Legisprudence: Problems and Agenda

Julius Cohen
LEGISPRUDENCE: PROBLEMS AND AGENDA

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The inquiries of jurisprudence in this country have focused mainly on the judicial side of the legal order—on the formal structure of the legal order that validates judicial authority; on the conceptual apparatus of judicial law; on the behavioral patterns and historical development of judicial institutions; on the logic of judicial reasoning; on the social ends that courts profess to serve; on the ethical ideals towards which they should strive; on the criticism and evaluation of judge-made law, etc. An assortment of “school” labels has often accompanied these intellectual endeavors—e.g., analytical, sociological, historical, philosophical—each often claiming superiority at the expense of the modest truth, namely, that each represents no more than a different, strongly emphasized, but non-competing focus on a given corpus of inquiry. If, broadly speaking, jurisprudence is a theoretical account of the legal order, in both its positive and normative aspects, one would logically expect the legislative side of the legal order also to be within its inquiring ambit. However, judging by the quantum of intellectual output on the subject appearing in jurisprudential literature, such is not the case; comparatively little writing energy has been devoted to examining the legislative aspects of the legal order.¹ Jurisprudence in practice has been primarily court-oriented, addressing only a part—albeit a significant part—of the legal order. If one may label the limited scope of this jurisprudential enterprise, it might suggestively be called judicativeprudence, a theoretical study of the judicial component of the legal order.

Legisprudence,² its counterpart on the legislative side of the legal order...

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* Distinguished Professor of Law Emeritus, Rutgers School of Law; Visiting Distinguished Professor of Law, California Western School of Law.


gal order, has, with notable exceptions, been left to languish. Much of this is no doubt due to the fact that the “law” studied in law schools is primarily the “law” emanating from the courts. This unilateral academic focus is based on the assumption that the locus of conflict resolution by lawyers is primarily in the judicial arena. The influential, though much misunderstood, observation by Justice Holmes that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law,” lent jurisprudential fuel to the notion that the judiciary is at the center of the legal universe. There was added fuel in the much quoted statement of John Chipman Gray that “it is with the meaning declared by the courts, and with no other meaning, that [statutes] are imposed upon the community as Law.”

It is now a matter of common knowledge—sufficient even for the technical test of judicial notice—that conflict resolution is often securely and definitively accomplished by lawyers who do battle in the legislative and administrative arenas as in the judicial, and that a host of legal norms are sufficiently unambiguous for effective implementation without the need to run the gauntlet of judicial interpretation or of constitutional scrutiny. Moreover, the principles that underlie discrete judicial decisions—the real law of the decisions—spring from the same communal source as do the principles that underlie discrete legislative enactments. Both are ultimately accountable to the same communal ideals of the larger community of which the legal community is but a part, albeit a salient part.

It is this kinship with communal roots and communal accountability that has prompted suggestions that the judiciary and the legislature be integrated in their decision-making processes in the interest of coherence of policy, instead of being separated into two competing fiefdoms of the order. These suggestions still await full implementation. Even Pound’s prediction as early as 1908—that statutes will

3. For the especially salutary contributions of Ernst Freund and Frank E. Horack, see E. Freund, Standards of American Legislation (1917); Horack, The Common Law of Legislation, 23 Iowa L. Rev. 41 (1937).

4. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897) (emphasis added). This could be wrongly taken by some to imply that the perspective of the practitioner interested in the outcome of litigation is the only perspective on “the law.” The statement obviously does not address itself to the judge who is not concerned with how he will decide a case, but how he ought to decide it—a normative, not a predictive task. On the latter, much of what Holmes had to say was significant, but in the context of a judicial, and not a legislative, orientation. See id. at 461-78.

eventually be dealt with as principles and not merely as discrete rules, and will be reasoned from by analogy on a coordinate par with judicial rules and their underlying principles⁶—has still not securely and comfortably come to pass.

Aside from the fact that legisprudence has suffered an identity problem because of the overshadowing presence ofjudicativeprudence, two other types of problems confront the field. The first is primarily environmental and relates to the terrain as well as to the intellectual and professional climate that legisprudence needs in order to develop and flourish—a problem exterior to the subject matter of the field. The second type of problem—of an internal nature—relates to those salient questions that need to be raised within the field itself, as well as the difficulties that might be encountered in coping with them.

I. THE PROBLEM OF TERRAIN

The terrain of legisprudence is considerably rougher than that of judicativeprudence. The legislative arm of the legal order conjures up images of bias, emotionalism, wheeling and dealing, maneuvering for power, compromise, etc. The judicial arm, at its best, is thought of as reflective, deliberative, objective, and, above all, rational. Legislators are thought to be susceptible to appeals to sentiment, or to power; hearings on the merits of proposed legislation must contend with prior partisan commitment; final votes are rarely influenced by debate; and final decisions are not defended by reasoned written opinions.⁷

Because these factors add up to a process whose character is perceived as "political," it might be asked how such an unruly process could possibly be intellectually tamed by inquiries of legisprudence. The response might well be that the comparative unruliness of the legislative process should be no more of a deterrent to theoretical inquiry than the turbulence of weather to the study of meteorology. Indeed, the legislative process may be in some ways even more complex than the process of judicial decision-making. There are many varied voices which must be heard and somehow be reduced, after compromise, to an aggregate expressed in statutory form. Judicial voices—comparatively few in number—come into play after the turbulence of legislating is over; as a result, the setting

is conducive to cooler deliberation and reflection because the problems faced are different. General policy and principle are not confronted at the outset; rather, the judiciary is activated into dealing with them later when difficult questions concerning their meaning, application, refinement, coherence, and/or validity are presented. Inquiry is set within parameters of orderly combat between specially trained adversaries; decision, for the most part, is accompanied by written justificatory opinion. Like the wholesaler and the retailer, the legislature and the judiciary deal in and with the same product, but in significantly different ways.

What is often lost sight of, however, in comparing the reflective coolness and deliberativeness of the judicial process with the politically charged atmosphere of the legislative process is that both ascriptions are mere caricatures—partly true, but somewhat exaggerated. There are "relatively stable and strongly stabilizing factors" behind much of the surface turbulence of the legislative process; by the same token, "political" considerations have been known to insinuate their presence in judicial decision-making. Thus, the issue is not the extent to which the legislative process falls short of the ideals of the judicial, or whether there are slight family resemblances and overlappings between the two; it is rather that both processes must be seen as serving two different, but complementary functions and, therefore, they should be contrasted instead of compared. With this in mind, they both must be analyzed, conceptualized, synthesized, and criticized, if jurisprudence, in the broad sense, is rightfully to claim philosophical jurisdiction over a deeper, more pervasive understanding of the legal process.

II. THE CLIMATE FOR LEGISPRUDENCE

As a coordinate branch of jurisprudence, legisprudence is necessarily a theoretical discipline, concerned with general and abstract issues of more immediate interest to the philosophical analyst or critic than to the legal practitioner or legislator. There are theorists who defensively point out that the better the theory behind a prac-

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8. This expression was the hallmark of Karl Llewellyn's influential work, K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960), in which he sought to demonstrate that appellate courts, long criticized for the intrusion of an arbitrary "political" element in its decision-making process, were actually governed by "relatively stable and strongly stabilizing factors." This author postulates that similar discoverable factors would be found to be at work in the day-to-day operations of the legislative process.

tice, the better the practice. However true this might be as an abstract proposition, the distance between theorists and practitioners is far greater than between theory and practice. The practitioner is uncomfortable with the language of theory and the questions that it poses. They seem remote from immediate problem-solving; one can, moreover, point to successful practitioners who were weaned on “how-to-do-it” teaching programs without exposure to the more theoretical or “insight” courses of a law school curriculum. The looming shadow of the bar examination—an exercise in rote and situational “logic”—places understandable pressure on law schools with limited energies and resources to respond to the more immediate concerns of would-be practitioners and to the professionals of a highly technical discipline. The engineer and the medical practitioner are species of the same generic class of practicalists with corresponding distance from the theoretical side of their respective undertakings. In schools of law, the presence of theory-oriented offerings is often a byproduct of the boredom of second and third-year courses that run the case system of teaching into the ground in a never-ending drive for more and more technical coverage. The ideal environment, then, for the research and critical functions of legisprudence, as well as for judicativeprudence, is one in which these functions are supported, maintained, and staffed independently of the teaching function.

This does not rule out the gifted teacher who is also a gifted researcher and critic. It does, however, indicate the need to make research and criticism ongoing and not occasional. There are laboratories and think-tanks that are known to operate full-time; schools for practitioners need no prodding in that direction. Of course, the efforts of both theorist and practitioner must ultimately meet and intertwine. Practice is ultimately indebted to theory for direction (i.e. social needs or ends) and conceptualization; theory is beholden to practice for its raw materials and its function as a constant check on the “fit” of theory. The yield of research and criticism should, therefore, ideally filter into the teaching program and into the work of the practitioner.

Both legisprudence and judicativeprudence merit study not only for their practical consequences, but also for the light that they shed on the larger problems of the human predicament. In the words of a keen observer: “Civilized life would be sadly impoverished if litera-

10. See Holmes, supra note 4, at 477.
ture were devoted entirely to advertising or propaganda, even for righteous causes, or if the fine arts were used only for practical purposes rather than as ends in themselves enriching the enjoyment of life."12 On the assumption that most social relations are potentially legal—involving virtually every branch of human thought and activity—such a theoretical enterprise, if taken seriously, could well encompass a fathomless area of intellectual activity, and involve a number of interrelated disciplines. This need not, however, invite paralysis at the outset. Modest attempts are still beneficial and the vastness can be tamed administratively by allocative measures that efficiently govern the division of talent, energy, and resources.

III. INTERNAL PROBLEMS: AGENDA FOR LEGISPRUDENCE

Of the many problems which press for attention in the field of legisprudence, some are contiguous, some seemingly overlap or are held in common, and some are independent of other disciplinary lines. No hard and fast territorial boundaries divide the problems, and it would be fruitless to try to construct such demarcations. Regardless of these common or overlapping properties, there need be no jurisdictional disputes if the objective is merely to observe these problems from a different—in this case a legisprudential—point of view.

A. The Control Over Legislative Meaning

One of the most vexing and pervasive problems facing legislative rule-making bodies is the inherent inability to frame rules that exhaust beforehand all of the particular cases to which they should be applied. A rule cannot a priori hope to claim all of its own instances; thus the inevitable human need for interpretative application. The problem is important because it ultimately concerns the extent to which the legislature and the judiciary share control over the life of the legal community. It is an old saying that he who has control over the interpretation of the law is, by the nature of things, its master. The problem is also important from the perspective of the one who is on the losing side of an interpretation by the courts of an ambiguously or vaguely worded statute. Although courts are free to and, in special situations, have ordered their interpretations to oper-

ate prospectively,\textsuperscript{13} in most instances the interpretation is retroactive in effect,\textsuperscript{14} causing deprivations, often severe, to those who guessed wrongly, although reasonably, concerning the meaning of the legislative enactment. Often the "guess" is consistent with four, albeit dissenting, Justices of the Supreme Court and is, therefore, outguessed by only one vote. Accordingly, the greater the control over meaning by the legislative body, the greater the assurance that there is fair notice, prior to a legislative enactment, of what one needs to do in order to avoid legal sanctions and other deprivations, i.e. to plan one's conduct, knowing in advance the ways in which one's liberty will be restricted.

If, as Kelsen has argued, a rule works like a frame within which different interpretations are possible,\textsuperscript{15} then judicial power over legislative decision-making via the task of "interpretation" cannot be eliminated. Many so-called "rules of interpretation"\textsuperscript{16} applied by courts are not in fact guides to the discovery of actual legislative intent, but rather they are maxims of public policy to be used by judges in creating legislation out of vague and ambiguous statutes. In this sense, judicial power over legislative decision-making means tilling in the same work-field as that of legislators, albeit with smaller and more refined tools. The question to be faced is whether such power can be limited and restrained, and if so, to what extent.

It is often assumed that the conventions of language, if rigor-

\textsuperscript{14} United States v. Dotterweich, 320 U.S. 277 (1943), one of a myriad number of examples, exemplifies the problem. The Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 331(a), 333(a) (1976) provides criminal penalties for "any person" who introduces adulterated or misbranded drugs into interstate commerce. Dotterweich, president and general manager of a pharmaceutical corporation, was charged with a violation. \textit{Dotterweich}, 320 U.S. at 278. The controversy centered on whether Dotterweich was a "person" as technically defined in the Act. The Court, splitting five to four, held that Dotterweich was a "person" within the meaning of the Act and therefore, subject to criminal penalties. See \textit{id.} at 284-85. Before the decision, Dotterweich, even with the help of learned counsel, could not have known beforehand the correct meaning of the law. The decision, nevertheless, followed the normal course of retroactive application.

\textsuperscript{15} H. Kelsen, \textit{General Theory of Law and State} 146 (A. Wedberg trans. 1945) ("The judge is, therefore, always a legislator also in the sense that the contents of his decision never can be completely determined by the preexisting norm of substantive law.").

ously adhered to, should ideally effectuate the necessary restraint.\textsuperscript{17} Yet, even in those instances in which it is agreed that the conventional language is "clear" on its face, it is difficult at times to know whether conventions of common usage or of technical use are controlling, or whether strong statements of purpose during the course of debate or incorporated within the enactment itself override conventional usage when the language of purpose and the language of conventional usage conflict.\textsuperscript{18} The difficulty involved in the relationship between rule and application stems from the inevitable incompleteness of meanings that attach to symbols. Incomplete symbols are prevalent and serious both in the fields of ethics and of legislation—legislative principles and policies often paralleling moral precepts. The notion of "theft," for example, involves the concept of another person's property, with endless ramifications of title and contract.\textsuperscript{19} The notion of "life," in legislative, judicial, and moral dealings with the problem of abortion, still remains indeterminate.\textsuperscript{20} Similarly, the concept of "dangerous instrumentality" is far from being made determinate.\textsuperscript{21}

There are several reasons for employing incomplete symbols in legislation. In some instances, determinate standards are impossible to formulate and vague standards such as "reasonable" must do the job, with delegation at the application stage to a judge, jury, or an administrative body. Vague criteria like "reasonableness" may be the only ones plausibly available in such instances because adequate scientific or conventional tests have not yet been developed.\textsuperscript{22} In other instances, however, calculated ambiguity is sought when agreement between competing groups in the legislative arena cannot be obtained, and maneuvering for a determinate position ceases when the issue of meaning is brought to the courts. What might be labeled "artistic obsfuscation" is thus often employed. Here, the delegation to

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  \item \textsuperscript{17} See Dickerson, \textit{The Diseases of Legislative Language}, 1 \textit{Harv. J. on Legis.} 2, 5 (1964).
  \item \textsuperscript{18} But see id. at 6 (while task of writing clear statutes remains formidable, problems of language are largely curable).
  \item \textsuperscript{20} Two recent attempts were made in Congress to declare legislatively that human life be deemed to exist from the moment of conception. See S. 2148, 97th. Cong., 2d Sess. § 1(j) (1982); S. 158, 97th. Cong., 1st Sess. § 1 (1981).
  \item \textsuperscript{21} See W. Prosser, \textit{Handbook of the Law of Torts} § 78 (1971).
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courts is not unlike an arbitration procedure, in which the competing parties in effect agree among themselves, by way of compromise, to permit an impartial third party to settle the matter in dispute.

At best, the limitations of language ordain that clarity and determinateness, even when it is seriously sought, must remain an ideal, incapable of complete human attainment. A problem which still remains unanswered, however, is how the legislative process can best be organized in order, at least, to maximize clarity of expression, when clarity is indeed the goal. The product of the serious draftsman, no matter how dedicated to and skilled in the goal of clarity, is valueless unless approval of the legislature can be obtained. It is, of course, theoretically possible for the course of unfavorable judicial interpretations to be changed by corrective legislation. Although this has been done in some instances, the practical difficulties in doing this as a matter of regular course can be overwhelming and crippling, siphoning off precious energies needed for planning and for the resolution of new problems. Statutory construction statutes also abound, representing an attempt by legislatures to establish their overriding authority over judge-made rules of interpretation; but these statutes are themselves full of ambiguities and therefore, remain grist for the judicial mill.

One suggested solution to this ongoing construction and interpretation dilemma is that the legislative body create a special standing committee to clarify existing laws that have produced conflicting

23. For example, Congress can expressly declare that a particular state regulation which affects interstate commerce is nonetheless a valid exercise of the state's police power and not a violation of the Commerce Clause, U.S. CONST. art. I, § 8, thereby effectively overruling a prior Supreme Court decision to the contrary. In Leisy v. Hardin, 135 U.S. 100 (1890), the Supreme Court invalidated an Iowa statute prohibiting sale of intoxicating liquors as applied to sealed kegs stored in Iowa but shipped in from out of state. The Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (1976)), was subsequently enacted, authorizing states to regulate the use, consumption, sale, or storage of liquor located within the state, no matter how it was packaged. The validity of the Wilson Act was then upheld in the case, In re Rahrer, 140 U.S. 545 (1891).


interpretations. This overlooks, however, the role of compromise in the legislative process—compromise that often results in language that is in effect a message to the courts to supply judicial gloss to an otherwise stalemated situation. Much of the frustration with this problem is a byproduct of its long term existence. Indeed, the commentary Sir Courtenay Ilbert made years ago could just as meaningfully be written today: "[C]ompromise and co-operation are admirable things in politics, but they do not always tend to clearness or accuracy of style, logical arrangement, or consistency, in literary composition." In sum, the careful language of the serious, enlightened drafter often becomes unrecognizable after it is buffeted and mauled by the forces, political or otherwise, that act upon it in the course of its journey through the legislative process.

This discouraging picture is not designed to suggest that improvements cannot possibly be made, and that efforts by theorists in legisprudence to minimize vagueness and ambiguity in legislative language should therefore be abandoned. To the contrary, such theorists must recognize and directly confront the problems that are involved, with full awareness that the odds are stacked against reaching Nirvana. One should not, in the language of Tourtoulon, "throw to the dogs all that is not fit for the altar of the gods."  

B. The "Public Interest"

Judging by the pervasive use and abuse of the concept "public interest" in conjunction with the justification of legislative proposals and enactments, an important task for legisprudence is the clarification of the concept and an assessment of its functioning role as a standard for evaluation. There are some who would assign the concept to the trash bin, because of its use as a rhetorical device for deceiving the unwary in a bid for power and authority. Yet, the very fact that the concept has been used by the unscrupulous is an implicit tribute to its normative force—much as the need of the hypocrite to employ pretense is an implicit recognition of the persuasive power of truth.

Some theorists, in a serious attempt at analysis, have concluded

27. C. ILBERT, LEGISLATIVE METHODS AND FORMS 230 (1901).
that no possible meaning can be ascribed to the concept of "public interest"—that it is an unanalyzable abstraction so vague in meaning that it cannot be employed for any useful purpose. Therefore, such theorists conclude that all that can be expected from its use is a confused, conceptual muddle. Perhaps, much of the latter difficulty lies in the erroneous assumption that a single, purified meaning of the concept is necessary for the elimination of the "muddle." The many competing voices that separately lay claim to the "true" meaning of the concept are, in a way, no different than the voices of the blind men in their claims to the "true" description of the elephant—each one certain that the part examined constitutes the whole. More technically, the multiple accounts of the concept "public interest" may, on closer examination, be no more than different stipulative definitions, i.e., resolves by each particular theorist to utilize the concept in a certain way for stated or presumed purposes. Multiple perspectives do not compete, nor need they confuse; they are simply implicit acknowledgements of the complexity of the subject-matter, functioning as separate but joint contributors to the illumination of the whole.

Some might disclaim the possibility of any meaning to the concept "public interest" by presuming: (1) that interest and desire are synonymous; (2) that "public" means all the individuals in a political entity; (3) that there is no single desire acknowledged to everyone's advantage; (4) that legislative policy-making is a function of competing, conflicting forces; and (5) that, therefore, there can be no public interest—only individual or group interests. The concept, under this view, has value only as a rhetorical device to gloss over the divisiveness of an intrinsic political pluralism. Others might find meaning in the term "public interest" not in any substantive goal, but rather in terms of process—the procedures by which all interests have a public voice and representation in the adjustment or reconciliation of competing claims. Some insist that careful analytic distinctions between desire, need, and interest must precede any attempt to corral the properties of the term "public interest." Others equate "public" not with any numerical count, but rather with a community ideal of citizenship, which requires that individuals and groups rise

30. See, e.g., id. at 220.
31. See, e.g., id; see also Sorauf, The Conceptual Muddle, in Nomos V: The Public Interest 186 (C. Friedrich ed. 1962).
above their special, private concerns and adopt a more "other-directed," general point of view—a public view of interest. Candidates for this general point of view are perhaps as varied as are the moral positions that are grounded in the diversity of modern ethical theories. "Public" and "community" are often equated—"community" being regarded by some as being something more than the aggregate sum of all of its parts; while others insist that "community" means no more than one of many patterns of relationships between individuals, and reject as mystical any attempt to endow the concept with a separate reified personality of its own—like the concept "state" or "sovereign." In short, the concept "public interest" embraces a number of competing, and not always consistent, points of view.

The legisprudential theorist cannot avoid confronting the analytic and other complex problems that surround the notion of "public interest." It is an integral part of the professional vocabulary of lawyers, judges, and legislators. The concept is constantly employed not only before courts when lawyers seek to fill the void of vague and ambiguous language by resort to arguments of "public interest" or "public policy," but also by lawyers who help frame justificatory arguments at legislative hearings—in reports, or in the debates that course through the legislative process. Legisprudence would seem to have a special duty to help untangle some of the analytic and justificatory problems that surround the concept and contribute to the debate concerning its usefulness as an operative concept, i.e. whether it merits dignity and serious concern, or warrants a definitive demise.

C. The Problem of Legislative or Judicial Supremacy: The Field of Human Rights

Much has been made of the distinction between policy and principle, the former thought to relate generally to matters of social welfare, economic, and otherwise, the latter to protection of basic individual human rights—often against the excesses of majoritarian power. This analytic distinction, however blurred in application,
has served almost automatically as a normative basis for the allocation of "ultimacies" among the competing claims for final and supreme authority under the Constitution.\textsuperscript{38} Although the Supreme Court early this century thought otherwise,\textsuperscript{39} it is now widely assumed that policy matters dealing with issues of social welfare should be the primary responsibility of the legislative branch,\textsuperscript{40} while the protection of individual human rights is the primary and ultimate responsibility of the judiciary.\textsuperscript{41} As a result, much of the Court's recent activist period reflects a belief that it is the judicial and not the legislative branch that ought to be the ultimate spokesman and guardian of the principles that protect these basic rights.\textsuperscript{42}

If the claim that the judiciary is the better guardian of individual rights is based on historic usage, the evidence is a bit cloudy—witness such landmark cases as Dred Scott v. Sandford\textsuperscript{43} and Plessy v. Ferguson,\textsuperscript{44} in which it was the Court that played the role of subjugator of the rights of individuals. The undulating roles of the Court in the course of American history should put one on guard against assuming that there is something inherent in the judicial process that qualifies it to be the ultimate formulator of the basic principles for the protection of basic human rights. In English history it has been Parliament and not the judiciary that has carved out the basic principles that make up Britain's unwritten constitu-

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\item 38. See id. at 131-49.
\item 40. See Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (adopting general "hands off" approach to legislative decisions in areas of business, economy and social affairs); Cox, The Role of the Supreme Court in American Society, 50 MARQ. L. REV. 575, 582-84 (1967).
\item 41. In recent years, the Supreme Court has handed down a number of decisions championing individual rights. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (right to privacy); Wisconsin v. Yoder, 406 U.S. 205 (1972) (right to free exercise of religion); Brandenburg v. Ohio, 395 U.S. 444 (1969) (right to free speech); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy). For a discussion of the role of the Court in individual rights controversies, see Wright, Professor Bickel, The Scholarly Tradition, and the Supreme Court, 84 HARV. L. REV. 769, 787-89 (1971).
\item 42. See cases cited supra note 41.
\item 43. 60 U.S. (19 How.) 393 (1857) (a slave, as property, cannot claim rights as a "citizen").
\item 44. 163 U.S. 537 (1896) ("separate but equal" segregated school system was not in violation of equal protection clause).
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tion,45 and has contributed to the formulation of many of the basic rights under the American Constitution.46 Neither historic complacency with the role of the judiciary in this respect, nor the absence of a present crisis which would generate immediate attention to the problem, should deny to legisprudence the ongoing critical task of determining: (1) whether such complacent practice is consistent with democratic theory; and (2) whether it should be. Legisprudence has the additional task of suggesting corrective measures if the first determination is found to be in the negative, and the second in the affirmative.

One of the complexities of the issue involves the very nature and locus of the concept "basic human rights." The simplistic notion that discrete principles concerning such rights are discoverable in the language of the Constitution has given way to the realist's view that: (1) only the language of general framework is discoverable; (2) for all practical purposes, it is the particulars, not the framework, that make up the substantive content of these rights, and (3) the chiseling-out of particulars is an act of creation—of value choice—no matter how much the impact is softened by the label "interpretation." It is often thought that the general principles of "human rights" involve such civil liberties as freedom of speech, press, religion, but in the past, the Court has not hesitated to regard property rights as another basic human right and thus to treat legislative policy that restricted the exercise of property rights as a violation of the human rights of the owners of property.47 Accordingly, the line between policy and principle is dependent on the eye—and, not insignificantly, the power—of the observer. The question of consonance with democratic theory comes to the forefront when the formulation of basic "rights" principles is a function of a body immunized from the electorate, often divided in outlook, and endowed with the power to veto an overwhelming expression of principle of the legislative body by a mere majority of one. The problem is not new; it will continue to persist, and theorists in legisprudence owe it both a long-range perspective and an intellectual vigil. It is a normative, evaluative problem, not a descriptive one; it cuts considerably deeper than the issue of judicial restraint in relation to legislative expression of principle; it probes the very allocation of "final say" in the determination of such principles within the framework of democratic theory; it raises

46. See generally id. at 42-78.
47. See cases cited supra note 39.
questions concerning the comparative infallibility quotients of the judicial and legislative bodies, respectively. Thomas Jefferson long ago raised the question in a letter to a correspondent: "You seem to consider the judges as the ultimate arbiter of all constitutional questions; a very dangerous doctrine, indeed, and one which would place us under the despotism of an oligarch." Thinking about the problem today as if it were being debated in Jefferson's time requires somewhat of a wrench from habit and complacency. In considering the problem of "final say," emphasis need not be placed merely on attempts to minimize the potential for regrettable excesses by the legislative body, if that is where "final say" is deemed to belong. Rather, the problem requires focusing upon how, if at all, it is possible to devise imaginative mechanisms for curbing excesses—be they legislative or judicial—without the sacrifice of democratic principles.

D. The Integration of Legislation and Adjudication

Much of the early discussion of the integration of legislation and adjudication centered on the need to remind the courts to search for principles underlying varied discrete rules and to allow these principles to insinuate themselves in the determination of whether modification of the rigidities of the common law are in order. Today, the discussion of the problem is centered less on the intractability of common-law-minded judges, than on the need to treat legislation at least as equal or coordinate in authority with judge-made rules, and at most, as a subsequent and overriding superior authority. This discussion of the integration of legislation and adjudication-

48. "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).
50. See Douglas, Stare Decisis, 49 COLUM. L. REV. 735 (1949). Justice Douglas stated: [J]udges have been admonished to hold steadfast to ancient precedents . . . . This search for static security . . . is misguided. The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts. There is only an illusion of safety in a Maginot Line.
Id. at 735.
51. See, e.g., Horack, supra note 3, at 53-56.
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tion has also stressed the need to incorporate legislative precedent analogically into the judicial reasoning process as courts have done analogically with judicial precedents, i.e. by extracting pattern and principle from a series of discrete judicial decisions. The claim for overriding authority is evidenced by the flexing of legislative muscle in recent attempts to limit the scope of appellate judicial review, and to reverse directional lines of judicial decisions by overriding enactments and by proposals for constitutional amendments. The task of extracting pattern and principle from a series of discrete legislative enactments has been thought to belong primarily to a court when a specific problem of interpretation or of constitutionality is brought to its attention in a litigious situation. Aside from the fact that it is an ongoing task to be shared by theorists in legisprudence as well, it would be of interest and value to compare the judicial extractions of principle with those who undertake the extractions from a legislative point of view.

E. Problems of Criticism

Legislation may be evaluated in terms of: (1) whether its avowed purpose or purposes have been efficiently achieved; (2) whether it is consistent with other expressions of overall legislative policy; and (3) whether it is morally justifiable. The first type of evaluation is technical, involving an assessment of the efficiency of social engineering on a broad and varied scale. Consequences other than those intended, often the result of a lack of appropriate study, frustrate legislative purpose—e.g., rent control for the poor resulting unwittingly in the deterioration of property and in the perpetuation of ghettos; subsidies to help farmers resulting in corporate farm ventures and, unwittingly, in the concomitant reduction in the number of farmers. A determination of whether legislative mechanisms for


the control of the production and sale of narcotics, street crime, or recidivism, are fruitful and efficient, involves vast resources for empirical research and specially trained skills. A major problem of legisprudence is the obtaining and harnessing of the resources and talent necessary for such evaluative tasks. Many critical studies have forced a fundamental rethinking of many conventional legislative attitudes—witness, for example, the work on the effect of death penalties or on alcoholism as an illness. Much more needs to be done systematically to maximize the efficiency of legislative engineering. The elusive problem of the efficacy of sanctions is high on the list of needed critical study.

Criticism based on the inconsistency of legislative policy is in the interest of a rational ordering of human affairs. Inconsistency is disruptive, produces uncertainty and often results in claims of injustice and disrespect for law. At times, judicial principles of statutory construction are not sufficiently elastic to correct such defects, and disharmony, accordingly results. The problem was pointed out in the early part of the century in Ernst Freund's classic work on legislocation with the following example:

When the legislature made the wife the mistress of her own property or income, it should have placed upon her a correlative obligation to contribute to the support of household and family. This has been done by the German Civil Code, but not by American or English married women's acts. We have thus the anomaly that a rich wife may obtain a divorce from a poor husband for non-support where that is a ground for divorce.

The problem is obviously ongoing, and is a function of the nature and complexity inherent in the legislative process. The average legislator and his staff have little time or inclination to survey the disparate enactments in statute books searching for larger patterns of policy and principle to determine whether a discrete proposal might properly fit within such patterns or lead to a jarring note of inconsistency. Occasionally, legislative staff members of committees that

58. See, e.g., Blinder & Kornblum, The Alcoholic Driver: A Proposal for Treatment as an Alternative to Punishment, 56 JUDICATURE 24 (1972); Committee on Problems Relating to Persons Under Disability and Their Property, Alcoholics and the Mentally Ill: Their Institutionalization and De-Institutionalization, 7 REAL PROP., PROB. & TR. J. 532 (1972).
59. E. FREUND, STANDARDS OF AMERICAN LEGISLATION 228 (1917).
prepare reports after hearings on proposals provide a longer-ranged perspective, but such occurrences are far too infrequent. There is clearly great need of efforts by more detached critics to perform the necessary research and critical tasks. Much of the content of law reviews is devoted to the examination of inconsistencies in judicial opinions or in the long-ranged patterns that are discerned in disparate judicial pronouncements; analogous energies could well be poured into journals that do not deal occasionally or peripherally with legislation per se, but whose central subject-matter is legislation.

Legisprudence shares with judicativeprudence the problem of the morality of the procedures, principles, and substantive policies that are the products of the legal order. In the case of legisprudence, moral criticism is directed to the legislative component of the legal order. At the outset, it is important to distinguish between conventional (positive) morality and critical morality. Conventional morality may itself be subject to criticism in terms of ideal principles that conventional moral practices contravene—principles that are believed, by those who hold them, to be universally applicable and which are thought to be ultimately acceptable to the tentatively unconvinced after rational discussion. Thus, legislation that establishes second-class citizenship on the basis of race, color, or creed, for example, may be criticized on two moral levels: (1) because of its variance with American principles of morality (conventional); or (2) because it is at variance with principles that, it is believed, rational people generally hold dear—the fact of adoption by any particular legal order being an irrelevant consideration. Thus, some basic principles that underly legislative practice—for example, *nulla poena sine lege*; no legal coercion unless justified by some communal good—are often thought of as embodying not merely American moral convictions, but principles that should, it is believed, apply to all mankind in general.

The eight procedural requirements, proposed by Professor Lon Fuller for distinguishing a valid legal enactment from the commands


61. The Harvard Journal on Legislation is a rare exception to the prevailing practice at law schools.
of a mobster or tyrant, serve as a good starting point for the articulation of norms for evaluating the formal elements of legislation. Such procedural requirements as clarity, publication, or prospective operation, are not only minimal conditions for the efficient enforcement of legal enactments, but are also expressions of the morality of means as distinguished from ends. However varied are the principles that have been advanced for governing moral purposes or needs, there is broader agreement within these varied theories on the morality of procedural means for achieving them.

Criticism of the substantive content of legislative proposals and enactments on moral grounds requires entrance into the dense and controversial thickets of ethical theory. Many moral judgments on specific issues converge, even though they flow from different theoretical premises—Kantian, Utilitarian, Rawlsian, Natural Law, etc. When they do not converge, the problems for legisprudence are the problems of ethical theory: i.e., how to make persuasive sense out of the various claims to objectivity (the latter term has varied meanings) in the search for ethical moorings; how, if at all, to distinguish the “discovery” of ethical principles from acts of commitment and exhortation; how to recognize moral “deliverance” even though clothed in secular and often scientific dress; and whether ethical theories are falsifiable or otherwise verifiable in the same or analogous sense that scientific theories purport to be. Three problems involving substantive legislation and related ethical theory are presently on center stage: (1) the extent to which government should legislate in the area of private morality—a problem involving the theories of Mill, Devlin, Hart and others; (2) the extent to which the goal of maximum utility should bend to the demands of justice—a problem involving theories of Kant, Bentham, Rawls

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62. These relate to generality, publication, retroactivity, understandability, contradiction, possibility of conformity, abruptness of change, and coherence between rules and their administration. See L. Fuller, The Morality of Law 38-39 (1964).
64. See J. Bentham, supra note 36; J. Mill, On Liberty (1859).
67. See J. Mill, supra note 64.
70. See I. Kant, supra note 63.
71. See J. Bentham, supra note 36.
72. See J. Rawls, supra note 65.
and others; and (3) whether lack of moral blameworthiness should in all instances foreclose legal responsibility—a problem involving such complex and controversial notions as fault, causation, determinism, and freedom. These problems assume concrete reality in current debate over substantive legislative proposals. The first involves such legislative issues as the regulation of pornography, abortion, and homosexuality. The second involves issues such as equality of opportunity, in which the needs and concerns of the disadvantaged are claimed by some to be a matter of moral right, and by others to be no more than dependent variables tied only to the achievement of maximum utility. Finally, the third problem concerns such issues as whether the absence of mens rea, for example, in cases of insanity or other forms of mental illness, should excuse legal responsibility; if so, to what extent; and whether the pressing need for the control and prevention of anti-social behavior (by preventive detention, for example) should minimize or completely bypass the requirement of fault.

On the non-substantive side, a recurrent problem of central importance concerns the extent to which procedures for electing legislators and for establishing legislative policies and principles are at variance with moral principles of fairness and equality that underlie democratic ideals. The problem has been raised concretely in recent criticism of the methods by which private interest groups, by means of the proliferation of political action committees (PACS), are able to circumvent financial limits on expenditures for candidates, thus warping the democratic process of political participation.73

If legisprudence is not to shrink from these basic legislative problems, it cannot afford to blink at the ethical theories that underlie their criticism and evaluation. They are the essential tools for legisprudential criticism and evaluation. Without them, legisprudence would be justifiably characterized as being adrift—without mooring or foundation.

IV. CONCLUSION

The proposed agenda for legisprudence is suggestive, and it does not pretend to be exhaustive. Other problems might loom large in the eyes of other observers. Beyond new enthusiasms that might be stirred or renewed by the proposed agenda, implementation is not simply a matter of the addition of just another course to the curriculum of a law school. Much more is required, not the least of which

involves a thoroughgoing change in thinking by judges and lawyers concerning the legislative decision-making process, and a significant change in the professional and critical role of law schools in dealing with the problems of the legal order from a broader view than that of a judicially oriented perspective.