would hesitate to admit a return to the categories of natural law, there does seem to be a gradual movement in that direction led, strangely, by writers whose work has previously been in the realist school. Many adherents of more traditional natural law views may dislike this trend because it is still anti-metaphysical in spirit, but it may lead to a *rapprochement* in jurisprudence under a vague but general agreement on the place of value judgments in the law. If the idea of justice has always occupied the central place in the philosophy of natural law, writers of many persuasions are finding a consensus in the need to pursue the ideal of justice. Perhaps a common statement of belief might be phrased: "An unjust law . . . is a perfectly intelligible conception if we understand it as meaning simply a law which, valid in itself, conflicts with the scale of values by which we choose to judge it."[81]

This minimum statement may be the most one can do to identify a common vantage point for the ethical criticism of positive law. Put in a concrete form, one may distinguish between a good legal system and a bad one on the basis of the law's conformity to the norms of the society in which it is found. The search for a universal set of norms has not yet been successful and indeed may be beyond the grasp of men. This may be a greatly diminished version of natural law, but it is a generally acceptable one. The search for a central element in human striving may be a fruitless hunt for jurisprudents.[82]

The idea of a higher truth and a higher justice than that of positive law need not require resort to metaphysical explanation. The Constitution of the United States, the Universal Declaration of Human Rights, and other basic documents supply examples of higher law community norms. Without requiring a return to neo-scholasticism, after the approach of Aquinas, there can be an acceptance of the necessity of a minimum content of natural law in any legal philosophy to be constructed in the future. By this is meant more than a mere observation that there is a moral content in any legal assertion.[83]

80. Northrop, *Contemporary Jurisprudence and International Law*, 61 YALE L.J. 623, 650 (1952).

81. LLOYD, THE IDEA OF LAW 131 (1964).

82. FULLER, THE MORALITY OF LAW 185–86 (1964) criticizes Hart and others for the futility of the search, but proceeds to find the central principle of the natural law in the maintenance of communication with one's fellows, an almost empty phrase.

83. GOODHART, ENGLISH LAW AND MORAL LAW (1953).

Instead, one may anticipate a newer version of higher law based upon the observable and verifiable norms of a growing society. As Laski wrote to Holmes earlier in the century: "The truth is that we are witnessing a revival of 'natural' law and 'natural' is the purely inductive statement of certain minimum conditions we can't do without if life is to be decent."[84] As yet, this promise is unfulfilled, but future work in psychology and sociology should supply the data missing in the writing of Edmond Cahn.

84. 1 HOLMES-LASKI LETTERS 116-17 (Howe ed. 1953).