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THE JURISPRUDENCE OF FRANCOIS GÉNY

THOMAS J. O'TOOLE †

ONCE AGAIN we are turning to fundamentals, for the circumstances of our age lay bare the radical importance of ideology. To lawyers this means a new emphasis on criticism and reform, requiring a re-examination of the jurisprudential basis of our legal rules. Throughout all of recorded history whenever law has been "in quest of itself"<sup>1</sup> some form of what we call "natural law" has come prominently to the fore. In our own times this has once again been true.<sup>2</sup> But natural law has always been subjected to vigorous and even violent attack, and sometimes its critics have had their task made light by the mode in which natural law has been treated by its avowed friends.<sup>3</sup> Not infrequently this has been due to an over-pretentious statement of the role of natural law concepts in the development of positive law. No greater service can be performed for the natural law position than a careful and professional survey of the relationship between this jurisprudential position and actual systems of living law.

One of the most impressive attempts at such a study was made by Francois Gény; but, never having been translated into our language, it has been largely overlooked both here and in England.<sup>4</sup> Our writers who profess a familiarity with Gény have unanimously indicated a profound respect for his achievement. He is known, however, principally for his *Méthode d'Interpretation*,<sup>5</sup> a critique of what had been

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1. Phrase borrowed from the title of FULLER, *LAW IN QUEST OF ITSELF* (1940).

2. "The most striking fact about current national developments is the rise of natural law philosophies almost everywhere." Hall, *The Present Position of Jurisprudence in the United States*, 44 VA. L. REV. 321 (1958).

3. See the critique in POUND, *LAW AND MORALS* 33 (2d ed. 1926).

4. Hereinafter cited as *SCIENCE ET TECHNIQUE* (Paris, 1914-1924). A translation of volume 2, chapter 6, is printed in appendix 1 of STAMMLER, *THEORY OF JUSTICE* (Husik trans. 1925).

A summary of his career appears in FÊTES UNIVERSITAIRES DE L'UNIVERSITÉ DE NANCY DES 28, 29, ET 30 NOVEMBRE 1934, on the celebration of his fiftieth year at Nancy.

5. GENY, *MÉTHODE D'INTERPRÉTATION* (Paris, 2d ed. 1919), hereinafter cited as *MÉTHODE*. One chapter is translated in 9 *MODERN LEGAL PHILOSOPHY SERIES* 1-40 (1921). The prevailing method of interpretation at that time (and throughout the entire 19th Century) was an artificially mechanical one. It was assumed that the Code provided a definite answer to any case which could ever possibly arise. This fictional

the traditional method of construing the French Civil Code. But of much broader importance is his four-volume *Science et Technique en Droit Privé Positif*, in which there is a systematic examination of the basic problems of law (*droit*), its nature and sources, with scholastic natural law conceptions as the point of departure. In the absence of a translation of even any significant fraction of this classic, a concentrated summary of Gény's views is here presented.

## I.

### GÉNY'S METHOD.

The basic concept in the jurisprudence of Gény is the division of law into two elements: the element of knowledge and the element of action. The one he calls "*science*" and the other "*technique*."<sup>6</sup> This division arises out of the very nature of law, which calls for the formulation of rules of conduct and for the application of these rules to the varying conditions of human society. Gény sees one side of law (the formulation of its basic principles) as a *normative* study; while the other aspect (the application of these rules in action) is a *practical* study.

It should be noted how crucial is this distinction. From it flow nearly all of the distinguishing features of Gény's jurisprudence. The normative study of law will admit of a fairly abstract development of basic rules along traditional natural law lines, while the practical study will permit the adaptation of these rules to the exigencies of life with variations to fit the particular time and place. The normative study will suggest human reason as the main instrument; the practical study will rely upon the observation of social facts and phenomena.

Thus does this fundamental cleavage of law determine the main outlines of Gény's entire work. It is, however, not a mere assumption adopted for the convenience of its consequences. Gény is painstaking in

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view, abandoned by later Codes, required an abstract, logical extension of the language of the Code. All decisions had to rest upon some provision of the Code, hence grammar, semantics and logic were the exclusive tools of the jurist. As Kantorwicz has said, the Codes were like slot machines—put in the facts and out come the answers. Perhaps a little juggling and joggling would be necessary, but the result was always ascribed not to the manipulation but to the machine itself. In France it was Gény who led the attack on this mechanical interpretation of the Code Napoleon. His *MÉTHODE* incisively analyzed the folly of the traditional mode of judicial interpretation and proposed a new approach which he styled "free scientific enquiry" (*la libre recherche scientifique*). Under this view a Code is seen not as the final point in the development of the law but only as a general and somewhat tentative outline. It is, indeed, never much more than a compendium of pre-existing customary and judicially declared law. The Code is a guide rather than an end. The end of law is justice, and in applying its provisions the Code must be read in the light of this objective and must be enriched by a full appreciation of the demands of justice in the particular case.

6. 1 *SCIENCE ET TECHNIQUE* 95-100 (Paris 1914-1924); 4 *id.* 1-46.

laying a foundation for all his conclusions. The division of juridical study into normative and practical elements is a result of a careful consideration of the epistemological bases of jurisprudence. Yet Gény recognizes the danger of excessive concern over philosophical premises. Since juristic study is designed to have its effect in action, refinements of philosophical principles can but serve to estrange others whose cooperative action is needed. As he himself expresses it: "Truly since law is intended for all and can develop only by collective efforts, it is not reasonable to think that it depends upon a general idea of the world which in fact would find itself foreign to most of those concerned, which one would not know how to make acceptable to the majority of juristic scholars, and whose demands would prevent any juridical developments."<sup>7</sup>

However disarming may be Gény's introduction to his philosophical foundations, his listing<sup>8</sup> of the principles of "common sense" gives a fairly complete enumeration of the postulates of Scholastic philosophy: recognition of both mind and matter; duality of subject and object of knowledge; objectivity of sense knowledge manifested by the common results among thinking beings; infallibility of a logic based on the principle of identity and its corollaries (non-contradiction and excluded middle); principle of sufficient reason and its corollaries (causality, laws); human aspiration towards an intelligible end which alone can give purpose to the world; moral principle of duty based on distinction of right and wrong revealed by conscience (and involving human free will).

We shall soon see that however explicitly Gény has exposed his personal philosophical preferences, in the actual development of the problems of law he dilutes his premises and makes a conscious effort to base his conclusions on grounds which would be acceptable even without reference to Scholasticism. This appears to be due not only to the fear of isolation which we have mentioned above, but also to a recognition that on many questions concerning law purely factual considerations are at least as important as are rational constructions.

This is not to say that Gény approaches in practice a pragmatic position. Such views are rejected by him on epistemological grounds, and he denounces pragmatism as a philosophy ". . . which completely abolishes knowledge in favor of a shifting poorly defined action which defies all fixed rules. . . ."<sup>9</sup> Characteristically, however,

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7. 1 *id.* 72.

8. 1 *id.* 74.

9. 1 *id.* 75.

Gény recognizes the utility of pragmatic confirmation of truths arrived at by judgment.<sup>10</sup>

In developing his self-styled "modern realism"<sup>11</sup> Gény is greatly concerned over the limitations of rational knowledge. The mind is the sole instrument for dissecting the essence of things, but the mind can operate only by a schematic analysis expressed by concepts, symbols, and words. The world, however, is in perpetual flux. How can the mind, using motionless and abstract concepts, embody a real picture of the moving universe?

For a solution of this problem Gény turns to the "*nouvelle philosophie*" stemming from Bergson. To compensate for the limitations of mental abstractions he proposes to use intuition. Gény sees intuition as a means whereby knowledge can capture action: "At base intuition appears to us as a kind of mental picture of things taken in their moving complexity and, so to speak, in their life, without attempt to analyze and, what is more, with an entirely contrary effort tending to maintain the fleeting unity of reality under a single view."<sup>12</sup>

Even in this limited acceptance of Bergsonian intuition Gény opened himself to criticism from all sides. Neo-scholastics would resent this modification of the principle of the objectivity of truth ascertained by reason,<sup>13</sup> and pragmatists have claimed that intuition is a paraphrase for knowledge based on pure faith.<sup>14</sup> But as actually applied by Gény, the theory of intuitive knowledge is used principally as a constant reminder of the dangers of abstract reasoning. Even though abstractions are the necessary instrument of reason, reducing and unifying knowledge, that very same process tends to divorce our concepts from reality, emptying them of all positive content, and giving them an ontological reality of their own. To mitigate these dangers the jurist should try to check his abstractions against an intuitive appreciation of living reality and should also put his conclusions to pragmatic verification.

It is in this connection that Gény refers to the place of sociology in jurisprudence. The data gathered by sociology can be used in the pragmatic testing of the products of reasoning.<sup>15</sup> Such data will also play an important part, as we shall see, in the shaping of two of the four groups of "starting points" for legal rules and judicial interpretation.

10. 1 *id.* 86.

11. 1 *id.* 74.

12. 1 *id.* 143.

13. For a neo-Scholastic critique of Bergsonian intuition see MARITAIN, *LA PHILOSOPHIE BERGSONIENNE* (2 ed. 1948).

14. See Wu's essay in Stammler, *op. cit. supra* note 4, at 570.

15. 1 *SCIENCE ET TECHNIQUE* 91 (Paris 1914-1924).

However, Gény explicitly asserts that the usefulness of facts and of induction does not extend to the basic principles of law, for principles rest ultimately not on facts but on reason. More specifically, he denies the claim, current among some sociologists, that facts can give us "scientific morality." Morality can arise only out of a higher conviction than is born of facts.<sup>16</sup>

It is evident that, after starting with classical Scholastic epistemology, Gény has mixed with it elements of intuitive and pragmatic modes of knowledge. One or another of the elements will be stressed as demanded by the nature of the object to be studied. Reason and intuition will play the major part in the scientific discovery and organization of the starting points for juristic rules; the technical work of devising concrete rules of law which will direct actual life along the lines indicated by the starting points calls for a more pragmatic approach.<sup>17</sup>

## II.

### THE NATURE OF LAW.

In analyzing the nature of law Gény starts with a purely rational consideration of the nature of human society. Man living among his fellows and having his own desires meet similar and rival desires of other men, finds that conduct must be subjected to certain rules. These rules are suggested by reason, but can be broken by rebellious wills, and hence need a social sanction adequate to achieve their end.<sup>18</sup>

Some of these rules dictated by reason are incorporated in religion and direct man towards a higher ideal, ordaining duties towards God and towards one's fellow men. The only sanction for these is the interior voice of conscience. Certain rules of practical morality arise from aspirations similar to those of religion, but have the additional sanction of public opinion. Customary rules, such as etiquette, likewise are supported by public opinion. Law differs from these other rules in that it can have and tends to have an external, and even coercive, sanction. This *tendency towards social constraint*<sup>19</sup> is the first distinguishing feature of rules of law (droit). This feature, however, is merely a quantitative difference in the strength of the sanction. The essential distinguishing mark of rules of law is that they are

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16. 1 *id.* 92; 2 *id.* 80, 85, 110.

17. Recognition of the validity of pragmatic methods for certain purposes is typical of neo-Scholasticism. See, for example, MARITAIN, *SCHOLASTICISM AND POLITICS* 31-41 (3d ed. 1954).

18. 1 *SCIENCE ET TECHNIQUE* 43-45 (Paris 1914-1924).

19. 1 *id.* 48.

designed necessarily and exclusively to realize justice.<sup>20</sup> "Fundamentally the law finds its proper and specific content only in the notion of justice, a primary, irreducible, and indefinable idea implying essentially, it appears, not only the elementary precepts of not harming others (*neminem laedere*) and of giving each his due (*suum cuique tribuere*), but also the more profound thought of an equilibrium to be established among conflicting interests with a view to assuring the order essential to the maintenance and to the progress of human society."<sup>21</sup> Just as the ideas of the divine and of the good suggest the rules of religion and of morality, so does the idea of justice suggest the rules of law.

In this analysis of the nature and end of law Gény proceeds in a typically Scholastic fashion, but the result which he reaches is one which could be supported by the followers of quite different philosophies. Indeed, the statement of justice in terms of an equilibrium of conflicting interests is familiar to several of the principal schools of contemporary jurisprudence. His view of law as merely one of several forms of social control is equally familiar.

Having thus defined rules of law in general, Gény proceeds to consider positive law, which he treats as merely a body of rules adapted to the exigencies of time and place for the purpose of achieving in actual operation the balance of conflicting interests which is the essence of justice.<sup>22</sup>

It is in the formulation of the rules of positive law and in the interpretation of those rules that Gény's important distinction between science and technique comes into operation. Law requires a work of knowledge to establish its basic principles, and a work of action to formulate rules which will apply those principles to the varied and shifting exigencies of actual life. The scientific enquiry yields the basic principles, or starting points,<sup>23</sup> or postulates. The technical work takes the starting points as given and proceeds to formulate the actual and variable rules which will achieve the desired ends in a given time and place.

### III.

#### THE STARTING POINTS.

We have already indicated in connection with Gény's critique of "scientific morality" as formulated on the basis of purely factual studies

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20. 1 *id.* 49.

21. 1 *id.* 50.

22. Cf. POUND, AN INTRODUCTION TO PHILOSOPHY OF LAW 98-99 (1922).

23. For this translation of Gény's *donnés*, see Pound, *50 Years of Jurisprudence*, 51 HARV. L. REV. 444, 465 (1938).

that he was firmly of the opinion that only reason could supply us with directive or normative principles. That is, of course, merely an alternative statement of his belief in the need for natural law. Having postulated an eternal and immutable distinction between right and wrong, together with a common human aspiration towards a higher ideal, Gény is entirely consistent in saying: "Only natural law, reduced to its necessary minimum, but so much the more assured in its principle once the content is more modest and more workable, furnishes the indispensable basis for a truly scientific elaboration of positive law."<sup>24</sup>

Being aware of the many criticisms to which classical natural law has been subjected, he prepares to meet these criticisms and to make whatever modifications of the theory are found necessary.

At the very outset he denies any intention to derive a body of rules of natural law from any single fact. Having in mind particularly the jurisprudence of Duguit, which observes the fact of "social solidarity"<sup>25</sup> and attempts to build a system of natural law upon that single concept, Gény vigorously asserts that ". . . a single principle, general and abstract, cannot contain the rich variety of rules necessary adequately to direct social life . . ." <sup>26</sup> With a view to 18th century thought he emphasizes that the nature of the individual man or the idea of liberty would be equally inadequate primary concepts. A variety of basic concepts, particularly including a picture of man in his relation to others<sup>27</sup> must be used as a foundation.

There is another danger to be avoided. It is commonly said of systems of natural law that they tend to become mere ideal pictures of the particular positive law observed by the author. Stating it in a more general fashion, Pound has written that all philosophical theories of law tend to bear a close relationship to the actual legal phenomena of the time and place.<sup>28</sup> Gény is well aware of this danger, and disavows any relevance of such a charge to the proposals which he is making. His natural law is to have a subjective origin, with its universal validity being checked by correspondence with the subjective ideas of others.

Finally we come to the most penetrating criticism to which natural law has been subjected: the charge of ontological dualism. A body of natural law is derived by reason from basic concepts; the products of that reasoning are themselves concepts; but natural law thinkers assert

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24. 2 SCIENCE ET TECHNIQUE note iv.

25. See DUGUIT, LAW AND THE MODERN STATE (Laski trans. 1913).

26. 2 SCIENCE ET TECHNIQUE 14 (Paris 1914-1924). See also 21 REVUE TRIMESTRIELLE DE DROIT CIVIL 779 (1922).

27. 2 SCIENCE ET TECHNIQUE 18 (Paris 1914-1924).

28. POUND, LAW AND MORALS 107-08 (2d ed. 1926).



that these rules, which are mere concepts, actually exist and have reality.<sup>29</sup> In his discussion of natural law, Gény makes no direct reference to this criticism. Yet it is evident from his remarks on epistemology that he is well aware of the tendency of the human mind to consider mere mental concepts as really existing objects. The mind, however, must act conceptually. To the extent that mental concepts correspond with reality there is justification for treating those concepts as real. "Natural law does not consist solely of the idea we make of it; it has a true reality."<sup>30</sup>

How, then, can we ascertain these rules of natural law which are to be not mere artificial abstractions of the human mind, but laws residing in the very nature of things? As Gény states the problem: ". . . it is here essentially a question of recognizing in the vast Universe surrounding us, the total premise (*donné*) of positive law separated as much as possible from all artifices, and imposing itself on man by whatever powers he can grasp it, be it by a truly scientific study or by means of more obscure forces however one designates them: subconscious, faith, intuition, sentiment."<sup>31</sup> This problem of finding in nature rules which the will ought to agree to follow is the problem of all ethical study.

The answer to this problem calls for a general philosophy, and Gény states that he finds the most satisfactory answer in Scholasticism. He admits that he should prefer to solve the question on the level of palpable facts, but considers this impossible. From mere facts we can never derive "oughts"; nor can we therein discover a set of values which will be needed in establishing an equilibrium of interests.<sup>32</sup> Purely factual study is limited to results which are merely descriptive of those facts.

But recalling his discussion of the futility of basing juristic ideas on a general philosophy which will prove unacceptable to the majority of jurists, Gény proposes to pursue the enquiry on a different level. Regardless of one's general philosophy, agreement can be reached which will be sufficient for practical purposes and which can provide the basis of an enquiry into the starting points for positive law. Intermediate ends of social organization can be agreed upon and secondary principles established.<sup>33</sup> Indeed, Gény admits that most juridical rules

29. CHROUST, *On the Nature of Natural Law*, INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 72-74 (1947). To the same effect is KORKUNOV, GENERAL THEORY OF LAW 134-38 (Hastings trans. 1922).

30. 2 SCIENCE ET TECHNIQUE 275 (Paris 1914-1924).

31. 2 *id.* 353.

32. 2 *id.* 358; 4 *id.* vii.

33. 2 *id.* 362-64.

receive almost unanimous acceptance by virtue of simple concepts and value judgments reflected in the general opinion of the public.

Pursuing the enquiry along these lines Gény finds four groups of starting points for the elaboration of all rules of positive law. Three of these four groups can certainly be accepted and investigated entirely apart from the natural law preferences of Gény. The basic groups are: factual postulates, historical postulates, ideal postulates, and rational postulates.<sup>34</sup>

The factual elements in our starting points hardly need to be elaborated. They are postulated by nature, and embrace physical and psychological phenomena. We cannot escape from them, and hence must give them due weight, for they form the matrix in which our rules of positive law will have to operate.

The historical elements in our starting points include the entire body of human experience. It imposes itself on our study both *de facto* and legitimately. Included in this group is the received body of judicial rules and custom, together with the record of their operation in the past.

The idealistic elements included by Gény contain the postulates of public opinion as of the given time and place. They are not universal nor are they eternal, but merely express the ideals of any given civilization.

Gény uses the institution of marriage under the law as an example of the blending of these various basic elements. Marriage is a recognition of the physical laws of procreation, and of the factual interest of society in a stable family unit. The particular form of marriage which our modern law sanctions is in part due to the historical development of the institution, especially to the Christian tradition. Monogamy itself is also endorsed by the commonly accepted ideals of our civilization.

There is a fourth, and to Gény the most important, element, which is that provided by the dictates of reason. The prime function of this rational element is to arrange the various starting points into a hierarchy which will provide for a decision in the event of competition among them. Thus the role of reason is basically an evaluating one. It performs this function by the use of the eternal and immutable principles flowing from the concept of justice. "Basically law remains a work of justice."<sup>35</sup> Gény refers us to Aristotle's discussion of justice<sup>36</sup> as the best summary of the essence of the rational starting points

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34. 2 *id.* 370-71.

35. 2 *id.* 390.

36. *ETHICS* V, ii, section 12.

for legal rules and judicial interpretation. The concept of justice is not, however, a magic device for the settlement of all the problems involved in the formulation of positive law. Taking justice as necessarily requiring that each be given his due, we can deduce from that the general rule that each individual should be allowed the fullest development of his personality consistent with coexistence of others.<sup>37</sup> And from that we can arrive at a restatement of justice in terms of a balancing of interests. If we attempt to derive more specific rules, such as the detailed implications of the integrity of the life and honor of the individual, or of the right of private property, we slowly pull away from our basic conception of justice and increasingly introduce into our rules elements derived from the body of historical starting points and from the commonly accepted ideals of the particular time and place for which we are devising legal precepts. We are giving up the scientific part of our work and embarking on the purely technical job. This involves a choice among the various starting points which our enquiry discovered, and an adaptation of those general rules to the particular exigencies of life.

#### IV.

#### CONSTRUCTION OF THE CONCRETE RULES OF POSITIVE LAW.

Our starting points are relatively vague and general; for practical purposes they must be reduced to concrete rules. This is a work of art or technique.<sup>38</sup> The particular form used is a matter of choice, determined largely by pragmatic considerations.<sup>39</sup> A good juridical technique states rules simply yet allows for the fullest possible determination of all the various factual situations which might arise. Because of its precision and certainty, enacted law is the best single mechanical tool.<sup>40</sup>

With such general remarks as these Gény undertakes to examine the problem of translating our starting points into concrete rules. He proposes to give us positive law with a variable content though based upon starting points which include (and are evaluated by) a limited body of immutable principles flowing from the concept of justice.

While holding written law to be the best single device, Gény says it can never provide the answers needed for all juristic problems. The belief that the French Code was all-inclusive resulted in a

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37. 2 SCIENCE ET TECHNIQUE 392-94 (Paris 1914-1924).

38. 3 *id.* 2.

39. 3 *id.* 3.

40. 3 *id.* 500-01.

method of juristic interpretation which artificially applied Code provisions to situations for which they were never intended.<sup>41</sup> Criticism of that artificial stretching of the enacted rules by dry logic was the main theme of the first volume of Gény's *Methode*. The same argument applies against the analytical jurisprudence of Austin and his followers.

If legislation cannot provide all the rules of positive law, how shall we supplement it? To persons familiar with the common law, Gény's answer is obvious: authoritative custom and juristic tradition will fill most of the gaps in the enacted law. These three elements—written law, custom, and legal tradition—constitute the formal sources of positive law.

In Gény's view, however, the formal bodies of law are, in large measure, merely a resumé of previous judicial decision reduced to linguistic formulae.<sup>42</sup> Law has at its disposal a large number of devices which Gény analyses at some length. For example, legal consequences are attached to certain acts only when they are completed in a special form.<sup>43</sup> The form sometimes is designed to insure that proof of the acts will be readily available, and sometimes it aims only to insure that adequate publicity is given to the acts. (Proof and publicity often overlap.)

While forms are artificial devices into which phenomena must be molded before legal consequences can follow, the events themselves are divided into various *categories*<sup>44</sup> with different legal results attaching to each category. This division being more realistic than formal, it represents a more sophisticated technique than do the artificial forms. The creation of categories, however, sometimes requires the use of subsidiary devices. For example, the law (presumably in pursuit of justice) says that no legal consequences shall follow an unratified contract entered into by a person of limited mental capacity. It thus creates a pair of categories: persons of full capacity, and persons of deficient capacity. The distinction is based on a chronological test: persons 21 (or 25 in civil law) years old or over have full capacity; persons less than 21 do not.

There are other devices which are used in making and applying rules of positive law. Fictions and presumptions are familiar enough. The particular device used is a matter of choice and in the long run will be decided by practical considerations. But the rule of law which it embodies will be directed towards the ends indicated by our starting

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41. 1 *METHODE* 109, 118, 149, and *passim* (2d ed. 1919).

42. 4 *SCIENCE ET TECHNIQUE* 9 (Paris 1914-1924).

43. 3 *id.* 96-102.

44. 3 *id.* 207 ff.

points as evaluated and arranged in a hierarchy by the rational concept of justice.

## V.

### CONFLICT BETWEEN NATURAL AND POSITIVE LAW.

Although the specific rules of positive law find their proper purpose in an attempt to realize in practice the ends indicated by our rationally evaluated starting points, it is possible that a rule of law may conflict with the starting points.<sup>45</sup> Can such a conflict be resolved?

It is the traditional answer of natural law thinkers that such a rule of positive law would be invalid.<sup>46</sup> Indeed, this principle was generally accepted until Machiavelli.<sup>47</sup> But the natural law view has been widely criticized and modern thinkers have generally rejected it.<sup>48</sup> Gény agrees that in the event of conflict between natural law and positive law a judge must apply the positive law.<sup>49</sup>

How can this result be justified in the light of Gény's claim that justice interpreted by reason is the supreme starting point for all juristic activity? If the positive rule of law is a mere artifice for achieving the starting points, the rule of law is theoretically subordinate to its end. Gény himself says that in essence the *donné* is superior to the *construit*.<sup>50</sup> But being aware of difficulty in applying this theoretical view, Gény makes a practical adjustment. He gives two reasons why a judge must always apply positive law when it clearly fits the particular case even though it may conflict with natural law. *First*, the judge is a public officer who assumes the duty of putting into effect the rules contained in the formal body of law. If he refuses to give effect to a particular rule of positive law he violates his civic and professional duty.<sup>51</sup> This he cannot in conscience do. *Second*, if we analyze the rational concept of justice we can derive from it the principle that the maintenance of order is an essential condition for the achievement of a just society.<sup>52</sup> Hence order per se promotes our primary starting point and calls for carrying out all the authoritative rules of positive law.

45. 4 *id.* 59.

46. See Chroust, *op. cit.*, *supra* note 29, at 76.

47. See FIGGIS, *POLITICAL THOUGHT FROM GERSON TO GROTTIUS* 84-85 (1907).

48. See HAINES, *REVIVAL OF NATURAL LAW* 282, 290-91 (1930). But see Fuller, *Fidelity to Law*, 71 *HARV. L. REV.* 630, 658-661 (1958).

49. 4 *SCIENCE ET TECHNIQUE* 22 (Paris 1914-1924).

50. 4 *id.* 60-61, 74.

51. 4 *id.* 122.

52. 4 *id.* 76.

It will readily be recognized that the first of these arguments is a purely practical one. It is the type of adjustment which Gény is always ready to make in deference to the realities of the phenomena with which positive law deals. The second argument is a rationalistic one and if carried to an extreme could wipe out the primacy of justice. Just how far does Gény carry it?

Despite his view that public order is a basic condition of justice, Gény recognizes a right of resistance to unjust law but carefully limits this right to certain conditions:<sup>53</sup>

1. It extends only to violations of the rights of man suggested by the rational concept of justice.
2. It is limited to those whose rights are challenged.
3. The wrong must be serious, evident, and irreparable.
4. Resistance should be defensive only.

These limitations, however, do not apply if the unjust rules create an intolerable situation in which there is such a widespread feeling of opposition that the state itself is in danger; revolution then becomes justified.<sup>54</sup> However equivocal this statement may sound, it is a practical recognition that order is not promoting justice when the existing regime acts in such a manner as to excite widespread opposition of serious intensity.

## VI.

### CONCLUSION.

In following the broad scope of Gény's work we may appear to have moved far from his neo-Scholastic philosophical premises. This is a necessary consequence of, *first*, his realization that law and morals are not coincident, but that much of what is positive law is a pragmatic adjustment to practical situations; and *second*, his persistent desire to base his conclusion on premises which would be acceptable to jurists generally without reference to their personal philosophical preferences.

To this blending of the purely philosophical and the eminently practical we can trace most of what is original and penetrating in the stimulating writings of Francois Gény. On the one hand he avoids the excesses of some natural law thinkers who falsely identified law and morals and either ignored or idealized positive law. And on the other

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53. 4 *id.* 120.

54. 4 *id.* 124-25.

hand he squarely faces the question of values which is the central problem in jurisprudence.

The sum of his teaching is that positive law is a body of variable rules designed to achieve in the circumstances of a particular time and place ends indicated by a set of competing starting points; that these starting points are drawn from the lessons of human history, from the necessary relationships of natural facts, from the ideals of the civilization, and from rational consideration of man in society; and that, above all else, our idea of justice must serve to decide among conflicting subordinate starting points and must indicate the final ends of juristic activity.

If the answer he gives to the problem of values, expressed as it is in terms of justice, appears vague and obscure, we should remember that it is intended only as a signpost pointing the direction in which our concrete rules should carry us. Those who share Gény's philosophical premises possess a key for the analysis of justice and for the translation of that concept into truly manageable starting points for juristic thinking.

Apart from all else we must conclude that the *Science et Technique* contains a wealth of suggestion almost unparalleled in twentieth-century jurisprudence.

Unafraid to face the problem of values, unwilling to shun philosophical commitment, and free from the overweening influence of any fleeting intellectual fad, his work compares impressively with that of the most noted jurisprudential scholars of our age. This modern heir of the most ancient and continuous tradition in civilized law has revealed the enduring value of the concept of justice. We can echo a judgment recently passed on Francois Gény and speak of him as "one of the greats."<sup>55</sup>

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55. FRANK, *LAW AND THE MODERN MIND* 6 n., 279 n. (1930), in which Gény appears to be construed as a "realist"; Pound, *50 Years of Jurisprudence*, 51 HARV. L. REV. 444, 464-66 (1938), in which Gény is treated as a neo-Scholastic; DABIN, *LA PHILOSOPHIE DE L'ORDRE JURIDIQUE POSITIF* 320 ff. (1929), in which a scholastic criticises Gény; Wortley, *Francois Gény, MODERN THEORIES OF LAW* 139 (1933), in which there is an obvious reluctance to label Gény's views; and C. K. Allen, *Justice and Expediency, INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 15-28 (1947), calling Gény an "idealist". An interesting discussion of Gény's thought is found in FRIEDMANN, *LEGAL THEORY* 229-233 (3d ed. 1953).