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# AN AGENDA FOR JURISPRUDENCE

*Denis V. Cowen†*

Jurisprudence is a subject which may inspire anything from wit and measure of wisdom, to disdain, despair, and revolution; for all of which sufficient evidence can be vouched. The vintage jokes range in flavor from Bentham's sour description of the subject as "the art of being methodically ignorant of what everybody knows"<sup>1</sup> to Professor A. H. Campbell's bland conclusion that:

Polonius might have found reason to approve of modern jurisprudence as the best subject in the world "either for tragedy, comedy, history, pastoral, pastoral-comical, historical-pastoral, tragical-historical, tragical-comical-historical-pastoral, scene indivisible, or poem unlimited." But it makes things a little difficult for the student.<sup>2</sup>

Disdain, verging on contempt, is the thrust of Dicey's observation that "jurisprudence is a word which stinks in the nostrils of the practising barrister."<sup>3</sup> The despair which the subject has generated, notably in the United States, may perhaps be measured by the fact that, in 1946, Professor Julius Stone reported that in nearly three-quarters of the recognized American law schools "no course is offered which is named or equivalent to jurisprudence."<sup>4</sup> The current offerings are, no doubt, considerably greater, but the uncomfortable fact remains that less than five per cent of the students graduating from American law schools include jurisprudence in their program. Finally, the step from despair to revolution is a short one. As every historian knows, the theme of revolution recurs throughout the long debate that stretches between St. Augustine's pronouncement that "an unjust law is not a law" and Hobbes' equally emphatic assertion that "no law is unjust."

In addressing myself, in this article, to a few of the many tasks of jurisprudence, I have no ambition (at any rate, no conscious ambition) to add to the cellar of legal jokes; I shall try, also, not to increase disdain and despair for the subject; and it will certainly not be my concern to fashion a new rationale or apology for revolution. Whether I

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This article is the text of a lecture delivered by Professor Cowen in the Cornell Law School on March 20, 1964, when he opened a series of lectures on fundamental legal theory.

<sup>1</sup> Bentham quoted by Allen, *Legal Duties* 1 (1931).

<sup>2</sup> Campbell, "A Note on the Word 'Jurisprudence,'" 58 *L.Q. Rev.* 334, 338-39 (1942).

<sup>3</sup> Quoted by Gray, *The Nature and Sources of Law* (2d ed. 1924). Continental lawyers sometimes express their distaste for the so-called "rechtsphilosophen" by observing that "the trouble with legal philosophers is that all too often they are neither lawyers nor philosophers."

<sup>4</sup> Stone, *The Province and Function of Law* 6 (1946).

succeed in adding a minor footnote to the chapters of jurisprudential wisdom may be judged, I hope, with mercy and compassion.

Some weeks ago, I was venturesome or perhaps foolhardy enough to tell one of my colleagues on the faculty of the law school at the University of Chicago that I was trying to put together an article on the tasks of jurisprudence. He snorted and coughed. He proceeded to inform me that he had read much of the available literature on the subject, and had found it unnourishing; and then he asked me, in tones more of sorrow than anger the following questions—all in quick succession, and without pausing for an answer, being convinced, I was made to feel, that there could be no answer.

First, are there, in this mid-twentieth century, *any* significant questions of a general jurisprudential character? Or, to phrase the same question slightly differently, are there any questions of basic importance to lawyers and lawyering as such?

Secondly, assuming that the first question admits of a sensible affirmative answer, what precisely are the main jurisprudential questions with which jurists should be concerning themselves in the mid-twentieth century. Or, if you prefer to limit the range of the inquiry to more modest geographical proportions—and it may well be wise to do so—what questions most urgently demand the attention of jurists, say, in the United States in the mid-twentieth century?

Thirdly, in what sense may questions of a general jurisprudential character be said to be significant? In other words, what practical or other purpose may be served by lawyers addressing themselves to such questions? This we agreed to call the "So What Question"—it is, as every student knows, a question often despairingly asked at the end of many courses on "jurisprudence."

Fourthly, how may the subject be most effectively taught in law schools? More particularly, should there be a course or courses on jurisprudence as a subject in its own right, or should the questions it deals with be left to various experts to answer at depth when expounding their own special fields of law? In other words, might it not be wise to abandon the subject wholly to teachers of, say, contract, tort, criminal law, tax, and equity, allowing them to dispose of the claims of jurisprudence, as a separate subject, by teaching it in specific contexts?

I was pleased with these questions—it was like meeting old friends in unexpected places—and I offered the suggestion that they at least could be relied on to provoke disagreement among a widely representative group of lawyers, especially at a faculty meeting in a vigorous law school. We even agreed that capacity to provoke interest and disagree-

ment among lawyers generally, might itself be the distinctive characteristic of a jurisprudential question. However, be this as it may, we are still friends; and he had supplied me with the means of introducing this article.

Now, one way of coping with my friend's first question—namely, what is jurisprudence—is to turn to the work of recognized authorities in the field, and see what they make of it. That this approach can be valuable and instructive I do not doubt—though there is always the danger of successive writers cribbing each other's mistakes, or of being infected with each other's diseases. Surveys of expert opinion as to the proper subject matter or province of jurisprudence have, however, often been undertaken; and their results have often been ably described; for example, by Sir Carleton Allen<sup>5</sup> and Professor Julius Stone;<sup>6</sup> in the United States, most notably, by Roscoe Pound;<sup>7</sup> and in Europe, with remarkable succinctness and suggestiveness, by Frede Castberg.<sup>8</sup> In this paper, I shall not attempt anything even remotely as ambitious. Leaving aside the question whether the late Karl Llewellyn was sound when he virtually claimed that all the world was the jurist's legitimate oyster,<sup>9</sup> I shall eschew any attempt at a formal definition of the province of jurisprudence,<sup>10</sup> and shall confine myself to formulating what I personally conceive to be a half-dozen questions of basic jurisprudential interest at the present day. I shall try, in other words, to formulate a half-dozen questions, or rather complexes of questions, which are, at the present time, in developed societies, of fundamental concern to lawyers in their craft of lawyering, or of doing what Llewellyn calls "law-jobs."<sup>11</sup>

Before doing so, however, I should perhaps make a confession, and ask your indulgence. I am, in effect, about to outline for you an agenda for a sixty-hour course in jurisprudence; and thereafter I shall try to compress into a few pages some remarks on the significance of the agenda itself.

Much as I should like to say in a few simple words what the law is all about, the task is beyond my power. I will, however, say this: prob-

<sup>5</sup> Allen, *supra* note 1, at 1-27.

<sup>6</sup> See Stone's masterly general introduction entitled "The Province of Jurisprudence Redefined," Stone, *The Province and Function of Law* 3-43 (1946).

<sup>7</sup> E.g., Pound, *Jurisprudence* (1959) (his monumental five volume summa); Pound, *Outlines of Jurisprudence* (5th ed. 1943). See also Hohfeld, "A Vital School of Jurisprudence and Law: Have American University Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?" in *Fundamental Legal Conceptions* 332-84 (1923).

<sup>8</sup> Castberg, *Problems of Legal Philosophy* (2d rev. Eng. ed. 1957).

<sup>9</sup> Llewellyn, *Jurisprudence* 4 (1963).

<sup>10</sup> Definitions of law and jurisprudence, said Llewellyn, shut things out. He was concerned with including and integrating, rather than with knowing what to shut out. "I have no desire to exclude anything from matters legal." *Ibid.*

<sup>11</sup> Some, but not all, of the questions with which I deal are of direct relevance in primitive or embryonic societies. See Hoebel, *The Law of Primitive Man* (1954).

ably the first step towards understanding what the law is about is to clear our minds of any illusion that it is simple. I sometimes think that one of Roscoe Pound's main services to jurisprudence has been his insistence upon the vastness and complexity of law, while doing so much himself to make it intelligible. Indeed I can think of no better way of starting along the road towards an understanding of what the law is about than that which you will find in Pound's small book entitled *Justice According to Law*.<sup>12</sup>

Pound points out that law, in the lawyer's sense, is a method of social control, that is to say, of influencing the conduct of persons and groups in organized society. In most societies many kinds of social control operate. For example, a measure of control is exercised by small specialized groups, such as clubs and institutions of learning; some is exercised more comprehensively by larger groups, such as churches. On some occasions, the control is informal, such as gossip, ridicule, or ostracism; on other occasions it is exercised formally, for example, by the imposition of a fine by a duly authorized officer after an inquiry. It is, however, the lawyer's task, says Pound, to understand the kind of social control which is exercised formally by politically organized societies; that is to say, societies which consist of the governors and the governed—the governors, in modern times, claiming a virtual monopoly of the formal and orderly application of force over entire geographic areas and all the inhabitants thereof. As Pound puts it: "law in the lawyer's sense has to do with social control by politically organized society."<sup>13</sup>

He goes on to explain that when used in relation to the kind of social control exercised by politically organized societies, the word "law" embraces several different ideas. In a very wide and undifferentiated sense it designates "the entire regime of adjusting and ordering conduct by a politically organized society."<sup>14</sup> This vast field is, however, as much the province of the political scientist, or the cultural anthropologist, or the sociologist, as that of the lawyer. And so we are led to inquire whether, within this field, there are any particular jobs which are more specifically law-jobs. And it is at this point, I think, that Llewellyn's analysis is helpful.

At the core of the lawyer's craft, Llewellyn suggests, lies the peaceful settlement of disputes.<sup>15</sup> This, of course, as he observes, is not the only

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<sup>12</sup> Pound, *Justice According to Law* (1951)

<sup>13</sup> *Id.* at 47.

<sup>14</sup> Compare the interpretation of Pound given by Davis, Foster, Jeffrey & Davis, *Society and the Law* 42 (1961).

<sup>15</sup> Llewellyn, "Legal and Social Science Method," in *Essays on Research in the Social Sciences* 91 (1931).

characteristic law job. In addition there is the orderly adjustment and channelling of various expectations (or interests) among individuals and groups within society, the allocation of governmental authority, and the establishment, interpretation, and application of authoritative guides or patterns of decision.<sup>16</sup>

Within the total area of social control exercised by politically organized societies—the weaning of the word “law” in its wide sense—we may therefore distinguish certain narrower and more specific ideas, which are also designated by the word “law.” Two of these have been singled out by Pound as being of central concern to lawyers, namely:

- (a) law in the sense of a set of guides or patterns of decision, including rules,<sup>17</sup> principles,<sup>18</sup> conceptions,<sup>19</sup> and standards,<sup>20</sup> as well as ideals<sup>21</sup> and techniques;<sup>22</sup> and
- (b) law in the sense of the various processes whereby these authoritative guides or patterns of decision are established, interpreted, applied, and enforced by officials; for example, the judicial process, the legislative process, the administrative process, and so on.

Pound often uses the phrase “the legal order” as a synonym for law in the wide sense, that is to say: “the entire regime of adjusting and ordering conduct by a politically organized society”; and he suggests that from the lawyer’s point of view, the legal order is compounded very largely of (a) and (b) above.

I have attempted to summarize Pound’s description of these manifold aspects of “law,” because it is with law in all its complexity that the six jurisprudential questions which I have selected are concerned.

First, there is the kind of question discussed by Mr. Justice Cardozo in his lectures on “The Nature of the Judicial Process,” and—more fully—by Karl Llewellyn in his book on *The Common Law Tradition*, namely: what are the characteristics of a good and wise judge; and what are the characteristics of a great judicial opinion? One could, of course, rephrase the question so as to open the way to the same kind of discus-

<sup>16</sup> See Llewellyn, “The Normative, the Legal and the Law-Jobs,” 49 Yale L.J. 1355 (1940).

<sup>17</sup> Pound defines rules as statements of precise and detailed legal consequences attaching to detailed factual situations. Pound, *supra* note 12, at 56.

<sup>18</sup> Principles are starting points for legal reasoning. *Ibid.*

<sup>19</sup> Conceptions are authoritative categories into which cases may be fitted, so that when classified, a series of rules, principles, and standards become applicable, e.g., sale and trust. *Id.* at 58.

<sup>20</sup> Standards are authoritative measures of conduct prescribed by law, e.g., the standard of reasonableness. *Ibid.*

<sup>21</sup> Pound defines ideals as the purposes of social control. *Id.* at 54.

<sup>22</sup> Technique is the art of developing and applying the rules, principles, concepts, and standards of the law. This encompasses the whole art of legal craftsmanship. *Id.* at 50.

sion by simply asking—as did Cardozo—what is, and what ought to be, the nature of the judicial process?

Conceiving, as he did—and as it is natural for lawyers to do—that the peaceful settlement of disputes lies at the core of the lawyer's craft, it is not surprising that Llewellyn and others devote so much of their talents and energy to an investigation of the judicial process. Nor is it surprising that in the Anglo-American world the main focus of jurisprudential thought, tends to be that much admired lady, the common law—her birth and breeding, her health and wealth, her liaisons, and her general shape. But this does not mean—and Llewellyn would have insisted that it does not mean—that the jurist should confine his attention to the nature of the judicial process in the application and development of the common law.

There would, you may agree, be something seriously wrong with a law-school curriculum which did not at least include some instruction on the nature of the judicial process, but it would be equally surprising if attention were confined to the nature of judicial process. Legal analysis of the legislative, the executive, and the administrative processes and of the proper relations between them, as well as an investigation of the role of the Bar, and the techniques and ethics of counseling and advocacy, are equally matters of fundamental jurisprudential interest. We might thus appropriately label the first broad problem area by the use of some such comprehensive title as "The Legal Process"—a term of growing popularity, it would seem, in the United States.<sup>23</sup>

Secondly, there is the kind of question with which Professors Lon Fuller and H. L. A. Hart have been much occupied in recent years. Do the words "law," "morality," and "justice" designate distinguishable concepts or phenomena? If so, what are the characteristics of these concepts or phenomena; and more particularly, what is the nature of the various relations (for there are several relations involved, and not only one) between them?

The two complexes of questions, thus far posed, include a large part of the area of the law-job. The next two questions are of a different order; they relate to legal methodology and epistemology. These are, however, also law-jobs, and, indeed, critically important ones; for they are concerned with informing us how best to do other law-jobs.

Then, in the third place, there is the kind of question which, in the United States, held the attention of Gray and, later, Professor Hohfeld, and which still interests analytical jurists wherever the breed is to be

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<sup>23</sup> Auerbach, Garrison, Hurst & Mermin, *The Legal Process* (1961); Hart & Sachs, *The Legal Process* (mimeographed materials 1958).

found, namely: are there any "fundamental legal conceptions which pervade legal thinking"—whether one looks at the legal process from the point of view of the judge, the legislator, the counselor, or the citizen? Conceding that lawyers do, in fact, often work with concepts of very wide generality—for example, legal rights and duties, privileges, powers and immunities, personality, things, events, acts and their modalities, possession, causation, and so on—could we lawyers do our work as well, and perhaps better, without such concepts? How, again, are the fundamental conceptions of a legal system related to each other? Continental lawyers usually refer to this particular area of jurisprudential study as "legal dogmatics"—a somewhat unhappy term for a branch of our subject which, as Castberg fairly contends, we probably cannot dispense with.<sup>24</sup> It is the branch discussed in Europe in the kind of book of which Andreas von Tuhr's commentary on the Allgemeiner Teil of the German Civil Code is a typical and brilliant example.

The fourth complex of questions is even more obviously methodological and epistemological in nature. And here I would like to focus attention on three aspects which are, I suggest, particularly relevant to lawyers in the mid-twentieth century.

(a) At the outset, there is the question of the use and limitations of linguistic analysis as a methodological tool; in other words, the subject matter of Professor H. L. A. Hart's distinguished Inaugural Lecture on "Definition and Theory in Jurisprudence."<sup>25</sup> How, with the aid of linguistic analysis, may one distinguish between futile questions and significant questions in legal work; between relevant and irrelevant questions? Again, how may fundamental conceptions best be elucidated? If, for example, the traditional technique of definition *per genus et differentiam* is not applicable to *fundamental* conceptions, what methods of helpful elucidation are available?

(b) Then there is the intriguing question discussed by Professor Edwin Patterson in the third of his 1962 Carpentier Lectures, *Law in a Scientific Age*, namely: to what extent is it practicable and helpful for lawyers to use scientific methods and analogies—and especially empirical study—"for the improvement of legal reasoning and evaluation, whether through legislation or judicial decision?"<sup>26</sup> This type of study is already yielding excellent results in the Chicago Jury Project,<sup>27</sup> and

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<sup>24</sup> Castberg, *supra* note 8, at 6-7.

<sup>25</sup> Hart, "Definition and Theory in Jurisprudence," 70 L.Q. Rev. 37 (1954).

<sup>26</sup> Patterson, *Law in a Scientific Age* 23 (1963).

<sup>27</sup> This study is under the direction of Professors Harry Kalven and Hans Zeisel. See generally Zeisel, Kalven & Buchholz, *Delay in the Court* (1959).

several other similar studies suggest themselves—a topic to which I shall refer again in this paper.

(c) And, to round off this short enumeration of methodological and epistemological problems, there is the kind of question which was broached by Roscoe Pound in his lectures on *Contemporary Juristic Theory*<sup>28</sup> and which—with different emphasis—recurs throughout Professor Patterson's 1962 Carpentier Lectures, namely: what kinds of knowledge both in the world of fact and value are taken for granted by judges and practicing lawyers in their legal work? More particularly, what is the rationale and scope of "judicial notice," both in the making of new law, and in the process of ascertaining the actual conduct of the parties to litigation? Again, what kinds of verification is this sort of knowledge susceptible of—at any rate for the practical purpose of carrying on day-to-day legal work? Are value judgments capable of rational verification, especially at an ultimate level?<sup>29</sup> And to what extent do, and should, changes in the status of knowledge affect the legal process? These, it may be agreed, are all fundamental jurisprudential questions.

And now, having raised questions which bear upon the nature of the legal process and upon legal methodology, I would suggest that it is appropriate to devote some attention to the teaching of jurisprudence; for we do well to remember that teaching is also a law-job—and by no means the least important. Accordingly, the fifth topic to which I would refer is what I call "the avoidance of shadow-boxing among the schools."

I do not have in mind merely the need for accurate description, comparison, and evaluation of various sociologies and philosophies of law—the field mapped out so comprehensively for the English-speaking world by Pound. Important as this kind of general survey undoubtedly is—especially for pedagogic purposes—the focus of scholarly interest should now, I think, be different. It could more profitably be directed to possible synthesis, and, above all, to methods of integrating social, political, and ethical theory into day-to-day legal work. Descriptive analysis of political, social, and ethical theory in the abstract, so to speak, is of mere secondary importance to lawyers. Their more pressing need is for skill in integrating this kind of knowledge, or of making it relevant in their day-to-day legal work. Attention might, for example, usefully be concentrated, in a course on legal theory, on posing specific practical problems, and examining how, again for example, Aquinas, Marx, and Dewey would have dealt with them. One would go on to ask at what points

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<sup>28</sup> Pound, *Contemporary Juristic Theory* (1940).

<sup>29</sup> *Ibid.*

knowledge of this kind may be relevant in the normal run of "law-jobs." This is what I call the "integrative aspect."

The work of synthesis is no less important. For example, is the wall of separation which is sometimes alleged to exist between the various "schools" of legal philosophers as implastic and impenetrable as it is said to be? I suspect not. I suspect that very often the disputants are talking about different things even though they appear to be using the same set of terms. Conversely, they may be talking about the same thing, though to listen to them you would often never suspect it. How much, for example, of Llewellyn's thinking, on specific problems, would have been acceptable to St. Thomas, and how much of St. Thomas' thinking would have been acceptable to Llewellyn? It will be found, I think, that there was in fact much common ground between these men.<sup>30</sup>

The sixth and last problem area which I would offer for study is perhaps the most obvious yet the most exacting of all. Why is it that the legal scholars of different countries, operating against the background of different historical circumstances and different economic, political, and theological systems, tend to concern themselves with different "fundamental" legal questions? Why is it, for example, that the sort of questions which most interested the American "realists"—if one may speak of them as a group—tend to be dismissed in a footnote both in Great Britain and, though to a lesser extent, on the Continent.<sup>31</sup> Why is it, conversely, that the sort of question that interests Professor H. L. A. Hart, of Oxford, did not apparently hold the attention of men like Llewellyn? How many of the answers to these and similar questions turn upon individual preference and experience? How much is explicable in the light of different national goals and policy objectives—whether consciously fashioned by a given society, or gradually shaped by history? How much is due to a fundamentally different understanding of the nature of the legal process? And so on. Concern for this area of study may provide an interesting avenue to the currently neglected field of legal history; and perhaps to further ventures along the paths opened up by Pound in his germinal books, *Interpretation of Legal History*<sup>32</sup> and *The Spirit of the Common Law*.<sup>33</sup> It is within this broad area, too, that comparative legal studies and interdisciplinary cooperation have, I think, most to offer.

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<sup>30</sup> See H. Jones, "Law and Morality in the Perspective of Legal Realism," 61 Colum. L. Rev. 799 (1961).

<sup>31</sup> Compare Shuman, *Legal Positivism* 2 (1963). An exception to this indifference is to be found in the writing of the Scandinavian jurists.

<sup>32</sup> Pound, *Interpretation of Legal History* (1923).

<sup>33</sup> Pound, *The Spirit of the Common Law* (1921).

Here then, very summarily stated, are what I suggest to be six problem areas of general and basic jurisprudential interest. The further question, which of them most compellingly demand attention in, say, the United States at the present time—namely, the second poser fired at me by my Chicago colleague—may, I think, answer itself in the course of our discussion of the more important question, namely: in what sense are the six problem areas which I have specified “significant”—which I interpret to mean what practical or other purpose is served by lawyers addressing themselves to such questions. Obviously within the space at my disposal I cannot hope to deal systematically and comprehensively with this aspect. Indeed my main objective must be limited to trying to persuade you of the worthwhileness of the agenda itself. To this end, I shall try throughout to give concreteness to the discussion by focusing attention on some specific problems which have given rise to real difficulty in the day-to-day administration of the law; and I would venture the suggestion that in no small measure the perplexity which they occasion is due to neglect of jurisprudence as a serious academic discipline.

The first of my six suggested problem areas, namely the nature of the legal process, is, of course, almost depressingly vast; and in attempting to establish its claim to your attention, I can do no more than touch upon a few selected aspects of it. I shall, therefore, confine myself to some currently live issues concerning the judicial process in the fields of constitutional law, common law, and the interpretation of statutes; and even with this limitation taken as granted, I can, I fear, do little more than formulate issues and suggest lines of inquiry.

Few who have read Professor Wechsler's essay entitled *Toward Neutral Principles of Constitutional Law*<sup>34</sup> or who are aware of the contemporary soul-searching among American lawyers in their quest for “principled” or “conscientious” adjudication, would, I think, deny the relevance and urgency of the main question raised by Llewellyn in his *Common Law Tradition*—what are the characteristics of a great judicial opinion? It is not my purpose to review the literature on the characteristics of good and bad judging.<sup>35</sup> Nor yet to attempt a restatement of current learning on a subject on which the last word has by no means yet been said. I do not propose, for example, to review the issues raised by Bickel on Wechsler,<sup>36</sup> or even by Gunther on Bickel or Wechsler.<sup>37</sup>

<sup>34</sup> Wechsler, “Toward Neutral Principles of Constitutional Law” in *Principles, Politics and Fundamental Law* (1961).

<sup>35</sup> See, e.g., Fuller, *Reason and Fiat in Case Law* (1943); Llewellyn, *Jurisprudence*, supra note 9, at 167-213.

<sup>36</sup> Bickel, *The Least Dangerous Branch—The Supreme Court at the Bar of Politics* (1962).

<sup>37</sup> Gunther, “The Subtle Vices of the ‘Passive Virtues’—A Comment on Principle and Expediency in Judicial Review,” 64 *Colum. L. Rev.* 1 (1964).

A few of the elementary points may, however, be summarized, in order to clarify what I mean by "principled" or "conscientious" adjudication.

In order to reduce irrationality and unpredictability in law to a minimum, legal judgments should, to begin with, be reasoned.<sup>38</sup> Secondly, the reasons should be "good" or "sound" ones. This means more than avoidance of logical nonsense, self-contradiction, and incomprehensibility, of the kind discussed by Professor Fuller in his latest book.<sup>39</sup> In addition, it means, at the very least, the avoidance of self-deception or dishonesty in adjudication of the kind which so irritated Llewellyn and his fellow "realists."

The process of adjudication should, as far as possible, always be honest and candid, not obscurantist and formalistic; it should always be self-aware and deliberate, not self-deceiving and out-of-control. Holmes long ago made it plain that "you can give any conclusion a logical form"; while "behind the logical form lies a judgment of the relative worth and importance of competing grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."<sup>40</sup> And of course, this kind of inarticulateness is just what should be avoided. To abjure the formal-style obscurantist opinion, to avoid self-deception, as well as the deliberate camouflaging of policy decisions by giving them the appearance of inevitability—mere formal deduction from allegedly self-evident premises—is vitally important, precisely because it leads to greater predictability in the judicial process, and to a greater degree of satisfaction of people's reasonable expectations.

All this is, of course, the familiar gospel of the "realist revolt"—now, fortunately, among the mere platitudes of the case. But the avoidance of formalism, the avoidance of self-deception and sloppy work, is only a first step toward judicial wisdom. A "grand-style" judicial opinion must measure up to many positive criteria as well, some of which Llewellyn was at pains to elaborate. It is not my purpose, even were it within my power, to discuss this aspect at any length; but there is one point to which I would like to invite your attention because it calls for even more thought than has already been given to it.

When Mr. Wechsler asks that cases be decided on neutral principles of *general* applicability, more specifically, on grounds much wider than the demands of the particular facts of the case, is it possible that he may

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<sup>38</sup> Fuller, *supra* note 35.

<sup>39</sup> Fuller, *The Morality of Law* (1963).

<sup>40</sup> Holmes, *Collected Legal Papers* 181 (1921).

be asking too much of general principles and general rules?<sup>41</sup> Is it not the case that in an important sense a general principle or a general rule is, in legal adjudication, a contradiction in terms, because the process of decision is always concerned with, and often depends upon, historically contingent facts? Is this not in part what Aristotle had in mind when he observed that "law is always a general statement, yet there are cases which it is not possible to cover in general terms . . . the material of conduct is essentially irregular."<sup>42</sup>

At this point, I would like to guard a little against being misunderstood; and perhaps I should try to make my meaning clearer by giving one or two specific examples. I should be among the last to demigrate the importance of general legal principles, but they may be found, on examination, to be few in number. For example, I would hope that United States constitutional law is in fact reaching the stage where "the equal protection" clause is to be interpreted as being equivalent to a "nondiscrimination clause," outlawing classifications on certain grounds (among them race) *in all cases*. This is the established position under many modern constitutions.<sup>43</sup> But whether American constitutional lawyers—and in particular the United States Supreme Court—are ready to go so far in so many words is possibly still an unresolved question; though this position has plainly very nearly been reached.

The point to note, however, is that the United States Constitution—unlike the constitutions of India, Nigeria, or West Germany, for example—does *not* specifically include a "nondiscrimination clause"; the authors were content to incorporate that rather more subtle phenomenon, an "equal protection clause."<sup>44</sup> Nondiscrimination clauses are, of course, quite unsubtle. They say bluntly and flat-footedly that certain criteria for classifying persons (for example, race) shall not be used. An equal protection clause, on the other hand, calls for a judicial assessment of the rationality of various criteria of classification for various purposes. It requires, in short, an assessment of reasonableness. But reasonableness must always be judged in the context of specific circumstances. Its full meaning in constitutional adjudication can never be divorced from specific facts; and, more particularly, from the evaluation of specific facts. This is not to say—and I would like to emphasize the point—that one should not sympathize with what Mr. Wechsler has in mind, namely,

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<sup>41</sup> Wechsler, *supra* note 34, at 21, 27; see deSmith, Book Review, 25 *Modern L. Rev.* 378 (1962).

<sup>42</sup> Aristotle, *Nicomachean Ethics*, Book V: 10, 1137.

<sup>43</sup> E.g., the Nigerian, Indian, and West German Constitutions.

<sup>44</sup> The West German Constitution and the Indian Constitution, on the other hand, include both a nondiscrimination clause and an equal protection clause.

greater predictability and less caprice in adjudication; but it may be doubted whether the main route to that desired end is along the lines of seeking so-called neutral principles of wide generality.

I would suggest, with respect, that at least one more fruitful approach might be to focus attention on the area which my colleague, Professor Kenneth Davis, describes as the area of "legislative," as distinct from "adjudicative," facts. By legislative facts, Professor Davis means facts, or an evaluation of a fact or facts, which the court takes into account in formulating a new rule of law, or in determining the range of applicability of an established rule of law. On the other hand, one is concerned with an adjudicative fact where there is no issue as to what is the operative rule of law, or its range of applicability, but the sole issue is whether the parties to litigation actually conducted themselves in a way covered by the rule. An example will make this clear. Assume that legislation fixes the maximum working hours for women at ten per day, and for men, at twelve per day. Whether, as a matter of law, such a classification is or is not reasonable, so as to escape being struck down due to the "equal protection clause," or by the "due process clause" may be the issue in a given case—as it was in the *Parrish* case.<sup>45</sup> In this event, the legal question may, and normally will, be decided upon an assessment of certain facts or alleged facts about the respective nature and functions of men and women in society. Such facts Professor Davis calls legislative facts. On the other hand, if we assume the reasonableness of the classification in question, a further issue may arise as to whether Miss Smith or Miss Jones did or did not work for, say, seventeen hours on a given Saturday in a given month. This issue, in Professor Davis' nomenclature, turns upon a finding as to an adjudicative fact.

It is generally recognized that courts should have greater freedom in holding legislative facts to be established than in the case of adjudicative facts.<sup>46</sup> But how wide should the court's discretion be; and what safeguards may realistically be insisted upon? For example, before holding critical legislative facts to be established, when, and in what circumstances, should the court give counsel an opportunity to argue the matter? I venture to suggest that insufficient attention has as yet been given to this aspect of the doctrine of "judicial notice" which, as Thayer long ago perceived, really goes to the heart of the judicial process.<sup>47</sup> It

<sup>45</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1936).

<sup>46</sup> See generally 1 Davis, *Administrative Law* 353-64 (1958).

<sup>47</sup> Thayer, *A Preliminary Treatise on Evidence* 277 passim (1898). Writing in 1928, Mr. Justice Frankfurter observed that "the legal profession has not yet put its mind to devising the necessary method and machinery by which knowledge of those facts, which are the foundation of Constitutional judgment, may be formally at the service of courts." See Frankfurter, *The Business of the Supreme Court* 315 (1928). The position seems still to be almost as little explored.

is, for example, not obvious to me why in one case a court should have no difficulty in saying, in substance, that everybody knows that freedom of speech and publication would be impaired by insisting that the authorship of books be disclosed, because—for example—a liberal journalist in Mississippi might be deterred from rooting for one man one vote,<sup>48</sup> while in another case, the same court should have insuperable difficulty in taking judicial notice of the fact that sit-ins in Mississippi are calculated to lead to a breach of peace.<sup>49</sup>

In the result, I would suggest that much more thought needs to be given to the question: how, if at all, may we make the judicial process more predictable and less capricious in *this* critical area? If, in the field of legislative facts, courts are to be free to make findings of debatable fact, they should perhaps at least give the parties an opportunity to argue the matter. Legislatures do no less. And judicial candor, it would seem, requires no less.

The need for "grand-style" or candid adjudication is, of course, by no means confined to the field of constitutional law; examples of unsatisfactory "formal-style" opinions in the common-law field are still legion despite the influence of the "realist revolt." Professor Patterson, in his recent Carpentier Lectures, calls attention to one such opinion, which may perhaps serve for illustrative purposes. Can a child maintain an action for prenatal injuries? This was the issue that arose in the New Jersey case of *Stemmer v. Kline*.<sup>50</sup> The *logic* of the majority opinion, which answered the question in the negative, may be shortly stated. "All right-holders are legal persons. No unborn child is a legal person. Therefore, no unborn child is a right-holder."<sup>51</sup> On which, one might respectfully comment: here indeed is a decision that is short, simple, and unsatisfactory.

However, while the need for self-aware and candid adjudication in dealing with the common law has often been stressed, I would suggest that the need is even more compelling when the courts deal with legislation; which brings me to the third aspect of the legal process to which I undertook to call attention. Here I propose to be very brief indeed, and will confine myself to the assertion that the whole question of the proper relationship between the legislature and the judiciary is still wide open for serious fundamental research—despite the hundreds of books which have been written on various aspects of this big subject. Take, for example, the subject of statutory interpretation—it raises quite basic

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<sup>48</sup> *Talley v. California*, 362 U.S. 60 (1959).

<sup>49</sup> *Garner v. Louisiana*, 368 U.S. 15 (1961).

<sup>50</sup> 128 N.J.L. 455, 26 A.2d 489 (Ct. Err. & App. 1942).

<sup>51</sup> See Patterson, *supra* note 26, at 15.

jurisprudential problems; yet, by common consent, it is currently in a most unsatisfactory state the world over. Lord Evershed observed in a recent lecture that the time has come for the whole subject of statutory interpretation to be fundamentally reassessed,<sup>52</sup> and few, I think, would disagree with him. Some have simply thrown up their hands in despair, on the ground that when all has been said and done statutory interpretation depends upon indefinable judicial attitudes towards legislation. Personally, I believe that many of the operative judicial attitudes in statutory interpretation are capable of being identified; the way in which they influence decisions may be observed and traced; and the reasons underlying them may be subjected to critical examination. There is urgent and worthwhile work to do in this field.<sup>53</sup>

Turning now to the second broad problem area which I have mentioned—how would I justify the inclusion of the various relations between law and morals, and between law and justice, as a fitting subject for jurisprudential study? This, admittedly, has been the key area—the most debated field—in jurisprudence from the time of Aristotle. Might it not be objected that it has become stale and jejune? I think not. It is still the Cape Horn of jurisprudence: still perplexing, still tempestuous—and still humbling, despite the efforts of the positivists from Austin to Kelsen. Dissatisfaction, in the United States, with current theories on the subject has recently inspired Professor Fuller to make a notable contribution to learning in this field<sup>54</sup>—and there seems little prospect of the age-old dialogue becoming stale.

To begin with, as Professor H. L. A. Hart has shown so very clearly, the topic of *the* so-called relationship (in the singular) between law and morals must be broken down into several distinguishable and more manageable topics. Among these, mention may be made of the following:

- a. In what fields has law influenced morality and vice versa, and what has been the nature of this influence? Are there certain areas of conduct which are more amenable to this mutual interaction than others; and if so, why? This is a causal or historical problem.
- b. Is it essential, or even helpful, to refer to morality or justice in ascertaining whether a particular rule of law, or a particular legal system, *exists*? This is the way in which Continental jurists are disposed to phrase this particular question;<sup>55</sup> though, possibly, a more penetrating formulation is Professor Fuller's: "What are the

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<sup>52</sup> Evershed, "The Judicial Process in England," in *Essays in Jurisprudence* 97 (1963).

<sup>53</sup> The author is, in fact, at present preparing a book along these lines.

<sup>54</sup> Fuller, *supra* note 39.

<sup>55</sup> See, e.g., Castberg, *supra* note 8, ch. 2, § 3.

directions of human effort essential to maintain any system of law, even one whose ultimate objectives may be regarded as mistaken or evil?"<sup>56</sup> This is a definitional problem.

- c. Assuming that law, morality and justice are distinguishable concepts, are there significant criteria of morality or justice for evaluating law; and are certain criteria more useful than others for this purpose?
- d. Assuming, again, that it is justifiable to impose legal sanctions for the commission of an immoral act, what, if any, are the limits which should be observed in the attempt to enforce morality by legal sanctions. More particularly, is it helpful to distinguish between the "private" and "public" effects of an immoral act, as does Professor H. L. A. Hart;<sup>57</sup> or between the "two moralities"—the morality of duty and the morality of aspiration—as does Professor Lon Fuller.<sup>58</sup>

With minor adaptation, I have taken these few aspects of the various relations between law and morals from Professor H. L. A. Hart's book, *Law, Liberty and Morality*.<sup>59</sup> Had Professor Hart done no more in this admirable book than distinguish these four questions, so as to make this aspect of our subject more manageable, we would be in debt to him. However the enumeration is not exhaustive, and was not intended to be; and it would seem that an even more thorough-going breakdown may be called for—especially if we extend the range of inquiry to the relations between morals and law, considered not merely as a system of rules but as including standards of conduct, such as the standard of reasonableness.<sup>60</sup>

Turning now to the third problem area which I ventured to include among the six, namely, the basic conceptual framework of the lawyer's craft, and the best method of elucidating it, I shall try to be equally brief. Analytical jurisprudence—including (as a minimum dose) the definition, analysis, and classification of juristic acts (*rechtsgeschäfte*) and of legal rights and duties—may not, in itself solve specific legal problems, but, to state the case at its lowest, it does enable a lawyer to pose such problems clearly and significantly; and, especially, to discern analogies which may otherwise escape notice. In this regard it has often surprised me that the Hohfeldian analysis which, I suppose, most of us have profited from at one time or another, should have gone so much out

<sup>56</sup> Fuller, *supra* note 39, at 2.

<sup>57</sup> Hart, *Law, Liberty and Morality* (1963).

<sup>58</sup> Fuller, *supra* note 39.

<sup>59</sup> Hart, *supra* note 57.

<sup>60</sup> See note 20 *supra*.

of fashion in the country of its origin. Interest in Hohfeld continued in the United States, it would seem, until the last world war. Today, I would hazard a guess that many graduating students in American law schools have neither read Hohfeld, nor even about him. This is a pity.

Hohfeld's analysis has, in the past, been applied mainly to the field of private law—property, tort, and contract—and no doubt most of what he had to teach in those fields has been absorbed, so to speak, into the bloodstream of the system. But there is still much profit to be gained from applying the Hohfeldian analysis in other fields, and especially in constitutional law. Are, for example, the so-called “basic human rights” rights in the strict sense, or privileges, or immunities? Different legal systems, of course, give different answers to this question. But, as Sir Ivor Jennings has pointed out,<sup>61</sup> the question itself, when thought through in Hohfeldian terms, is most instructive. Ask yourselves, for example, whether in the United States, the “right” of association is a right in the strict sense or a privilege or a power or an immunity. If it is a right, is there a corresponding duty on the part of private citizens?<sup>62</sup> Again, is there any practical difference between postulating, *ab initio*, a right of a defined content corresponding to a duty of noninterference on the part of the state, save with due process of law; and postulating, *ab initio*, the enjoyment of an undefined immunity, the scope of which depends solely upon what is left to the citizen after the state has acted with due process? For example, the West German Constitution presupposes the existence, *ab initio*, of rights against the state, which have, moreover, an irreducible minimum content; for the constitution expressly forecloses the possibility of state action which deprives such rights of their “essential content.”<sup>63</sup> In other words, the citizen is given something different from an indefinite immunity from state action without due process; he enjoys, as against the organs of the German state, a specific right of a defined minimum content. You might, I think, find it instructive to compare the position under the United States Constitution. Now I am not suggesting that Hohfeldian analysis, in itself, provides answers to the questions of policy which are here involved; it obviously does not. It does, however, facilitate analysis and comparison; and by so doing makes it easier to arrive at informed answers on questions of

<sup>61</sup> Hohfeld, *Some Characteristics of the Indian Constitution* ch. 4 (1953).

<sup>62</sup> Some German courts are tending to develop a theory of so-called *drittwirkung*, in terms of which certain constitutional guarantees may be invoked against the action of private persons. The subject is, however, no less controversial in Germany than is the question of the wide interpretation sometimes sought to be given to “state action” in the United States. See generally Maunz-Durig, *Grundgesetz Kommentar*, Munich, 1963, art. 1, Abs. III, pp. 64, 599; Neumann-Nepperdey-Scheuner, *Die Grundrechte*, Berlin, 1954, pp. 18, 599.

<sup>63</sup> West German Const. art. 19(2).

policy. In short, it is a conceptual tool which lawyers can ill afford to neglect.

The various aspects of methodology and epistemology, which I have grouped together to form a fourth problem area, call for rather more extended treatment than I dare burden you with in what has already become a long paper; but I shall try to give you the flavor. Few, I think, would deny that mastery of the kind of linguistic analysis, which Professor H. L. A. Hart uses so effectively, saves a great deal of time and energy that might otherwise be wasted in asking futile or misleading questions. This may be illustrated in a practical context by reference to the litigation which took place in South Africa on the validity of the "entrenched sections" of the South African Constitution.<sup>64</sup>

In 1910 the South African Constitution came into operation. Under it, South Africa was given a bicameral parliament empowered to deal with the general run of legislative business by a simple majority vote in the two houses of Parliament sitting separately. The voting rights of the colored people in the Cape Province, were however, "entrenched" in the sense that these rights could not be modified or taken away, save by a two-thirds majority vote in both houses of Parliament sitting together.

Between the years 1910 and 1931, the South African Parliament, in common with the legislatures of other Commonwealth countries, suffered under certain theoretical disabilities, or limitations of power, in comparison with the Parliament of the United Kingdom. For example, legislation of the United Kingdom Parliament could, in theory, be made applicable by the United Kingdom Parliament in Commonwealth countries, and the legislation of Commonwealth parliaments was liable to be set aside on the score of "repugnancy" to British legislation. These disabilities were removed in 1931 by the Statute of Westminster.<sup>65</sup>

Thereafter, in 1950-1951, an attempt was made by the South African Government to deprive the colored people of their voting rights in the Cape Province by legislation passed by an ordinary majority vote in the two houses of Parliament sitting separately. The colored voters challenged the validity of this legislative measure.

There were some who posed the main issue in the case by asking whether "the two-thirds majority requirement was binding as a limitation of the powers of Parliament?" To put the issue this way, however, was to assume that Parliament should be defined as a bicameral legisla-

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<sup>64</sup> See generally, Cowen, *Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act* (1950); "The Entrenched Section of the South Africa Act: Two Great Legal Battles" 70 *S.A.L.J.* 238 (1953); "Legislature and Judiciary," 15 *Modern L. Rev.* 282 (1952); 16 *id.* at 273 (1953).

<sup>65</sup> Statute of Westminster, 1931, 22 & 23 *Geo. 5*, c. 4.

ture, functioning by simple majority vote, for *all* legislative purposes; and was calculated to obscure, and in fact to beg, the real question. The critical question was: what *is* Parliament, for the purpose of dealing with the colored people's voting rights; in other words, what are the rules which lay down how the constituent elements of Parliament must function in order to deal effectively with such voting rights? These rules had been laid down very clearly in 1910 in the South Africa Act (the South African Constitution); a two-thirds majority at a joint sitting had been prescribed. Once this was clearly grasped, the way was opened to ask the further decisive question whether the rules had been changed subsequently. On the other hand, to ask the question (as many did): is the South African Parliament sovereign, was to pose a question which was really irrelevant, and which, in any event, could only be answered when other questions had *first* been answered. To assume a universally accepted meaning as attaching to the word, "sovereign," and then to attempt to deduce the answer to specific questions from the nature of sovereignty was to engage in a logically preposterous exercise.

In the result, largely because of significant question-posing, the South African Court of Appeal cut through the irrelevant and the question-begging aspects, and held that: "It is [the South Africa Act] . . . and not the Statute of Westminster which prescribes the manner in which the constituent elements of Parliament must function for the purposes of passing legislation," and the court then went on to rule that nothing had taken place between 1910 and the date of the litigation to change the two-thirds requirement.<sup>66</sup> In short, the Statute of Westminster had brought to an end certain limitations upon the power of a duly constituted Parliament; it had not changed the *definition* of the South African Parliament itself.

It would, I think, be instructive, in a course on jurisprudence in the United States, to take, say, a half-dozen major questions that have perplexed American lawyers in the last decade, and to ask whether they have been significantly posed. Would, for example, Professor H. L. A. Hart pose them differently? What advantages are to be gained from posing them differently? I shall not, however, presume to inflict anything like another half-dozen perplexities upon you; I will confine myself to but one more example of the importance of significant question-posing.

The field of law which, in my view, cries out most urgently for more realistic question-posing, is conflict of laws. Let us suppose, for example, that T, while domiciled in state X, where marriage does not revoke a

<sup>66</sup> Harris v. Minister of the Interior, [1952] 2 So. Afr. L.R. 428, 473-84 (1952); see Wheare, *The Statute of Westminster and Dominion status* 344 (5th ed.); Marshall, "What is Parliament? The Changing Concept of Parliamentary Sovereignty," 1954 *Political Studies* 193.

will, makes a will disposing of his entire estate to a university, and that subsequently he marries in state X. He dies domiciled in state Y, where marriage does revoke a previously made will. He survives his wife and leaves no heirs. Assume that the courts of state Z are called upon to decide whether T died testate or intestate. Now a purely formalistic approach to this question (an approach for which there is, unfortunately, judicial warrant), would be to rest content with asking whether the rule in state Y that marriage revokes a will is a proprietary consequence of marriage, or a matter relating to the law of succession; and then, having made the characterization, to apply *automatically* the law of the testator's domicile at the date of his marriage in the former case, and, in the latter case, the law of the testator's domicile at the date of his death.

Such an approach tends, however, to conceal the policy issues which are involved, and which should not be avoided. It assumes, moreover, that the comparatively few broadly stated "conflict rules" in a given system can fairly accommodate the vast number of specific internal or domestic rules to be found in the modern world. My former Chicago colleague, Professor Brainerd Currie, surely gets nearer the mark when he insists that the policy underlying the potentially applicable rules must be ascertained and evaluated; though I would not agree with him that in all cases preference should be given to the policies of the forum. In a case such as the one which I have posed—uncomplicated by other possible factors—it is, for example, by no means immediately clear why the decisive question should not be: what solution of this particular problem best satisfies the reasonable expectations of the parties, namely, the testator and the university?<sup>67</sup>

Earlier in this paper I suggested that Professor Edwin Patterson's plea for the more extensive use of empirical studies in law should be taken seriously. This sort of inquiry plainly has merit because it tends to push back the point where men feel constrained to take a stand on a confession of faith (at some point, we all take such a stand), and so it allows a rational dialogue to go on longer. If, for example, the issue is whether reasons should always be given for judicial decisions, it would be of value to organize a controlled experiment on the question whether the giving of reasons for the decision of a legal question does or does not have an appreciable influence on the actual decision. Again, take the question whether a measure of absolute or strict liability (along the lines, for example, of French law) should be introduced for damage caused by the

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<sup>67</sup> I am aware that the rule that a will is revoked by marriage in *ius cogens* and not *ius dispositivum*; but why should this consideration affect the relevance of the reasonable expectations of the parties? For a penetrating discussion of the whole problem, see Falconbridge, *Conflict of Laws* 112-17 (2d ed. 1954).

servants of public authorities in the course of their duties—one of the keenly debated questions of contemporary Anglo-American administrative law. It is sometimes argued, against the position of absolute liability, that its introduction would tend to dampen initiative and experiment on the part of public authorities; and it has even been suggested by the opponents of absolute liability that insurance is not a practicable way of spreading the risk. These, however, are empirically or historically verifiable considerations; and, to the extent that they are to be given weight, they should surely be verified before a final position is taken on the substantive question. Factual investigations of this kind and, in particular, the study of the scientific preconditions and requirements for making the relevant conclusions reliable are, in my submission, appropriate matter for study in an active law school.

I come now to the fifth area in which I believe that there is room for creative jurisprudential effort, namely, a reexamination of “the battle of the schools.” I have already called attention to the importance of learning to integrate one’s political, social, economic, and ethical knowledge into day-to-day legal work in a scientific and controlled way. Here I shall limit myself to a few remarks on reconciliation and synthesis. Few battles have been more heated, yet more unenlightening, than the battle between “natural law adherents” and “realists.” On the whole, this has been shadow-boxing on the part of persons who are an embarrassment to the natural-law camp, and whose opponents, the realists, for their part, would be pleased to disown. Indeed, there appears to be room for a brace of instructive essays, entitled respectively, *Saving Natural Law From Its Friends*, and *Saving Realism From the Realists*. The former essay might try to make the points that not every person (and indeed no qualified person) claiming to be a natural lawyer is inevitably committed to the “naturalistic fallacy” in logic, or is an intellectual imbecile or is dedicated to the sacrosanctity of private property, or believes that natural law provides principles from which the great majority of practical questions which have to be decided in a legal system might be deduced from readily identifiable principles with logical precision. The essay on the realists might, *inter alia*, try to make the point that it is the sheerest travesty to suggest that “realists” are, one and all, devoid of interest in justice and morals and the relations between these concepts and that of law. Consider, for example, the following passage from Llewellyn’s *Common Law Tradition*:

The standard of wisdom to which appeal is being made (to get that one out of the way first) is not any person’s personal standard; it is rather a standard which aims to get idiosyncratic preferences largely hewn off until

the standard becomes what the courts also are reaching for: something which can be hoped, on thought, to look reasonable to any thinking man; something that can even be hoped to look reasonable in the light of that uncommon sense, horse sense.<sup>68</sup>

St. Thomas, I would suggest, might have written that passage. In any event it is probably nonsense to speak of a "school of realists," as if its members were a collection of fungible commodities all committed to any one dogma. Indeed, Llewellyn makes this very clear in an appendix to his *Common Law Tradition*.<sup>69</sup>

What I have said thus far might be thought by some to be all very well in its way. But does it justify the study of jurisprudence as a separate subject in an ever increasingly crowded curriculum? Is there not a danger, moreover, that the teacher of jurisprudence will merely peddle a few superficial generalities and his own brand of biases and prejudices? Why not leave the law to people who really have dug into a tough subject and who have their feet on the solid earth? And, in any event, is jurisprudence calculated to make lawyers better lawyers, better craftsmen?

These questions bring me to the sixth and final section of this paper. Let me take the last question first. I personally have no doubt that the kind of jurisprudence which I have discussed in this paper is calculated to make lawyers better lawyers and better craftsmen. Gray and Holmes and Learned Hand, for example, were certainly none the worse for their interest in jurisprudence; and probably they were as effective as they were precisely because of it. But, in any event, there are justifications other than strictly utilitarian ones for the study of jurisprudence. Among these, I would mention two. Roscoe Pound makes the point<sup>70</sup> that one of the main advantages to be gained from this study is that it saves its votaries from shallowness, and the dangers of superficiality and oversimplification. Recognition of the enormous complexity of the phenomena called law and justice and morality is, in itself, a very salutary and humbling thing. Secondly, despite the complexity of the law, there is much to be gained from making the attempt—even though one may fail—to see the subject comprehensively, and to see it whole. The challenge to understand the forces which shape the law's growth, and the purposes which it serves, cannot be ignored by any lawyer if he could do his best work. For all this, there is available, in abundant measure, the testimony and the example of the best witnesses who have adorned the profession.

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<sup>68</sup> Llewellyn, *Common Law Tradition* 277 (1960)

<sup>69</sup> *Id.* at 508.

<sup>70</sup> See Pound, *Justice According to Law* (1951).

In regard to the advantages of having jurisprudence taught, if possible, by people who have had their hands calloused, so to speak, in the tough areas of the law, I am all for it. Fuller does jurisprudence better because he is also expert, for example, in the law of contracts; Llewellyn never lost his love for sales and negotiable instruments; Gray was not loath to temper his scholarship with a successful and very lucrative Boston law practice. Conversely, a torts teacher like Harry Kalven, or tax lawyers like Walter Blum or Joe Sneed are none the worse for their interest in jurisprudence. But to recognize these facts does not mean that one should go to the other extreme, and leave the subject of jurisprudence to squeeze its way, for example, into a course on contracts or on the Rule Against Perpetuities, however well and philosophically such courses might be taught.

No doubt a good deal of what I have discussed in this paper could be fitted into various standard courses on such subjects as constitutional law, administrative law, and conflict of laws. But much of it could not. Indeed it is, I think, fair to say that without jurisprudence, taught as a separate discipline, the sum total of any combination of individual courses taken in a law school can seldom, if ever, give an adequate view of the law and its significance.

But, then, it is objected that persons who are properly qualified to teach jurisprudence do not grow on gooseberry trees. Of course, they do not. And the more capable they are the harder they are to find. Indeed, if the present disinterest in the subject continues, there may soon not be any qualified teachers of jurisprudence. It takes years of thought and practice and trial and error to build up a good jurisprudence course, and there is danger that competent people may soon be too discouraged to continue the effort.

Just as Llewellyn claimed that there is a grand style in opinion writing, so too there is a grand style in jurisprudence—or as Shuman would say, in “doing jurisprudence.”<sup>71</sup> If, in arguing a point, one makes value judgments, one should do so explicitly. If one has—as one ought to have—philosophical foundations for one’s value judgments, one should disclose what those foundations are. Indeed, teachers of jurisprudence ought sooner or later, and the sooner the better, to disclose their epistemology, their ontology, and their theology, if they have such. For example, I hold the view that the intentional killing of a human being calls for justification. Indeed, I would give this as an example of natural law. I leave aside, for present purposes, the question whether a

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<sup>71</sup> Shuman, *supra* note 31, at 12.

given explanation is or is not "adequate justification," and I leave this aside because I am concerned to emphasize the point that to require *any* justification for killing involves *in itself* the holding of a distinct philosophical position. Indeed, it presupposes, in addition, in my case, a committal *inter alia* to a particular theology. If, for example, one believed sufficiently strongly that people passed on after death and rebirth to an inevitably better and happier life through death, rebirth, death, and so on, one might perhaps be justified in framing the natural law which I have suggested quite differently. On this view, indeed, one might have to justify why one did *not* kill people. The fact of the matter is that, ultimately, we lawyers are thrown back on certain confessions of faith (or, at least, on certain working hypotheses) which are probably not empirically verifiable. Those teaching jurisprudence should at least make the effort to examine what it is, if anything, they really believe in; they should have the courage and honesty to make these basic assumptions manifest; and, by so doing, submit them to rational criticism and judgment. In this way alone is it possible to avoid the charge of dogmatism or proselytising.

I have now made my plea for a more serious interest in jurisprudence. If jurisprudence impresses you as potentially a worthwhile subject, that is because it is what it is. If, on the other hand, you have been deterred, the fault is mine.