(Not printed at Government expense)

Experimental Jurisprudence and the "New Deal"

EXTENSION OF REMARKS

OF

HON. HOMER T. BONE

OF WASHINGTON

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ADDRESS BY JEROME N. FRANK, GENERAL COUNSEL OF THE AGRICULTURAL ADJUSTMENT ADMINISTRATION, BEFORE THE ASSOCIATION OF AMERICAN LAW SCHOOLS, CHICAGO, DECEMBER 30, 1933

Mr. BONE. Mr. President, I ask unanimous consent to have printed in the RECORD an address by Jerome N. Frank, general counsel of the Agricultural Adjustment Administration, before the Association of American Law Schools thirty-first annual meeting at Chicago, December 30, 1933.

There being no objection, the address was ordered to be printed in the RECORD, as follows:

EXPERIMENTAL JURISPRUDENCE AND THE "NEW DEAL"

(By Jerome N. Frank, general counsel, Agricultural Adjustment Administration, Washington, D.C., before the Association of American Law Schools thirty-first annual meeting, in Chicago, Ill., Dec. 30, 1933)

One of the most interesting facts some of us lawyers encountered in the early days of the whirl of the "new deal" in Washington was this: There were two kinds of lawyers working on the "new deal." The first were admirably adapted to aid in setting up new governmental experiments. They did so without strain. Unfatigued, they could work 16 hours a day every day in the week. The other group of lawyers worked against the grain; recurrently they stripped their gears; they were confused and soon became weary.

Now, the surprising fact was that the first group, on the whole, were those who, consciously or unconsciously, share that point of view toward legal techniques which has come to be known as "realistic jurisprudence."

Equally interesting was the fact that these same lawyers usually found as their most congenial clients and coworkers a group of economists who, consciously or unconsciously, share the point of view toward economic techniques which has come to be known as "experimental economics."

Parenthetically, let me say that realistic jurisprudence was an unfortunate label, since the word "realism" has too many conflicting meanings. In the light of its congeniality with experimental economics, I suggest that realistic jurisprudence be renamed "experimental jurisprudence" and that those who lean in that direction be called "experimentalists."

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The attitude of the experimentalists among the lawyers and economists cannot be adequately compressed into a few words. But briefly it can be described thus: These men are critical students of institutions but are committed not to mere detached study but are devoted to action on the basis of their tentative judgments. They are constantly skeptical of their own formulations but not to the point of paralyzed inaction. Especially do they repudiate fixed beliefs as to the eternal validity of any particular means for the accomplishment of desired ends. They are ready at all times to acknowledge their own mistakes. They admit that all their tentative proposals are, and in the nature of things must be, based upon partial and unavoidable ignorance, for they are keenly alive to the shifting nature of many of the so-called "facts" upon which all human action is based. They are not—as some of their detractors would have it—delighted with human fallibility, but accept that fallibility as one of the important factors which must be faced honestly and courageously. They are devoted to increasing the use of reason, but unafraid to confess how small a part reason has heretofore played in human affairs; they hope, indeed, that by recognition of the immense stretches of unreason, its proportions can be reduced. Their skepticism as to the best means of accomplishing desired ends is not a dilettante iconoclasm; it is more hardy and athletic. To them, skepticism is indeed a means, not an end in itself; its terminus, they think, is not the mere pleasure of doubting but the consequences achievable only through effective and constructive doubting.

The experimentalists, be they economists or lawyers, share also these attitudes: They tend to look upon human activities with the eyes of anthropologists. Economics is often thought of as the relation of men to things. The experimentalists see it rather as, in large part, the relations of men to one another with respect to things. Economics, thus considered, must concern itself principally with human customs, habits and beliefs. It has to do with the effects of the interactions of those customs, habits and beliefs. To the extent that the folkways are unalterable, economics deals with unalterables; but to the extent that the folkways are flexible and variable, economics is flexible and variable.

Most of these experimentalists, too, are characterized in these troubled days, by their primary regard for the immediate. They begin with the present, make that their constant point of reference, work backward from and forward to it. I do not mean for a moment that they neglect the past; among them are profound and earnest students of history. The point is that what they seek is a better future. But they believe that, insofar as intelligence can play a part in shaping the future, it must deal informedly with present possibilities. They regard the future not as unlimited in its possibilities, but as conditioned by that residue of the past we call the present. Yet they do not consider that conditioning as an unalterable determination of what is to come. That is to say, they are not rigid determinists, but "possibilists." A considerable, yet limited, variety of future events are made possible by past and present events; within the limits of those possibilities, both chance and intelligence will play their parts. Within those limits, the experimentalists seek to increase the role of intelligence.

All this is loosely vague. Partly the vagueness is inescapable. Largely it is due to my own ineptitude of expression. (To some extent it is the result of haste, for I must confess that the pressure of work has forced me to write this paper, without opportunity for reflection or careful revision, just in time to present it to this meeting.)

But vague though it is, perhaps this brief outline will serve, for present purposes, to describe the point of view of some of

the men who are, at the moment, acting as humble servants of that master experimentalist, President Roosevelt.

For the " new deal ", as I see it, means that we have taken to the open road. We are moving in a new direction. We are to be primarily interested in seeking the welfare of the great majority of our people and not in merely preserving, unmodified, certain traditions and folkways, regardless of their effect on human beings. That important shift in emphasis is the vital difference between the " new deal " and the " old deal " philosophy.

It is the leaders of this new movement whom the experimentalist lawyers in Government find it delightful to serve. For those leaders repudiate Sabbatarianism. They reject the notion that governmental devices must, at all costs to human happiness, jibe with inherited principles of what can or cannot be done by Government for human well-being. When they see that those inherited principles have led to misery, to insecurity, to bread lines and broken lives, they refuse to accept those principles as Molochs to which human beings must be offered as a sacrifice. Principles are what principles do. And if the old principles, which the high priests of the " old deal " worshiped, dictated the unhappiness that we call a depression, then, say those men, those principles are not divine but satanic, barbarous, and cruel. We must find new principles, new guides for action, which will tend to produce happiness and security in the place of anguish and confusion.

These leaders start with those aims and ends and work backward in their search for adequate generalizations, that is for tentative principles of action. Their principles are the result of creative thinking in the interest of what is best for millions of men, women, and children. Government they want thoroughly to humanize. Governmental devices, they believe, should be revised or invented with human welfare as their constant measure of success.

Now you can see why the experimental-minded Government lawyers work with pleasure for such clients. For experimental jurisprudence (heretofore dubbed realistic jurisprudence) is of like mind in respect of legal techniques. It has frequently expressed its doubt as to the efficacy of legal thinking which purports to begin with so-called " legal principles."

It inclines to the belief—and here, for lack of time I am talking sketchily—that many judges, confronted with a difficult factual situation, consciously or unconsciously, tend to commence their thinking with what they consider a desirable decision and then work backward to appropriate premises, devising syllogisms to justify that decision. They see that many judges phrase the two vague variables (the so-called "facts" of the case and the so-called "rules of law") so as to produce opinions aesthetically and logically satisfactory in support of judgments and decrees in accord with what they think just and right. It seems to those experimentalists that those judges who do their work with the most dispatch and effectiveness are precisely those who tend consciously thus to begin with their conclusions and work backward to the available premises. These experimentalists believe that, to the extent that a judge poses to himself as Jove, to the extent that he denies or fails to realize his own human fallibility, to the extent that he actually pictures himself to himself as always arriving at all his decisions as a result of strictly logical reasoning which begins (without any possibility of choice) with the only available applicable rules of law—to that extent he builds up friction and squanders his time in lost motion. Marshall, Story, and Holmes, for instance, were effective judges because they were more aware than many of their colleagues of their own thinking processes, because where possible, they more or less deliberately selected or cre-

ated those premises which justified results they considered desirable.

(This is an abbreviated statement which, because of its brevity, may seem exaggerated. I ask leave to incorporate by reference other writings of myself and others such as Arnold and Llewellyn, in which this point of view is more elaborately and cautiously set forth.)

What is true of the judge is no less true of the lawyer. If he is aware of his technique, if he sees clearly that his role is to justify, if possible, what his client desires, he can work with comparative ease and precision. But if he must attitudinize to himself, if he must pretend to himself that he always begins with undeviating fixed legal principles and, by sheer good luck, happens to arrive at a logical deduction from those principles which merely happen to accord with his client's wishes—then he wastes time. proceeds unnecessarily by indirection, and burns up his energies needlessly.

The experimentalist has learned from experience that usually (of course not always, but in most cases), if he starts with his conclusion, he can find satisfactory premises. There are, so to speak, plenty of vacant premises—or at any rate, premises which can be sufficiently repaired or remodeled.

Notably is this true in the field of what is known as "constitutional law." Often, too, the experimentalist government lawyer finds that the same is true in the interpretation of highly ambiguous or highly generalized statutes. Let me illustrate the difference between the experimentalist and the Jovian lawyer confronting an act of Congress. I have in mind an interview (which, for obvious reasons, I am changing as to details) between two brilliant young government lawyers, Mr. Try-it and Mr. Absolute. They had been asked whether, under a certain statute, a proposed program for the relief of the destitute would be lawful. Mr. Try-it started with his objective. "This," he said, "is a desirable result. It is all but essential in the existing crises. It means raising the standard of living to thousands. The administration is for it and justifiably so. It is obviously in line with the general intention of Congress as shown by the legislative history. The statute is ambiguous. Let us work out an argument, if possible, so to construe the statute as to validate this important program."

But Mr. Absolute attacked the problem differently. He must refuse, he said, to consider the desirability or urgency of the proposed project. These were irrelevant aspects of the problem which, if he were a judge, he would be compelled to ignore. He was the legal adviser of Government and must be what he termed "calmly judicial", aloof and indifferent to the ill effects of an adverse conclusion. That the project would be useless if not promptly initiated and that Congress would not convene for many months were factors he had no right to take into account. Nor was it important that delay might have wide political consequences which might even lead to disruption of Government in wide areas of the country. Such political possibilities or probabilities were not for the judge or Government lawyer. They were reserved for the legislature. If he were a judge he would decide that the "true" pertinent legal principles must prevail absolutely, whatever happened, even if the very governmental structures of which his court was a part was wrecked by a social upheaval resulting from his decision. In that frame of mind and no other he would approach this statute. So he began by reading and re-reading its ambiguous words, in the light of principles of statutory interpretations as laid down in reported judicial opinions.

It is interesting to note that, after many hours of labor, Mr. Absolute agreed with Mr. Try-it. Their written opinions were interchangeable. But Mr. Try-it wrote his opinion in about one-fifth the time and with one-tenth the energy used by Mr. Absolute.

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Both opinions preserve the Jovian fiction. Neither opinion reveals on its face any concern with the usefulness or social value of the proposal which was found to be legally valid. But I suspect that Mr. Absolute was as much influenced as Mr. Try-it by those factors. The difference consists in the direct and indirect influence of those factors in the thought processes of those two lawyers.

It must be added that there are, of course, instances where a desired objective is impossible, where, for instance, a statute plainly and unmistakably or by clear implication forbids action, however desirable, where the action is outside the legislative intent. But the experimentalist lawyer is quicker to find avenues of escape from such impasses when such escapes exist. It should be said, too, that while for any lawyer, the wishes of his client ought to be paramount where achievable, yet if those wishes are repugnant to him, he can always withdraw. This is peculiarly true of the Government lawyer; if the executive asks him how he can lawfully do something which is revolting to the lawyer, the latter can always resign.

In many ways those who sympathize (whether or not avowedly) with experimental jurisprudence have found it easy to work for the "new deal." It is not only because they are less procrustean and more flexible in their techniques. It is because legal institutions and devices are constantly viewed by them as human contrivances to be judged by their every-day human consequences. They are (as I have suggested elsewhere) followers of Holmes as the founder of non-Euclidean legal thinking—a kind of thinking which makes it easy to test legal postulates by their results in human lives. Accordingly, the experimentalists are stimulated by the opportunity to help contrive new governmental agencies to be used experimentally as means for achieving better results in agriculture, industry, labor conditions, taxation, corporate reorganization, municipal finance, unemployment relief, and a multitude of other subjects.

It may be worth while to note that the experimentalist lawyers are not the products of any one law school. They come from Columbia, Harvard, and the law schools of the Middle and Far West. The experimentalist attitude may have been fostered, in its inception, at Columbia and Yale, but today it is an attitude which has spread everywhere. It is part of the spirit of the times.

I have said that these experimentalist lawyers worked admirably with the experimentalist economists. I might have said that they and those economists often play interchangeable roles, the lawyers thinking in terms of experimental economics, the economists thinking in terms of experimental jurisprudence. It is perhaps because their thinking contains this experimental economic element that these lawyers are denounced as radicals. Of course the term "radical" is merely a verbal brick. In place of giving reasons for disagreeing with an idea, it is the habit of some people to refuse to make their objection explicit, but instead to try to demolish the proponent of the idea with an emotion-stirring epithet.

The fact is, that if the word "radical" means a ruthless, thoughtless destroyer of cherished institutions, those who pose as the enemies of the so-called "radicals" are themselves the most dangerous of radicals. They are recklessly ignoring the gravest kind of evils, which, rather than the correctives being applied to those evils, are the real dangers to the social order. For if force ever undermines the present American system, it will be because of the stubborn and blind refusal of a few powerful beneficiaries of the old order to accept improvements, and of their attacks on and obstruction to needed revisions, of traditional business practices. Let me briefly indicate what I mean.

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The majority of the American people are still devoted to the profit system. They still believe that there is substantial worth in using the desire for individual profit as one of the important incentives in getting done the necessary work of the world. Although the profit system, as it has worked recently, seems to have worked poorly, most Americans believe that, properly controlled, it can work well. As long as the majority of the American people continue to cherish that system, it would be impossible, even if anyone considered it desirable, to abandon it in favor of another system. To do so would be to fly in the face of our current folkways.[1] The course of the wise statesman today is clear, if he wishes to avert complete breakdown. He will seek, so far as possible, to eliminate the evil aspects of the profit system. He will give that system a fair trial.

For the truth is that the profit system has not heretofore been given a fair trial. As I see the "new deal", it is to be an elaborate series of experiments which will seek to show that a social economy can be made to work for human welfare by readjustments which leave the desire for private financial gain still operative to a considerable extent. It will permit the profit system to be tried, for the first time, as a consciously directed means of promoting the general good.

We are to use the method of trial and error to demonstrate to what extent, when modified so as to make it work at its best, the profit motive can adequately promote social well-being. It is no longer to go on uncurbed, anarchistically, and unguided. We are to have the opportunity to see how an intelligently controlled profit economics (supplemented by important nonprofit devices such as Public Works, the Federal Surplus Relief Corporation and others) can bring an abundant and secure life to the majority of our citizens. We have witnessed in the past few years how profit economics, if not intelligibly directed, can lead to a smash-up. Our people have lost faith in the hit-or-miss way of running our industries and our agriculture. But the "old dealers", in or out of politics, refuse to recognize the dangerous antagonism of the bulk of our people to the old ways in their undirected form. The "old dealers" want to restore both the evil and the good of the 1925–29 days. If they were successful, they would in short order destroy completely what can be preserved of those old ways. In their indiscriminate reverence for the past, they are inviting chaos and perhaps violent destruction.

And yet they hurl the word radical at those who are trying to show that, stripped of its worst features and intelligently revised, the traditional economics of America can, in considerable part, be conserved. They denounce those, engaged in that experiment, who would eliminate any small feature of the preexisting anar-

[1] A garbled excerpt from this paper has received some circulation and has provoked comment which indicates a misunderstanding of the meaning of the word "folkways." That word was invented years ago when a great, conservative professor of political economy, William Graham Sumner, published his book in 1906 called "Folkways." He there stated that he had formed that word on the analogy of words already in use. "I mean by it," he said, "the popular usages and traditions, when they include a judgment that they are conducive to societal welfare, and when they exert a coercion on the individual to conform to them, although they are not coordinated by any authority." In other words, "Folkways" means the well-established customs of the country.

It is interesting to note that on the same day when this paper was delivered, and before the same association, Judge Joseph C. Hutcheson, of the U.S. Circuit Court of Appeals for the Fifth Circuit, spoke of how his thought had been enriched by Sumner's book on Folkways.

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chistic method of conducting industry or banking. They are playing the role of the Bourbons, they are fostering violent change, in their resistance to unavoidable modifications of institutions whose uncontrolled workings have produced untold miseries and consequent discontent.

I cite the following as an illustration of the extreme and absurd character of their opposition to changes in what they consider the sacredness of the old order: There is an industry the components of which have frequently been in the courts with respect to their alleged violations of the antitrust laws. They have asked the Secretary of Agriculture to enter into an agreement with them which would grant them substantial exemptions from the rigors of the Sherman Act. It has been suggested that if those exemptions are granted to that industry, thus reversing a 40-year-old governmental antitrust policy, the Secretary should reserve the right to examine their books (of course, keeping confidential the information he thus obtains) since in no other way than through such access to the books can he accurately ascertain whether and to what extent the industry exercises these exemption privileges in the interest of or adversely to the farmers and consumers. This right to examine books has been generally asked by the Agricultural Adjustment Administration of industries seeking such exemptions, and this right has been generally granted. Yet this particular industry has repudiated the suggestion that it be treated in like manner, intimating that those who advocate such book examination are dangerous revolutionaries who are seeking to subvert the fundamental principles on which American business has been conducted and threatening to overturn the profit system in toto. Their attitude is almost humorous when it is remembered that the Bureau of Internal Revenue already has complete access to their books. This kind of resistance to such moderate measures is indicative of the die-hard Bourbonism which condemns any change as dangerously destructive. For it indicates that there are still some rock-ribbed standpatters in this country who have forgotten all too soon the disastrous adventures of Insull and Kreuger, the closing of the banks, the shutting down of schools, the horrors of unemployment, the outrageous consequences of an unplanned economy to millions of farmers and their families. In their stupid forgetfulness they urge us to go back as soon as possible to an era of drunken prosperity, which led inevitably to this prolonged and horrible morning-after. But the bulk of our people are not thus forgetful. They want peaceful, tranquil, well-ordered lives. The "old dealers", I repeat, in their blind opposition to the great experiment, are indeed the extreme radicals. For the Bourbons are always the fomenters of violent and destructive revolution.

As a result of an economic catastrophe, we are in the midst, then, of a period when experimentation is an imperative necessity. The old folkways brought us to the verge of breakdown. Those folkways need to be revised. And a great leader is hard at work on that job. He is trying to give the forgotten man a decent life, free of gnawing insecurity and with adequate leisure—aims made possible of achievement by the remarkable accomplishments of applied science in modern times. Perhaps within the near future these aims can be worked out. If and when they have, then perhaps experimentation can be diminished (although I happen to believe that it has a permanent value). But in the present crisis it is indispensable. In that crisis, experimental jurisprudence can and should perform an important and useful function. And, I submit, a jurisprudence which does not today, in some measure, fulfill that function is of little value.

I said previously that, at present, most of the experimentalists, because of their interest in a better future, have a primary regard

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for the immediate. I do not mean by that to indicate that they are not interested, and intensely, in speculative and historical studies. (To illustrate from first-hand information, if I may: I consider myself a humble experimentalist and I can report that about a year ago I spent many a night hour, after the day's routine tasks were over, striving to work out, from available material relating to so-called "primitive" communities, the social functions of courts and lawyers.) Nor would it be proper to portray experimentalism as prosily utilitarian. Jurisprudence, experimental or otherwise, can be an amusing game, and intellectual games should not be disparaged even by the practical minded. The history of mathematics, for instance, shows that what begins as an intellectual game may turn out, centuries or decades later, to be amazingly practical. But at this juncture of the world's affairs, a jurisprudence which is primarily an amusing game seems trifling. And it is the ability of experimental jurisprudence easily to lend itself to present practical undertakings to which at the moment I direct your attention.

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