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The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism and the Revival of Natural Law*

I will discuss the influence of the Nuremberg trials on legal philosophy in the United States, focusing on the decline of legal realism as an autonomous jurisprudential movement and the revival of natural law philosophy. Legal realism emerged in the late 1920s as a jurisprudential movement that criticized the formalist approach to law, expressed skepticism about the influence of the rules of law, and sought to demystify how courts operated and judges made decisions. The legal realists generally urged the incorporation of social science into efforts to understand how courts operated and to improve their operations.

The legal realists were viewed as intellectual provocateurs. By the early 1930s, legal realism had become a prominent jurisprudential movement - not dominant, yet extensively discussed. Critics complained that the legal-realists divorced morality from law, worshipped at the altar of power, and were engaged in a fruitless quest to impose the precision of scientific methods on the understanding of law and the legal system. As the decade progressed, the emergence of fascism abroad gave these criticisms additional urgency. In the aftermath of World War II, the horrors of Nazi Germany and the emerging totalitarian threat of the Soviet Union contributed to the decline of legal realism as an independent jurisprudential movement. Quite simply, the United States could not embrace a legal philosophy in which morality was detached from the legal system. This concern for morality in the legal system contributed to the revival of natural law philosophy.¹

I must acknowledge that this brief summary oversimplifies the relevant developments. My topic is enormously broad and spans nearly three decades. Therefore, at the outset, I have taken the following steps to make the topic more manageable. First, my discussion focuses on two authors: Jerome Frank and Lon Fuller. Each man is, deservedly, a towering figure in American jurisprudence. Jerome Frank practiced corporate law in Chicago and New York City, held a number of high-level positions in the federal government during the New Deal (including Chairman of the Securities and Exchange Commission), and was appointed to the Second Circuit Court of Appeals in 1941. He wrote a number of books, including Law and the Modern Mind - a provocative and popular legal realist tract - and taught at Yale Law School. Frank was, to be sure, a committed legal realist.

After World War II, Frank made clear in his writings that he saw a place for morality in the law, and that he cared deeply about the fate of democracy in a world threatened by totalitarianism. Frank's efforts to acknowledge the role of morality in the law, to pronounce, repeatedly, his concern for democracy, and to broaden his focus from describing the insights available to judges through psychoanalysis to proposing reforms for the judicial fact-finding process reflect broader shifts in American jurisprudence. That shift occurred, in part, because of events like the Nuremberg trials.

Lon Fuller, a lifelong law professor who spent more than 30 years at Harvard Law School, was one of the most thoughtful proponents of natural law theory. Initially Fuller appreciated the anti-formalist insights offered by the legal realists, though he insisted on a more purposive and value-laden understanding of the law and the legal system through which it developed. As the 1930s progressed,

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¹ Natural law philosophy, broadly speaking, insists that positive law - statutes, court decisions interpreting statutes - should be evaluated according to a higher moral law. To put it another way, natural law also, generally, insists upon the existence of foundational principles of morality that exist apart from the legal rights and duties established by positive law. Natural law philosophy may be defined in relation to the legal philosophy of positivism. See, e.g., Philip Soper, “Some Natural Confusions about Natural Law,” 90 Mich. L. Rev. 2393, 2395 (1992) (“the legal positivist claims that no necessary connection exists between law and morality; the natural law legal theorist denies that a sharp separation of these concepts is possible”).

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Fuller joined the chorus of natural law scholars criticizing legal realism. In 1940, Fuller’s book, “The Law in Quest of Itself,” sharply and specifically condemned the legal philosophies of positivism (and its related successor, legal realism) for contributing to the emergence of fascist governments in Germany and Spain.

Fuller continued to develop his theory of natural law after World War II. Fuller’s 1958 debate with the English philosopher H.L.A. Hart over positivism in the Harvard Law Review is perhaps the most famous jurisprudential exchange of the 20th century. As I will discuss, the specter of Nazi Germany informed— even, to some extent, framed—the exchange. Central to the debate was a disagreement over judicial treatment of laws enacted and enforced while the Nazi government was in power. Although neither Fuller nor Hart specifically discussed the Nuremberg trials, the debate over retroactive invalidation of Nazi laws paralleled the retroactivity issue raised by the war crimes prosecutions.

Second, I want to be clear on the way in which the trials should be understood in my discussion of the relevance of the Nuremberg trials to the development of American jurisprudence. First, the trials loomed large in world politics during and after World War II, and inspired an extensive debate over their legitimacy. The trials were a significant event for legal philosophers. Second, the Nuremberg trials received extensive press coverage, and widely publicized the nature and extent of the Nazi atrocities during World War II. The trials therefore both reflected and contributed to serious post-war concerns about totalitarianism. The debate inspired by the Nuremberg trials therefore is one measure of a broader shift in American legal thought—a change in which legal realism continued to decline as an autonomous jurisprudential movement, and natural law philosophy returned to prominence.

I. Situating American Legal Realism: Context and Definitions

Legal realism in the United States emerged early in the twentieth century as a response to the dominance of formalism in legal thought and practice. Harvard Law School Dean Christopher Columbus Langdell, who devised a new approach to legal education in the 1870s, is perhaps the archetypal legal formalist of this era. Langdell maintained that law is an inductive science, and “that all the available materials of the science are contained in printed books” of judicial opinions. For Langdell, as Bruce Ackerman has explained, “the task of the legal scholar, like that of the natural scientist, was to transform the disordered data found in judicial opinions and render them intelligible by demonstrating the way in which each term could be explained in terms of the fundamental legal principles implicit in the common law.”

Oliver Wendell Holmes, Jr., was an early critic of legal formalism. Although Holmes respected Langdell’s contribution to legal education, he disagreed with Langdell on the idea that logic was vital to
the development of legal thought. In his 1881 book The Common Law, Holmes essentially "argued that practical expediency, necessitated by the needs and conflicts of human society, were more central to the development of law than were any logical propositions." Furthermore, Holmes maintained a skeptical attitude towards the law, defining it as nothing more than "the incidence of the public force through the instrumentality of the courts." By early in the twentieth century, Holmes' criticism of Langdell and legal formalism began to attract followers, planting the seeds that would develop into the legal realism movement.

Holmes' legal philosophy loomed large in the work of Jerome Frank and other legal realists, who shared Holmes' skepticism of Langdell's formalism. They focused their efforts on investigating and explaining how judicial decisions really were made, and "attempted to move beyond the talk of rules and principles heard in the courtroom and the academy and to expose them as myths obscuring most of the principal factors at work in the decision-making process." The idea of science figured prominently in the efforts of the realists, but it was not the self-contained, inductive logic of Langdell. Instead, the realists were dogged empiricists who consulted the social sciences – Frank, for example, turned to psychiatry – to locate the extra-legal factors that, they argued, determined the outcome of judicial decisions.

II. Jerome Frank, Law and the Modern Mind, and Legal Realism

To simplify matters, I have decided to explain legal realism through the writings of Jerome Frank. Frank offered a comprehensive critique of formalist legal thought. His views made him an extreme – and extremely clear-spoken – legal realist. In addition, Frank's views were well known outside the legal academy. His first book, Law and the Modern Mind, sold well when it initially was published in 1930, and went through a number of printings. As a result of his extremism, clarity and prominence, Frank inspired a substantial response from both fellow realists and ardent critics of legal realism.

In Law and the Modern Mind, Frank described "the basic legal myth" – the myth of certainty – and explained its causes. He did not, however, prescribe a solution for it. Frank proclaimed that "[t]he law always has been, is now, and will ever continue to be, largely vague and variable." And yet, according to Frank, the necessity of uncertainty in the law – even the existence of it – is denied. Why? To answer this question, Frank turned to psychiatry – in particular, the child psychiatry of Jean Piaget. Frank attributed the need for, and belief in, certainty in the law to a child-like need for certainty.

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8 Edward Purcell, THE CRISIS OF DEMOCRATIC THEORY, 75 (1973) (discussing Oliver Wendell Holmes, Jr., THE COMMON LAW (1881)).
10 See Ackerman, "Law and the Modern Mind," 103 Daedalus 121 (identifying first generation, including Holmes and James Bradley Thayer, as critics denying "the assumption of the scientific school that the Common Law had a fundamental structure discernible by the architectonic intelligence"); second generation "affected by Progressive politics and Deweyite pragmatism," including Louis Brandeis, Felix Frankfurter, and Roscoe Pound; and third generation of legal realists, including Frank).
11 Ackerman, "Law and the Modern Mind," 103 Daedalus 121.
13 Jean Piaget was a Swiss psychologist who worked with Alfred Binet in testing the intelligence of children, and wrote a number of books on childhood development. Frank acknowledged that, in Law and the Modern Mind, he "relied chiefly upon Piaget, an eclectic psychologist, who has done an immense amount of first-hand work with children." LAW AND THE MODERN MIND, 326 n.1 (notes to Part One, Chapter II); see also id. at 69 n.* (citing three articles by Piaget).
14 LAW AND THE MODERN MIND, 13-16. To be fair, Frank asserted that he was providing only a "partial explanation" of the phenomenon he described, and included an appendix offering 14 other "suggested or possible explanations of the basic legal myth." LAW AND THE MODERN MIND, at xiii, 13, and 263 (Appendix I). On the other hand, Frank's writing style was both provocative and repetitive, so it was easy for the reader to form the impression that the "partial explanation" is dominant, if not exclusive. See Robert Glennon, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW, 48 (1985).
Frank’s account of child development was relevant to the myth of legal certainty because, ultimately, according to Frank, the law “inevitably becomes a partial substitute for the Father-as-Infallible-Judge.”15 Caught between the uncertainty attendant to the practice of law – with its “changing realities,” which require “recognition of novel circumstances, tentativeness, and adaptation” – and the desire to “achieve certainty, rigidity, security, uniformity” (the result of “unconscious longing for the re-creation of a child’s world stimulated in all men ... by the very nature of law”), the lawyer essentially becomes a “professional rationalizer.”16 Frank, needless to say, objected to this state of affairs. In response, he urged the legal profession, essentially, to grow up and embrace uncertainty, rather than attempt to avoid it or conceal it.17

Frank also focused his analysis on the understanding of rules and judicial decisions in the legal system. Frank chose Joseph Henry Beale, an accomplished Harvard Law School professor (and former student of Dean Langdell), to personify the conventional formalist view of what constitutes law.18 According to Frank, Beale defined law as “(1) Statutes, (2) rules, and (3) ‘the general body of principles accepted as the fundamental principles of jurisprudence.’” Moreover, for Beale, “[t]his third element is ‘the one most important feature of law: that is ... a body of scientific principle.... Law, therefore, is made in part by the legislature, in part it rests upon precedent; and in great part it consists in a homogeneous, scientific, and all-embracing body of principle’ which is ‘‘truly law’ even ‘though no court has lent its sanction to many [of its] principles.’”19

Frank railed against this view. The law according to Beale bore no resemblance to the law experienced by practicing lawyers. “Particular judgments of particular controversies are only vaguely predictable,” observed Frank. “Decisions in the courts of any given state vary.”20 Borrowing from Holmes, Frank offered his own definition of the law “from the point of view of the average man,” which he described as “a decision of a court with respect to [any particular set of] facts as far as that decision affects that particular person.”21 So far, Frank’s critique was familiar, even, in its own way, conventional. Holmes, after all, already had observed that “[a] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by the court has lent its sanction to many [of its] principles.”22

Frank extended this criticism, however, drawing upon the lessons he had learned from the emerging discipline of psychiatry. Focusing on the judge, Frank challenged the conventional view that “the judge begins with some rule or principle of law as his premise, applies this premise to the facts, and thus arrives at his decision.”23 Nonsense, insisted Frank; instead, he argued that, “[j]udicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.”24 Frank elaborated upon his challenge to the conventional view of judicial decision-making. He quoted favorably the description of Judge Joseph C. Hutcheson, Jr., that judging consisted of arriving at a “hunch,” and then providing the “ratiocination” for the decision in the written opinion.25 Frank recognized the consequences of his argument: “Whatever produces the judge’s hunches makes

15 LAW AND THE MODERN MIND, 18; see also id. 20 (“Hence the basic legal myth that law is, or can be made, unswerving, fixed and settled.”).
17 LAW AND THE MODERN MIND, 17-18 (discussing the career of William James, who made “a sudden shift from panic fear of insecurity to a deep enthusiastic bliss in the absence of security” which “marked for James the advent of emotional adulthood.”).
18 LAW AND THE MODERN MIND, 48 (describing Beale as “one of America’s influential legal writers from whom, at Harvard Law School, many of the leading lawyers of this country have received valued instruction. Beale’s opinion, which is representative of the conventional doctrine, commands attention.”).
21 LAW AND THE MODERN MIND, 46.
the law." Although he acknowledged that the "rules and principles of law" were part of the stimuli that produced the judge's hunches, Frank nevertheless insisted that there were many "complicated" and "hidden" factors that influenced the individual judge.

Frank did not confine his critique to the vagaries of the judge's personality. In addition to the fact that judges made decisions based upon hunches, Frank argued, the judicial fact-finding process was full of opportunity for error. Even honest witnesses made mistakes when they testified, and the risk for error increased due to the possibility that the judge or jury did not correctly understand the testimony or became distracted while listening to the witness.

One should not exaggerate the novelty of Frank's insights - even Frank acknowledged that much of his book merely debunked myths for the general audience told by lawyers and judges about the legal system. In part, it was the vehemence of his assault on the legal system that made his claims bold and provocative, especially for the era in which they were written. Frank effectively held up a mirror to the legal system, and reflected back was something akin to the abyss. It is difficult to conceive of a more direct assault on the inductive logic of formalism. The operating legal principles, said to be discoverable in the law books and reported cases in the library, did not resolve cases, and did not provide definitive guidance on the outcome of a legal dispute. Frank did not shy away from the implications of his argument: if the administration of justice was idiosyncratic, it could not be said that litigants received equal treatment in the legal system.

Frank did not provide a programmatic solution to improve the judicial system he described in Law and the Modern Mind. He agreed with reformers that psychology could provide further insights into how individual judges decided cases, but acknowledged that such efforts depended upon the willingness of the "judges to engage in searching self-analysis." However, he did not expect most judges to be willing to engage in such self-analysis. Still, the best lawyers and judges can do, according to Frank, is grow up. This meant embracing change, accepting uncertainty, and liberating civilization from "father-governance."

Law and the Modern Mind received a broad but divided reception. Although critics agreed that Frank's book was "provocative," not every reviewer employed that description with favor. A number of prominent professors and writers praised Law and the Modern Mind. More revealing than the

26 LAW AND THE MODERN MIND, 104. See also id. 133 (" ... the personality of the judge is the pivotal factor.").
27 LAW AND THE MODERN MIND, 105.
28 LAW AND THE MODERN MIND, 106-111. See, e.g., id. at 111 ("If [the judge's] final decision is based upon a hunch and that hunch is a function of the 'facts,' then of course what [the judge], as a fallible witness of what went on in his courtroom, he believes to be the 'facts,' will often be of controlling importance. So that the judge's innumerable unique traits, dispositions and habits often get in their work in shaping his decisions not only in the determination of what he thinks fair or just with reference to a given set of facts, but in the very processes by which he becomes convinced what those facts are.") (emphasis added).
29 LAW AND THE MODERN MIND, 111-12.
34 See "Law and the Modern Mind: A Symposium," 31 Colum. L. Rev. 82 (1931); Karl Llewellyn, "Legal Illusion," 31 Colum. L. Rev. 82 ("This book excites ... It is well nigh unique in attempting exploration of emotional drives and genetic psychology for their contribution to understanding of the ways of law."); Walter Wheeler Cook, "Legal Logic," 31 Colum. L. Rev. 108-15 (defending Law and the Modern Mind against attack by Mortimer Adler). See also Thurman Arnold, "Law and Men," Saturday Review of Literature (March 7, 1931) (located in Jerome Frank Papers, Box 128 Folder 3). Earlier in 1931, Arnold wrote a letter to Frank in which he observed that Mortimer Adler - in his review in the Columbia Law Review - "appears to throw big words at you like a comedian throws custard pies." Thurman Arnold to Jerome Frank, January 15, 1931, Jerome Frank Papers, Box 4 Folder 108. Arnold returned to this image in his article for the Saturday
positive reviews, however, were the critical ones. Initially Law and the Modern Mind was challenged for its method, or its science. These reviews questioned, for example, whether Frank had accurately described the operation of the legal system, whether he had properly weighed the value of certainty in a legal system, and whether he reasonably relied upon psychiatry as the explanatory extra-legal discipline.

For example, Mortimer Adler, a University of Chicago philosopher who embraced foundational principles, sounded a sharp note in his assessment of Law and the Modern Mind in the Columbia Law Review in 1931. Frank’s book offended Adler from start to finish. According to Adler, Law and the Modern Mind was a lawyer’s brief rather than a philosopher’s discussion; it demonstrated flaws in logic and argument; and the book erred even in its understanding of psychiatry. Adler dismissed Frank as “an extreme nominalist” for whom “nothing exists except particulars, and words are merely their names.” Adler’s assault, though sweeping, centered on the shortcomings of Law and the Modern Mind as a work of philosophy. Frank’s book did not, in 1931, pose a threat outside the academy.

What is worth noting about the reception of Law and the Modern Mind immediately after its publication is that the debate over the book revolved around the soundness of its science. This inquiry did not focus on the political implications associated with an arbitrary judicial system. As the decade progressed, this would change, and Frank and the legal realists came under fire for the political values associated with their jurisprudence. On the eve of and during World War II, those critics could be sharp: legal realism, they charged, permitted – indeed, was synonymous with – fascism.

Indeed, by the end of the 1930s, virtually no academic discussion could occur without reference to the political developments in Europe and elsewhere. An increasingly popular attack on legal realism was that it permitted fascism. This development is reflected, in part, in the Julius Rosenthal Lectures Fuller gave at Northwestern University in 1940. In his second speech, Fuller addressed legal realism. He viewed legal realism as a modern form of positivism—one that sought “to anchor itself in some datum of nature, which considers that the law’s quest of itself can end successfully only if it terminates in some tangible external reality.” In their studies of judicial behavior, according to Fuller, the legal realists modified positivism, focusing on what judges do, rather than on what they say. Indeed, Fuller argued, the legal realists insisted upon a “sharp line between the rules that judges act on and those they talk about” – a “field” of “pure judicial behavior” that corresponded to Austin’s sovereign.

In his final lecture, Fuller connected his critique of positivism to current political developments. “We live in a period when major readjustments in our economic and social order have become necessary,” he wrote. “It would seem that the present is a time when our social structure requires to be held together by a cement firmer than that supplied by the abstract principle for law as such. If Renan was right in assuming that men have the capacity for developing the illusions necessary for their survival, we ought to be seeing a revival of natural law.” This prediction turned out to be correct. Under the philosophy of positivism, Fuller continued, “[s]ince power rests ultimately on the acquiescence of the governed, the most logical principle of government is that of majority rule, since this offers the broadest base for the order set up.” Fuller was dismayed by this view of democracy: it did not provide for justice, and did not come “closer to the inner essence of things than the will of any

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35 Purcell, THE CRISIS OF DEMOCRATIC THEORY, 3 (noting that Adler believed “that human reason could discover certain immutable metaphysical principles that explained the true nature of reality”).
38 Fuller, THE LAW IN QUEST OF ITSELF, 47; see also id. 55 (“the psychology involved in the realist view is largely indigenous to the soil of legal positivism.”). Fuller cited Frank’s Law and the Modern Mind as one the “most important expositions of the realist conception of law.” Id. 52 n.11
39 Fuller, THE LAW IN QUEST OF ITSELF, 52.
40 Fuller, THE LAW IN QUEST OF ITSELF, 59.
41 Fuller, THE LAW IN QUEST OF ITSELF, 115, 116.
particular individual." Moreover, he argued that this “purely negative ... conception of democracy” - based upon only the exercise of power by the majority - has “played an important part ... in bringing Germany and Spain to the disasters which engulfed those countries.”

As world events brought the United States closer to and then into World War II, critics of legal realism compared the realists to the emerging fascist governments in Europe, in particular the Nazi regime in Germany. By divorcing law from morality, insisting upon retaining an air of scientific detachment, and denying the significance of legal rules, the realists appeared to embrace the notion that power - and only power - was relevant to and necessary for governance. Compared to claims made by other natural law scholars in the early 1940s, Fuller’s critique seemed positively mild. In 1942, for example, Father Francis E. Lucey of Georgetown wrote: “Realism is being tried today in Germany and Russia,” he argued. “The Jurisprudence of these countries is that ‘Is’ Instrumentalism or Pragmatism of the Realist. What works is good. They exclude principles and morals and God from the picture of law, national and international.” Lucey continued: “For Holmes and the realist [man] is a sort of superior animal. ... If man is only an animal, Realism is correct, Holmes was correct, Hitler is correct.”

III. World War II, the Nuremberg Trials, the Decline of Legal Realism, and the Revival of Natural Law Theory

After World War II, attention turned to development of a new political order. Immediately after the war, some in the United States desired – and even were optimistic about the prospect of – a new world order governed by international law. The idea of human rights, for example, reflected this sentiment. A working definition of human rights, from the perspective of the United States in 1945, was the idea that individuals in a foreign state “have universal, objective human rights ... regardless of the content of [that foreign state’s] positive law.” This idea of human rights reflected natural law principles.

However, the vindication of human rights potentially conflicted with another fundamental legal principle, the due process protection against retroactive laws. Although there was (and is) not an absolute protection against retroactive lawmaking, the principle of due process protects individuals against liability – and even more strongly, against criminal punishment – for conduct that was not illegal or prohibited when it occurred. This concern about retroactive lawmaking reflected positivist principles. In the post-war period, the protection against retroactive lawmaking was subordinated to the human rights principle that some rights exist independent of the state’s laws, and that some conduct is wrong – and may be judged as such – even if that conduct is not prohibited by law.

42 Fuller, THE LAW IN QUEST OF ITSELF, 121.
43 Fuller, THE LAW IN QUEST OF ITSELF, 121, 122. With respect to Germany, Fuller elaborated: “It was only this conception [of democracy] which could mislead men into believing that power relations inside a society could be radically displaced by the mere will of a numerical majority or that a social or economic revolution could be accomplished through a democratic control un-sustained by any common faith or program. It was this conception which lulled men into the dangerous dream that a kind of political euthanasia of vested interests would be possible. In the rude awakening which followed this dream there was demonstrated, at least in Germany, not only the futility of the dream itself, but the inability of repressive violence to fill the void left by a defaulting principle of majority rule, for the purported counter-revolution of Nazism has in many cases only increased the tempo and violence of the disintegrative forces from which it claimed to be rescuing Germany.” Id. 122.
45 Lucey, “Natural Law and American Legal Realism,” 30 Geo. L.J. 531. See also Purcell, THE CRISIS OF DEMOCRATIC THEORY, 157-58 (quoting Robert Hutchins, former Yale Law School Dean, as saying, “There is little to choose between the doctrine I learned in American law school and that which Hitler proclaims.”).
48 See Primus, “A Brooding Omnipresence,” 106 Yale L.J. 431 (noting that although the “International Military Tribunal tried to limit the trial[s] to issues of positive law codified in treaties and international conventions of war, ... the propriety of Nuremberg rested on the distinctly nonpositivist principle that some things were simply wrong, whether codified or not, and that justice sometimes calls upon courts to act when they lack formal legal authorization”).
The clash between the natural law notion of human rights and the positivist concern about retroactive lawmaking is reflected in the writings of both Frank and Fuller after World War II. Fuller discussed it in a debate about the validity of Nazi laws after the war, while Frank addressed this conflict in the context of the Nuremberg trials. In an article published in Collier’s in 1945, Frank defended the necessity of the trials for the sake of world peace. In this discussion, he specifically noted “the moral effect of the trials,” and enlisted this value in the cause of establishing a new world order.

The Nuremberg trials were an extraordinary event, and important to United States post-war foreign policy. It therefore is not entirely surprising that Frank would set aside his skepticism of judges and the judicial process in endorsing the efforts of Justice Jackson and the goals of the war crimes trials. Nevertheless, it is worth noting, that his discussion of the Nuremberg trials did not even resonate with, much less mention, his usual criticisms of the trial process – the childish quest for certainty, the limits inherent in the judicial fact-finding process, the intuitive quality of judging. This silence is even more notable given the novelty of the tribunal, as well as its task – to pass legal judgment on the conduct of individuals pertaining to international affairs and war.

The Collier’s article is important also because it is one of the earliest indications of Frank’s acknowledgment – if not embrace – of natural law principles. In his post-war books, Frank responded to criticism that his emphasis on “fact skepticism” indicated a lack of commitment to values – by acknowledging basic natural law values, and by emphasizing that his work aimed to improve fairness in the judicial system (and was intended to promote democratic government). To be sure, Frank did not abandon his earlier views and become a disciple of natural law. He continued to address the limits of the trial process, and to insist that psychiatry remained crucial to understanding the individual decisions made by trial judges. Natural law was not, and could not be, “practically meaningful” because “Natural law aims at justice, and at moderate certainty ... in the more or less abstract, generalized human formulations of what men may or may not lawfully do,” and “judicial justice must be justice ... in the concrete – in the courts’ decisions of the numerous particular individual cases.”

Frank was more vehement about his concern for democracy in the post-war era. Even before the Cold War dashed hopes for a world order regulated by a regime of international law, there was anxiety in the United States about the fate of democracy in the post-war period. Some of this anxiety stemmed from the example of Nazi Germany, which revealed the nightmare possible through tyranny of the majority. Frank’s post-war writings consistently noted and addressed this concern for democracy. In the sixth printing of Law and the Modern Mind, published in 1949, Frank emphasized that his efforts to demystify the trial court process were motivated by an effort to ensure fair trials, which were vital to democracy. It may be argued that Frank’s concern for democracy, acknowledgment of natural law, and proposals for reforming the judicial system resulted from his own efforts to “grow up” since he wrote Law and the Modern Mind in 1930. Yet it is also the case that these developments in Frank’s jurisprudence reflected the revival of natural law in the United States – a shift that itself resulted from and reflected concerns about totalitarian governments, in particular Nazi Germany.

49 Jerome Frank, “War Crimes: Punishment for Today – Precedent for Tomorrow,” Collier’s (Oct. 13, 1945), 11, 73 (“the principal purpose of the trials is not the regeneration or re-education of Germany. Far more important is the moral effect on other peoples. ... With the dropping of the first atomic bomb on August 6, 1945, lasting world peace became the immediate concern of everybody on this planet, including the hard-headed practical realists. For the maintenance of such peace a vigorous, organized world order is imperative. The Nuremberg trial signalizes the emergence of such a world order. ... To the prisoners’ dock are called men once mighty – among others, a Reich Minister Goering, a Foreign Minister Von Ribbentrop, a Labor Minister Ley, a Field Marshall Keitel. Their very presence dramatically affirms that a robust world morality is alive at this moment, that a world conscience is on its way to becoming an accepted world custom.”).

50 Duxbury, “Jerome Frank and the Legacy of Legal Realism,” 18 J. of Law and Society 194 & n.130 (In “the 1940s Frank ‘found’ natural law”). The Collier’s article is the earliest writing by Frank cited in Duxbury’s discussion of Frank and natural law.


52 Frank, LAW AND THE MODERN MIND, xix.
The issue of retroactivity, briefly taken up by Frank in his Collier's article, is at the heart of the debate between Professors Hart and Fuller. The specific question addressed in the exchange is the validity of laws that had been enacted by the Nazi government, and had been invoked to perpetrate wrongful acts. In German legal proceedings after World War II, could litigants defend their actions on the grounds that they were authorized by Nazi laws? This question paralleled the retroactivity debate over the Nuremberg prosecution: in the post-war German cases, the courts relied upon natural law principles to invalidate Nazi laws, and thereby denied litigants the protection claimed by positive Nazi law. In the Nuremberg trials, the prosecution effectively relied upon natural law principles to retroactively criminalize conduct that previously had not been illegal under international law. The specter of Nazi Germany framed the debate: Hart vigorously denied the connection between positivism and Nazism.\(^3\) Fuller - citing the history of positivism in German jurisprudence – argued to the contrary.\(^4\)

In presenting his case for positivism, Hart argued for the separation of law and morals through an account of the utilitarian philosophy of Bentham and Austin. He connected positivism with their political reforms. Bentham and Austin “were not,” Hart wrote, “dry analysts fiddling with verbal distinctions while cities burned, but were the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws.”\(^5\) When Hart turned to criticism of positivism based upon the example of Nazi Germany, he sought to downplay the argument by describing it as “less an intellectual argument ... than a passionate appeal supported not by detailed reasoning but by reminders of a terrible experience.”\(^6\) Nevertheless, Hart seemed defensive as he began his presentation.\(^7\)

Hart then addressed the retroactivity issue. After World War II, the German courts had to decide cases in which “local war criminals, spies, and informers under the Nazi regime were punished.”\(^8\) The cases presented a dilemma: the persons punished after the war had been prosecuted for actions authorized by laws enacted during the Nazi regime; now, however, those laws did not provide a defense because they were immoral, and therefore were not valid. For example, as Hart summarized:

“I in 1944 a woman, wishing to be rid of her husband, denounced him to the authorities for insulting remarks he had made about Hitler while home on leave from the German army. The wife was under no legal duty to report his acts, though what he had said was apparently in violation of statutes making it illegal to make statements detrimental to the government of the Third Reich or to impair by any means the military defense of the German people. The husband was arrested ... and was sent to the front. In 1949 the wife was prosecuted [pursuant to an 1871 law that had been in force since its enactment] in a West German court for an offense which we would describe as illegally depriving a person of his freedom. ... The wife pleaded that her husband’s imprisonment was pursuant to the Nazi statutes and hence that she had committed no crime.”\(^9\)

Ultimately the wife was found guilty of depriving her husband of his freedom. The German appellate court invalidated the Nazi law cited by the wife as “contrary to the sound conscience and sense of justice of all decent human beings.”\(^10\)

Although, as Hart noted, “[m]any of us might applaud the objective” of the court’s decision, Hart was disturbed by the result because the court had found that a validly enacted law did not, in fact, have


\(^4\) Fuller, “Positivism and Fidelity to Law,” 71 Harv. L. Rev. 657-661.


\(^7\) Hart, “Positivism and the Separation of Law and Morals,” 71 Harv. L. Rev. 616. Hart acknowledged that among the post-war critics of positivism were “German thinkers who lived through the Nazi regime and reflected upon its evil manifestations in the legal system,” citing Gustav Radbruch, who had “shared the ‘positivist’ doctrine until the Nazi tyranny” but essentially recanted those views after the war. Id.

\(^8\) Hart, “Positivism and the Separation of Law and Morals,” 71 Harv. L. Rev. 618.


the force of law. The better solution, Hart argued, would have been for the legislature to pass "a frankly retrospective law" that at least would have acknowledged that "in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems."\(^{61}\) Positivism demanded candor, and Hart believed it was necessary to expressly resolve the moral dilemma between delivering justice in the woman’s case and observing the duty to obey the law by passing a new law to supersede the prior Nazi laws.

Fuller did not believe that the case presented such a dilemma. In a more detailed response, he analyzed the Nazi statutes relied upon by the wife, and argued that they did not provide a valid defense because they did not have the quality of law. Fuller argued that one of the statutes, enacted in 1934, had been applied in an overbroad manner, while the other statute, enacted in 1938, was a "legislative monstrosity" that permitted "uncontrolled administrative discretion."\(^{62}\) Whether a court or an individual was required to follow such laws (simply because of their status as laws) or to instead "do what we think is right and decent" did not create a dilemma for Fuller. "I do not think it is unfair to the positivistic philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law," Fuller concluded.\(^{63}\) Although Fuller also endorsed the enactment of a new statute to invalidate the earlier laws, he justified that choice on entirely different grounds: the adoption of a new law would "symboliz[e] a sharp break with the past," and help usher in a new, lawful regime.\(^{64}\) Although Fuller did not discuss the Nuremberg trials, his remarks endorsed the natural law justifications for the Nuremberg trials.

IV. Nuremberg, Legal Realism, and Brown v. Board of Education

So far, I have discussed the influence of the Nuremberg trials and the example of Nazi Germany only in the American legal academy, in the decline of legal realism and the revival of natural law after World War II. Nuremberg and Nazi Germany also influenced the development of constitutional law during the post-war period as well. With respect to Nuremberg and the example of Nazi Germany, the case law runs the same way as the academic discussion — in the direction of natural law foundationalism.

Perhaps the most compelling illustration of the influence of Nazi Germany on the Supreme Court is — as Richard Primus and others have suggested — Brown v. Board of Education, in which the Court held that separate-but-equal public schools for African-American children violated the Constitution’s equal protection clause.\(^{65}\) The Nuremberg trials contributed to the growing sentiment against segregation which enabled the Court’s decision in Brown.\(^{66}\)

Brown represents the culmination of the developments discussed thus far in at least three ways. First, a foundational principle in the post-war world was racial nondiscrimination.\(^{67}\) Brown enshrined that principle in the law of the United States, in a morality-based decision.\(^{68}\) Second, Brown launched an era of greater judicial activism. This development was necessary to guarantee the protection of


\(^{62}\) Fuller, "Positivism and Fidelity to Law," 71 Harv. L. Rev. 652-54.

\(^{63}\) Fuller, "Positivism and Fidelity to Law," 71 Harv. L. Rev. 656.

\(^{64}\) Fuller, "Positivism and Fidelity to Law," 71 Harv. L. Rev. 661.


\(^{66}\) See William E. Nelson, "Brown v. Board of Education and Legal Realism," 48 St. Louis U. L.J. 795, 812 (2004) ("The Nuremberg trials, as well as massive press coverage of Nazi atrocities, served to inform the wider American public of the horrors of the Third Reich's Final Solution. All of this would help make the kind of easy yet deep racial prejudice common earlier in the century far less respectable after the Second World War.").


\(^{68}\) See Richard Fallon, "Legitimacy and the Constitution," 118 Harv. L. Rev. 1787, 1836 (2005) (arguing that Chief Justice Warren’s "reasoning" in Brown "can easily be understood as advancing a substantially moral justification.").
foundational principles, and reflected the post-war rejection of the legal realist's demystified depiction of the judge. Third, *Brown* demonstrated that although legal realism no longer remained viable as an autonomous legal philosophy, it continued to influence American case law and jurisprudence.69 This influence is shown in *Brown* in the Court's reliance upon extra-legal materials to support its decision—specifically, the social science studies involving dolls cited by the Court, which demonstrated that racial segregation "generates a feeling of inferiority."70

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69 See Robert J. Cottrol, "Justice Advanced: Some Comments on William Nelson's *Brown v. Board of Education* and Legal Realism," 48 St. Louis U. L.J. 839, 850 (2004) (concluding "that Brown made a difference precisely because the advocates urging desegregation and the Court that accepted their arguments tapped into the changed mood and needs of the nation. In doing so they proved that they had learned the realist lesson well.").

70 *Brown*, 347 U.S. 494 & n.11 ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority," citing psychology studies).
Rodger Citron

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Der Niedergang des Rechtsrealismus und die Wiedererstehung des Naturrechts