

## Province of Jurisprudence

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### Recommended Citation

Edgar Bodenheimer, *Province of Jurisprudence*, 46 Cornell L. Rev. 1 (1960)  
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# CORNELL LAW QUARTERLY

VOLUME 46

FALL, 1960

NUMBER 1

## THE PROVINCE OF JURISPRUDENCE

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In the celebrated *Corpus Juris Civilis* of 529 A.D., the Roman Emperor Justinian proclaimed a definition of jurisprudence which is believed to have originated with the classical Roman jurist Ulpian. The definition reads as follows: "Jurisprudence is the knowledge of things divine and human, the science of the just and of the unjust."<sup>1</sup>

The first half-sentence of this definition is marked by an exceedingly broad sweep. Furthermore, it is open to the charge that it does not bring to light a characteristic peculiar to its object of definition. Inquiry into "things divine" is commonly regarded as the province of theology or metaphysics rather than of jurisprudence, and knowledge of "things human" is sought by philosophy, sociology, psychology, and medicine as eagerly as by legal science. Because of this vulnerability of the statement, the French Romanist Felix Senn suggested that the two parts of the definition should not be considered as components of equal import and weight. The first half-sentence, he argued, was merely intended to set out a condition or presupposition which is to impart a greater degree of precision to the second part of the definition.<sup>2</sup> The German scholar Rudolph Sohm, on the other hand, was willing to attribute an independent significance to the phrase in question. He maintained that it was meant to accentuate an important truth, the truth, namely, that "he alone can claim to have attained a real vision of the law, of justice and injustice, to whom life has revealed itself in its fulness."<sup>3</sup> In other words, to Sohm the thought that Ulpian wished to convey was that only "the rounded man" acquainted with the manifold aspects of human

† See contributors' section, masthead p. 138, for biographical data.

<sup>1</sup> "Juris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia." Digest 1.1.10.2; Institutes 1.1.1.

<sup>2</sup> In Senn's opinion, the Latin text should be translated as follows: "Jurisprudence, resting on the knowledge of things divine and human, is the science of the just and of the unjust." (Translation from the French by the author of this article.) Senn, *Les origines de la notion de jurisprudence* 2 (1926).

<sup>3</sup> Sohm, *the Institutes* 29 (3d ed. Ledlie transl. 1907). See also the comments on the definition by Wu, *Cases and Materials on Jurisprudence* 5 ff. (1958).

existence would be able to master the science of jurisprudence successfully.

The second and more significant part of the definition expresses a belief in the possibility of a *science* of justice, *i.e.*, a systematic body of knowledge relating to the just and unjust in human affairs which can claim objective validity. It is this component of the definition with which a large part of this paper will be concerned. Can there be a science of justice? If so, must such a science be purely descriptive, *i.e.*, confine itself to the recording and analysis of historical or contemporary theories of justice? Or can we permit jurisprudence to cross the bridge from the world of the "is" to the realm of the "ought" and to evaluate legal norms or legal systems from an ethical point of view? In undertaking this inquiry, the assumption is made that Ulpian, in his definition, conceived of justice in its ordinary meaning, namely, as a value relating to the intrinsic rightness or wrongness of acts, judgments, or laws, and not merely as a concept for testing the conformity of human conduct to the enacted laws of a particular society.

## I

The legitimacy of a normative or value-oriented science has often been questioned. The influential twentieth-century theory of logical positivism takes the position, for example, that value judgments to the effect that something is good or bad, right or wrong, just or unjust are subjective and largely irrational, and that such value judgments are therefore not a proper subject of scientific inquiry as to their truth or untruth. There is, according to this view, no criterion by which we can test the validity of the judgments concerning ethical or other axiological concepts, and these judgments must therefore be denied cognitive value.<sup>4</sup> Ethical imperatives are considered as mere "ejaculations" or "emotive" utterances which are scientifically worthless.

As applied to the problems of jurisprudence, this view implies that a "science of the just and of the unjust," going beyond the description of theories or systems of justice, is impossible. In the words of Hans Kelsen, "to determine . . . whether this or that order has an absolute value, that is, is 'just', is not possible by the methods of rational knowledge. Justice is an irrational ideal. However indispensable it may be for the willing and acting of human beings, it is not viable by reason."<sup>5</sup>

<sup>4</sup> Ayer, *Language, Truth, and Logic* 103 (1952); Carnap, "Philosophy and Logical Syntax," in White, *The Age of Analysis* 217 (1955); Kraft, *The Vienna Circle* 182-83 (1953).

<sup>5</sup> Kelsen, "The Pure Theory of Law," 50 *L.Q. Rev.* 474, at 482 (1934).

The Scandinavian jurist Alf Ross remarks in a similar vein: "Justice . . . cannot be a legal-political yardstick or an ultimate criterion by which a law can be judged. To assert that a law is unjust is . . . nothing but an emotional expression of an unfavourable reaction to the law. To declare a law unjust contains no real characteristic, no reference to any criterion, no argumentation. The ideology of justice has no place in a reasonable discussion of the value of laws."<sup>6</sup>

## II

The view that all valuations, including the value judgments about justice, are merely matters of personal opinion or subjective preference cannot be accepted. There are substantial areas of uniform or near-uniform valuation among different men and groups of men, and therefore, as Jerome Hall has pointed out, "we cannot be satisfied by the assertion that valuation is entirely and always subterfuge or self-deception or the expression of emotion."<sup>7</sup> These universal value patterns are of great significance for jurisprudence since they provide the bottom layer of human normative ordering.

Uniformities of valuation have their ultimate source, for the most part, in the strength of the human life instinct. The large majority of men prefer life to death, although there may be morbid or exceptional conditions in which impulses of self-destruction or self-sacrifice may temporarily drown out the life-affirming forces in individual or group existence. Most of the activities characteristic for group life, such as the production of food, the building of towns and cities, the education of children, the practice of vocations, the gathering of knowledge, the creation of art, are carried on in the service of the will-to-live. In view of the strength of the life instinct, an openly proclaimed policy having as its goal the extirpation of the human race from the earth would have no chance of gaining acceptance or cooperation from the large majority of men. Although it is true that in the age of atomic weapons, the incompetence or recklessness of a few political leaders could easily endanger or thwart the self-preservation of mankind, this statement is entirely compatible with the assertion that a transformation of values which would declare the promotion of destruction, illness, injury, and death to be the supreme and controlling goals of social action would

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<sup>6</sup> Ross, *On Law and Justice* 280 (1959). According to Ross, it is wholly impossible to prove the 'rightness' of an attitude by rational argument. *Id.* at 302.

<sup>7</sup> Hall, *Living Law of Democratic Society* 80 (1949). Hall points out, for example, that value judgments to the effect that "torturing an innocent child to death is good" or "killing a man because you don't like the color of his hair is right" are invalid, untrue, and perverted. *Id.* at 68-69.

not be within the realm of possibility.<sup>8</sup> As shown by factual experience, men have resolved that, as a general rule subject to exceptions, life "ought" to be preferred to non-life.<sup>9</sup>

It might be objected that there have been and still exist great religions, such as Buddhism, which look upon the life instinct with suspicion and by their teachings seek to restrain and reduce its pulsating and vibrant force. These religions and the philosophies corresponding to them have, however, by no means denied the will to live in the sense that they have advocated suicide, prevention of births, universal violence, or mass extermination of human beings. Buddhism, for instance, admonishes its adherents to go out into the world, get married, raise a family, and lead a life of kindness and service to one's fellowmen.<sup>10</sup> What this creed has done is to develop a mental therapy designed to alleviate human suffering by minimizing the importance of those manifold active manifestations of the will to live which may lead to serious disappointments, mental anguish, frustration, or degradation. By proclaiming the need for renunciation of the self-assertive ego and the superiority of the contemplative life, Buddhism has attempted to subdue the strength of passions and desires that may cause misery or dereliction. The purpose of this philosophy is not to vilify or extinguish life, but to make it more tolerable by emancipating the human personality from the external things of existence.

It should be remembered in this connection that Buddhism originated in a period of time in which the burdens and anxieties of life, especially the struggle for food and physical survival, were a great deal more arduous and harrowing than they are today in most parts of the world. In such a time, the need for a world view which makes people bear the palpable imperfections and privations of material human existence with equanimity and resignation is extremely urgent. There is evidence that the purely life-renouncing aspects of Buddhism are losing some strength today in those countries of Asia in which a distinct improvement in the conditions for a more healthful and meaningful human life has taken place in recent decades. It is not entirely impossible or improbable that the denunciation of earthly existence, if it assumes

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<sup>8</sup> It should not be replied that these objectives become paramount in case of war. Wars are fought or asserted to be fought for the purpose of defending, securing, or improving the life conditions of a social group or nation.

<sup>9</sup> Sigmund Freud believed that the human life instinct was counteracted by a force of coequal strength, the "death instinct." Freud, *The Ego and the Id* 54-57 (Riviere transl. 1927). For a refutation of this view see Fromm, *Man for Himself* 210-26 (1947).

<sup>10</sup> See Radhakrishnan, *Eastern Religions and Western Thought* 64-76, 100-01, 378-82 (2d ed. 1940); A Sourcebook on Indian Philosophy XXVIII-XXIX (Radhakrishnan & Moore eds. 1957).

large-scale proportions in a community of men, is at least in substantial part due to extreme impoverishment, social lag, and backwardness, *i.e.*, to conditions which make such earthly existence, in the words of Hobbes, "nasty, brutish, and short."<sup>11</sup>

The empirical fact that most men prefer life to death provides the foundation for various aspects of the normative ordering of human relations which exhibit surprising uniformities or similarities throughout the world. The chief value protected by the criminal laws of human communities is life and bodily integrity. The law of torts likewise provides sanctions against assaults and aggressions upon life and limb. We do not know of any legal system which, as a matter of basic policy, puts a premium on destruction and penalizes respect for the life and bodily safety of the members of the community. A system of law which would reward indiscriminate killing and wanton aggression would certainly be regarded as unjust by the members of the social group. "There can have been, and there will be, no tribe, no kingdom, where all men find it natural to hate and injure each other. A purpose of co-operation, expressed in institutions no matter how imperfect, is required if men are to live together."<sup>12</sup>

But men form social organizations regulated by law not only for the purpose of protecting the bare life of the group members, but for broader objectives. The overwhelming majority of societies permit men to own certain articles of use and consumption and protect the right to the ownership of these articles. Furthermore, a certain amount of trade or other intercourse always exists among the members of a community, and such intercourse is impossible unless the members of the group observe a modicum of good faith in adherence to commitments. All societies have, therefore, outlawed at least the grossest types of fraud.<sup>13</sup> Anthropological and sociological research will disclose other minimum requirements for the carrying on of human group life.

### III

What bearing do these considerations have upon the subject of our inquiry? If objective conditions can be discovered by research which would be experienced by the members of a community as an unjust state of affairs, the investigation and description of such conditions would

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<sup>11</sup> Hobbes, *Leviathan* ch. XIII (Everyman's Library ed. 1914).

<sup>12</sup> Stapleton, *Justice and World Society* 105 (1944).

<sup>13</sup> On these and other cultural uniformities see Linton, "Universal Ethical Principles," in *Moral Principles of Action* 645-60 (Anshen ed. 1952); Kraft, *Die Grundlagen einer Wissenschaftlichen Wertlehre* 245-57 (2d ed. 1951).

appear to be a legitimate subject for exploration by the science of jurisprudence. For this science must devote its attention to all political, social, and economic factors which affect the institution of law and the attitude of human beings toward this institution. If a jurisprudential inquiry reaches the result that a certain type of legal ordering (for example, an ordering which would foster individual aggression and discourage non-violent behavior) would be felt by the members of the community to be totally unacceptable, it is by no means necessary that such a conclusion be supported by evidence of unanimous agreement. We are always confronted in reality with the polarity of norm and exception, and a sociological or psychological law is not disproved by the fact that it reflects a statistical rather than an ironclad regularity. The gauge for testing community reaction to the imposition of normative standards is the feeling of the normal individual, not of the abnormal psychopath.

Only a thorough study of the history of human societies will disclose the conditions under which men will tend to repudiate or revolt against the existing legal order. If such a study will bring to light certain sociological or psychological laws relating to the sense of justice which are capable of guiding future legal policy, this would constitute a substantial contribution to a "science of the just and of the unjust." It would offer aid and advice to those concerned with the making of the law, and no higher purpose can be conceived for scientific activity than to illuminate the path of those entrusted with the management of human affairs.

An inquiry of this character would be essentially descriptive and would, therefore, not burst the bounds of scientific endeavor as customarily conceived. However, if a legal sociologist or legal philosopher wishes to undertake an ethical justification for the common principles of morality underlying human legal systems, there would appear to be no convincing reason why such a leap from the domain of the descriptive to the realm of the normative should necessarily be subjected to censure. There exist strong factual (though not logical) bonds between the "is" and the "ought", and the evaluative impulse in human nature is so strong that the bridge from a factual truth to a postulate is easily crossed.<sup>14</sup> Let us suppose a legal or ethical thinker would state the following conclusions: (1) Human beings are so constituted that they desire to live in organized groups in order to preserve life and develop the potentialities in-

<sup>14</sup> A work highly relevant to this discussion is Northrop, *The Complexity of Legal and Ethical Experience* (1959). On the factual bonds between the "is" and the "ought" see also Brecht, *Political Theory* 367-86 (1959); Verdross, *Völkerrecht* 20 (4th ed. 1959).

herent in human existence; (2) indiscriminate killing is incompatible with group life; (3) it has therefore been condemned by the universal moral sense and proscribed by the legal systems of organized societies; (4) indiscriminate killing must for these (and perhaps other) reasons be deemed an "evil," *i.e.*, a non-value. Is it necessary or reasonable to view such a statement as the expression of a personal emotional preference rather than the formulation of a normative truth?<sup>15</sup>

#### IV

Thus far, the discussion has dwelt on certain basic requirements of social order generally with respect to which substantial consensus exists among persons of normal rationality. When an overwhelming majority of men reach informed and substantiated conclusions on certain data of factual or value experience, such findings (subject, of course, to being overthrown subsequently by evidence unknown at the time) may be said to represent the truth, or at least an approximation to the truth.

Our problem moves into a different dimension when we leave the rock bottom layer of legal and ethical experience and enter the domain of controversy between contending views of justice and good social order. Does the jurisprudential scholar engaged in the pursuit of truth have the right to weigh and assess opposing theories of justice and attempt to prove the superiority of one or some of them over others? Or is he doing no more than to express a subjective, unverifiable opinion when he undertakes such a task?

It has repeatedly been argued that conceptions of justice are entirely dependent upon and conditioned by the character of the political and social system to which they are related. Ideas of justice for an individualistic and democratic society will be diametrically opposed, it is maintained, to those applicable to a collectivistic and autocratic order. To Plato, a believer in collectivism, justice meant that every individual should do his work in the station and place where his activity would contribute most to the common good.<sup>16</sup> To Spencer, a strong advocate of individualism, justice signified the maximum of freedom for the individual person compatible with the equal freedom of all.<sup>17</sup> Jurisprudence can offer no help, it is argued, in solving this irreconcilable conflict of views. The most it can do is to describe and elucidate the supreme values recognized in a particular society and to evaluate the accuracy and

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<sup>15</sup> The position in the text is sharply opposed to that of Carnap, who argues that the statement "killing is an evil" is not verifiable and "has no theoretical sense." Carnap, "Philosophy and Logical Syntax," in White, *The Age of Analysis* 217 (1955).

<sup>16</sup> Plato, *The Republic*, bk. IV, at 433-34 (Everyman's Library ed. 1950).

<sup>17</sup> Spencer, *Justice* 45 (1891).



aptness of the normative system in the light of these goal values. Thus a nation bent on releasing the greatest amount of individual productive effort educible from its citizenry might commission its jurisprudential scholars to appraise its legal institutions from the aspect of the maximum accomplishment of its dominant social objective. Jurisprudence, pursuant to this conception of its functions, may investigate and propose the juridical *means* necessary and proper for the attainment of a certain social ideal; it cannot, if it wishes to remain within the bounds of scientific inquiry, determine the *ends* towards which social effort as reflected in the legal system should be directed.<sup>18</sup>

This argument possesses a great deal of vigor and contains important elements of truth. Nevertheless, the question should be seriously pondered whether the time may not be ripe for launching a cautious and judiciously circumscribed investigation concerning societal goal values which might yield some objectively acceptable conclusions. Is it really possible, for any sustained period of time, to predicate a social system on extreme and undiluted principles of atomistic individualism or organicistic collectivism? It is a fact of undeniable significance that the highly individualistic social and economic order of the United States in the nineteenth century, because of certain shortcomings of untrammelled laissez-faire, was subjected to a number of public controls which no political party today would propose to abandon. The Union of Soviet Socialist Republics, on the other hand, which in the first half of the twentieth century had attempted to create a collectivistic order of unparalleled rigidity, found it necessary in recent years to make certain limited concessions to personal autonomy and privacy. While this has only slightly narrowed the gap between the social systems of the United States and the Union of Soviet Socialist Republics, it brings to light certain conditions of human nature which the political and legal order cannot ignore without considerable danger to its effective operation. Man undoubtedly possesses a dual nature.<sup>19</sup> He is a social being who ordinarily can fulfill his destiny only in association and cooperation with others. At the same time he is (not always but often) a unique "self" who is capable of rebelling against society-imposed conventions and of pursuing independent goals. He needs some social matrix in which to un-

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<sup>18</sup> This view seems to underly the earlier works of Gustav Radbruch and also, to a considerable extent, the writings of Lon Fuller and Arnold Brecht. See Radbruch, "Legal Philosophy," in *The Legal Philosophies of Lask, Radbruch, and Dabin* 53-59 (Wilk transl. 1950); Fuller, "American Legal Philosophy at Mid-Century," 6 *J. Legal Ed.* 457, at 477-78 (1954); Brecht, *Political Theory* 121-22 (1959).

<sup>19</sup> On the dual nature of man see Verdross, *Abendländische Rechtsphilosophie* 228-29, 241-46 (1958); Pound, "The Lawyer as a Social Engineer," 3 *J. Pub. L.* 292, at 295-96 (1955).

fold constructive effort and attain the self-actualization to which his nature impels him; but in all historical epochs there have been men discontented with the existing ways of their community and who have resolved to circumvent, improve, or change them.<sup>20</sup> If men had invariably been content to accept the established community norms, there would have been no social development and progress. Individual creative effort has always alternated with or complemented cooperative social effort, although the relative proportion between them has not remained invariant.

To these assertions it might be objected that it might be perfectly possible by proper conditioning or education to either individualize or collectivize human beings completely, *i.e.*, to put an end to man's dual nature. Man, it might be argued, could be wholly individualized in a course of development which would result in the emergence of a breed of wholly free and autonomous individuals who would pursue their own ends in a way which would make any social control and coercion unnecessary. On the other hand, it might be contended that a totally collectivized "beehive" society could be produced in which any type of nonconformity, disagreement, or desire for individual uniqueness would be unknown and in which the human ego would become a purely functional element in an organized group endeavor. The historical evidence thus far available fails to show that these extremes are capable of being attained; certainly they have not prevailed in those civilizations that have left their mark on the course of civilized human development.

These considerations have an important connection with the problem of justice. Because of man's dual nature as an individual and societal being, justice has always had its individual as well as its social aspects. From the point of view of the individual alone, abstracted from the social whole, that system of law would be just which would satisfy all his interests and demands. He would most likely desire a maximum of freedom, a maximum of equality, and a maximum share of the goods in existence, and would consider that social order just which would concede him these benefits and advantages. But neither the theory nor practice of justice has ever accepted this point of view. Even the most individualistic theory of justice, that of Herbert Spencer, has not carried individualism to this extreme. He recognized an "altruistic" element in justice, the necessity, namely, to limit freedom and self-

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<sup>20</sup> An interesting account of how Soviet students evade some extreme collectivistic controls and intrusions into their privacy is given by Burg, "Observations on Soviet University Students," *Daedalus* 527 (1960).

assertiveness of the individual in the interest of the equal freedom and autonomy of others.<sup>21</sup> This introduces a (limited) social element into his view of justice, since he recognized the need for taking account of the interests of the whole group. It would be difficult to find a social system in which individual demands were recognized by the law simply because they were made.

It is likewise impermissible to identify justice with the requirements of the collective good as determined by the governing organs of society. Although some cynical thinkers have argued that justice is simply that which the rulers of society have decreed as just, these thinkers have in fact denied the existence and reality of the human sense of justice. The large majority of rational and thinking human beings would certainly reject a view according to which the wishes, conveniences, or actions of the rulers would be deemed to be automatic expressions of justice regardless of their consequences for society. It is true that Plato, an eminent thinker, advocated a collectivistic theory of justice, but Plato was throughout his works concerned with the true happiness of individuals which he believed would be most genuinely promoted by the wise dispositions of benevolent philosopher-kings.

Any rational and realistic theory of justice must take account of the needs of individuals as well as the requirements of the common good. What individuals may claim as their due share of the tangible or intangible goods of existence depends to a large extent on the resources available and the state of the productive system, apart from other relevant factors. Human beings have claimed freedom, equality, and other basic rights. No theory of justice can ignore these claims, since they are rooted in the structure of the human personality. But the extent to which these demands can be granted depends on the effect which their satisfaction would have on the good of society as a whole. Even the most individualistic order of *laissez-faire* permits a maximum of self-assertion and economic freedom in the light of a conviction that the general happiness and prosperity will be thereby promoted. We are confronted here with an objective element in the theory and practice of justice which requires investigation by a "science of the just and unjust."

## V

The further question arises as to whether the jurisprudential scholar, after having explored whatever objective components exist in the analysis of the problems of justice, may go one step further and portray the pic-

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<sup>21</sup> Spencer, *op. cit.* supra note 17, at 36-37.

ture of a society which he believes would satisfy the human urge for justice. Many of the works and writings that are studied in traditional courses on jurisprudence have attempted to undertake this task. Men like Plato, Aristotle, St. Thomas Aquinas, Grotius, Locke, Rousseau, Kant, Bentham, Hegel, and Mill were deeply concerned with the question of the "good society" and, in some of their writings, drew up a blueprint for such a society. In their discussions of the role of law in society, they were less interested in giving an account of the positive law in force than to develop the principles upon which a sound system of law should be based. Can there be any grain of "truth" value in such undertakings?

Throughout most of the history of Western civilization, philosophy was not only considered a science but was valued as a science of very high rank. Institutions devoted to the discernment of truth, such as the European universities, did not consider it contrary to their tenets or guiding ideas to permit the holders of their chairs to expound their world views. Kant, Fichte, and Hegel set forth in the classroom their ambitious schemes of how men should conduct their lives. Many students had their most inspiring academic experience when sitting at the feet of original thinkers laying down their system of "Weltanschauung."

Today, under the influence of positivistic thinking, our attitude toward philosophy as a "science" has changed. A strict positivist, if he is moderate enough to reject the extreme view that the speculative philosophers from Plato to Hegel were mere purveyors of nonsense, would be inclined perhaps to view Plato's "Laws" as something comparable to imaginative art, such as a painting or a musical composition, and Rousseau's "Social Contract" as an ingenious piece of political pamphleteering. But he would strenuously contend that such works had no conceivable relationship to anything that might be called social "science."

It is submitted that positivism has overshot its mark by excising all normative endeavor, all inquiry into the foundations of a "good" society from the sphere of scientific truth-seeking. It is undoubtedly necessary to draw a line between political reform schemes and jurisprudential theory, between evangelism and social science. But it would seem that the line should be drawn at an angle different from the one at which it is customarily drawn today.

If the author of treatise on philosophical jurisprudence, on the basis of a painstaking sifting of historical evidence and a thorough study of individual and social psychology, comes to the conclusion that certain types of normative ordering are superior to other types, such an inquiry

should not be denounced as being necessarily outside the realm of truth-seeking. It might be pointed out in this connection that nobody would declare beyond the bounds of science a medical treatise evaluating various therapies for the treatment of a certain disease and reaching the conclusion that a certain therapy is superior to all others and therefore "ought" to be adopted. Legal science, like medical science, is concerned with "health." It is interested in the health of the body social and politic rather than of the physical body, and schemes for improving the health of the social body should not per se be viewed as unscientific. What distinguishes the work of the legal scholar or legal philosopher from that of the politician or propagandist is the method and procedure used by him in arriving at and substantiating his conclusions. It is expected of him that he will predicate his conclusions on a solid basis of facts, that he will weigh his evidence against countervailing evidence, that he will reach his results on what he considers a preponderance of evidence, and that he will scrupulously endeavor to separate subjective opinion from what he regards as objective data. Such a procedure in the area of the social sciences will often not yield a permanent and iron-clad truth, but we know today that even in the natural sciences truth is frequently of a provisional and temporary character and must give way, when the time comes, to better knowledge and insight. What needs to be emphasized is that there exists no a priori reason why truth-seeking must be excluded from the area of human values. Men are as deeply or perhaps more deeply concerned with values than with the facts of existence; that it is more difficult to reach objective conclusions in relation to values than with respect to the data of external experience furnishes no ground for abandoning the attempt.

The rejoinder will be made that a term has been injected into the discussion which is intrinsically ambiguous and indeterminate and therefore cannot provide us with any standard of analysis or appraisal. This is the term "social health." It might be contended that social health is entirely incommensurable with physical health, because what is socially "healthy" is wholly dependent upon the political and social philosophy of an individual, group, or nation. To some, the utmost freedom of action guaranteed by government might connote social health, to others a sound balance between freedom and authority, to some maximum unity and coordination of social effort. The problem has to some extent been discussed before,<sup>22</sup> but some additional comments are required.

Undoubtedly, social health may be achieved by many different ave-

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<sup>22</sup> See text under IV supra.

nues, and different times may require entirely different measures and approaches. It is, however, submitted that the goals and objectives to be attained by such measures and approaches are not quite as heterogeneous and diversified as is sometimes supposed. It would presumably be possible to draw a general blueprint of a healthy society which, in a world poll, would draw a wide approval by the members of different communities; it would also be possible to prepare a scheme of social goals which almost everybody would reject as unfeasible, nonsensical, or vicious. The reason for this restriction of controversial schemes has been hinted at earlier. It lies in the prevalence of the life value over non-life and annihilation. Life in any meaningful sense implies not only the satisfaction of the instincts of self-preservation and procreation, but the use of the powers and energies latent in men. On a social scale this necessitates the creation of opportunities and outlets for the development of man's productive capabilities, material and mental. All human societies which in the common opinion of mankind have had a measure of success have sought to cope with this task by building a civilization in which the constructive powers of the members of society were harnessed for the production of food and shelter, the manufacture of tools and other articles of use or consumption, the creation of works of learning and art, and other affirmative endeavors. Mankind has most highly valued the men and women who have made creative contributions to this enterprise called "civilization," and our judgment on peoples and nations has largely depended on whether and to what extent they have been able to advance civilization in some area of material or spiritual effort. In the words of Gustav Radbruch: "History . . . appraises states according to what remains when men and peoples have passed: according to their works."<sup>23</sup>

We are confronted here with an ultimate value of a social character which to an overwhelming extent is appraised as a positive rather than negative value. Jurisprudence is justified in taking this fact into account as an objective element in value theory.

## VI

We have reached the conclusion that jurisprudence, in accordance with the view of Ulpian, may be regarded as a "science of the just and unjust," not only in the sense that it may inquire into the means by which a legal order may effectuate a given ideal of justice, but in the more embracing sense that it may cause the notion and requirements of justice to undergo an objective and searching inquiry. If this premise

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<sup>23</sup> Radbruch, *op. cit.* supra note 18, at 97.

is accepted, then it follows that jurisprudence may take an active interest in the postulates and fundamental policies designed to secure and improve the "good life" in society. This must, indeed, be the highest concern of all the social sciences.<sup>24</sup> No nobler and more significant task can be imagined for the scientist and savant than to reflect constructively, in the light of the totality of experience furnished by the past, on the conditions under which human happiness and inner contentment can be most effectively assured in the social order. We can see no reason why this problem of overarching importance, which requires a great deal of time-consuming immersion and detached thought, should be left to the politicians and legislators absorbed with the immediate, pressing practical tasks of the day.

Two words of caution must be inserted at this juncture, however, lest the enthusiasm of the scholar entering upon the field of social ethics may carry him too far afield. In the first place, it would be unbecoming for him to abandon historical objectivity and judicious restraint in passing judgment on the events of the past in the light of a social ideal in which he strongly believes. The attainment of social goals is always conditioned and limited by the harsh and stern facts of reality. What our technologically and scientifically advanced society might do for the promotion of a full and civilized life would not have been possible in primitive society. Thus the truth in social science is always contingent upon, and subject to, the state of knowledge and scientific development obtaining at a certain period of time, the volume and intensity of available social experience, and the degree of ethical maturity reached by men in the growth of civilization. This consideration leads us to the second caveat to be observed by the social scientist and scholar of jurisprudence. While social science, including jurisprudence, may concern itself with the ends and purposes of social life and political-legal organization, it must always retain an open mind about these ends and purposes. Our value judgments, as has been pointed out before, should never be proclaimed to be permanent and final; they should constantly be tested against the shifting and evolving teachings of experience. While the search for the best form of society need not be shied away from by social science and legal philosophy, it must be demanded that dogmatism, rigidity, and intolerance be ostracized from scholarly enterprise. For even though we may strongly believe that our conception of justice for a civilized community is correct and unassailable, we must

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<sup>24</sup> In accord, Kruse, *The Foundation of Human Thought* 185-209, 250-53 (1949); *The Community of the Future* 1-99 (1952).

always admit the possibility of error about our basic premises and postulates.

## VII

The task of philosophizing about the conditions of a just and well-ordered society is not the only function of a science of jurisprudence. This task appertains to one particular branch of jurisprudence only, that of *philosophical* jurisprudence. Some fields of inquiry within the domain of another branch, known as *sociological* jurisprudence, have been mentioned earlier in the course of the discussion. In its full range, this discipline deals with the political, economic, and social forces which decisively influence and shape the institution of law. There is also to be recognized a jurisprudence of an *historical* character which probes into the theories of law and justice which have been advocated in different times and by different men, or which have found realization in the practice of governments or social units. Finally, there exists an important branch of jurisprudence which by some authors has been claimed to be the only genuine subject matter of this science, viz., *analytical* jurisprudence. It deals with basic general notions of the legal order, such as right, duty, responsibility, guilt, sovereignty, and others.<sup>25</sup> (Insofar as it goes beyond the merely analytical exposition of these notions and develops a philosophy of guilt, responsibility, etc., it crosses the line into philosophical jurisprudence.) Analytical jurisprudence also concerns itself with the means and techniques by which societal conceptions of law and justice are carried into effect. It analyzes the operational tools and methods used for the promotion of the purposes of the law and develops a theory of legal sources.

A broad area of social inquiry has been staked out for jurisprudence in this essay. There would seem to be justification, however, for including under a unified head all legal research which deals with the general aspects of law rather than with the positive regulation of specific social problems. No jurisprudential scholar will be able to pursue all the various tasks and objectives of this branch of knowledge at the same time in his work. He may, perhaps, be unready or unwilling to launch an inquiry into the broad issues of social ethics and the theory of justice. However, if he places these issues in the center of his research, we have no right, per se, to denounce his investigations on the ground that they transgress the proper bounds of scholastic endeavor. It was the principal purpose of this essay to accentuate this thought, in the face of a predominant temper of opinion questioning its validity.

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<sup>25</sup> See in this connection Austin, "The Uses of the Study of Jurisprudence," in *The Province of Jurisprudence Determined* 365-72 (Hart ed. 1954).