

THE PROCESS OF RESPONSIBLE DECISION: OBSERVATIONS ON THE JURISPRUDENCE OF PROFESSOR JONES

EDWARD N. PETERS*

INTRODUCTION

Harry Willmer Jones has affected significantly the legal thought of many judges, lawyers, academicians, politicians and students. For more than 20 years he held the influential and prestigious title of Cardozo Professor of Jurisprudence at Columbia University,¹ and has authored more than 75 articles and reviews on jurisprudence,² legal history,³ church-state relations,⁴ legislative interpretation,⁵ and contract law.⁶ Professor Jones

* B.A., St. Louis University; J.D., University of Missouri at Columbia; member of the Missouri Bar; Western Director of the Intercollegiate Studies Institute, Claremont, California.
¹ Professor Jones taught at Columbia University from 1947 to 1979, and was designated Cardozo Professor in 1957. For a brief biographical sketch of Professor Jones' career, see *Resolution of the Faculty*, 79 COLUM. L. REV. 817, 817-20 (1979).

² See, e.g., Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023 (1974) [hereinafter cited as *An Invitation*]; Jones, *The Practice of Justice*, 1966 WASH. U.L.Q. 133 [hereinafter cited as *The Practice*].

³ See, e.g., Jones, *The Creative Power and Function of Law in Historical Perspective*, 17 VAND. L. REV. 135 (1963) [hereinafter cited as *The Creative Power*].

⁴ See, e.g., Jones, *Church-State Relations: Our Constitutional Heritage*, in RELIGION AND CONTEMPORARY SOCIETY 156 (H. Stahmer ed. 1963); Jones, *The Constitutional Status of Public Funds for Church-Related Schools*, 6 J. CHURCH & ST. 61 (1964).

⁵ See, e.g., Jones, *Legislative-Agency Disagreements Concerning the Construction of Regulatory Statutes*, 36 A.B.A. J. 859 (1950); Jones, *Some Causes of Uncertainty in Statutes*, 36 A.B.A. J. 321 (1950); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2 (1939).

⁶ See, e.g., H. JONES, E. FARNSWORTH, & W. YOUNG, JR., CASES AND MATERIALS ON CON-

has written, edited, or contributed to at least nine books, delivered dozens of special addresses and lectures before a wide range of audiences, and even produced two films.⁷ His writing is as light and entertaining as that of an eloquent speaker;⁸ his speeches display a clear and precise style. This study is intended as an introduction to the legal thought of Harry W. Jones. A comprehensive presentation of his jurisprudence is long overdue.

AN AMERICAN LEGAL REALIST

Professor Jones hails from that branch of legal thought—American Legal Realism—which, despite the existence of European counterparts,⁹ has remained independent of any other jurisprudential approach. The roots of American Legal Realism reach back to Oliver Wendell Holmes.¹⁰

TRACTS (2d ed. 1972); Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43 (1975).
⁷ For a complete bibliography of Jones' published works through 1979, see *The Writings of Harry W. Jones*, 79 COLUM. L. REV. 824, 824-27 (1979).

⁸ This Article is not the first to call attention to Jones' splendid writing style. See, e.g., Wise, Book Review, 15 AM. J. JURIS. 175, 175-76 (1970) (reviewing H. JONES, *THE EFFICACY OF LAW* (1969)).

⁹ American Legal Realism may be compared to both the more theoretically inclined Scandinavian Realism, see R. DIAS, *JURISPRUDENCE* 484 (2d ed. 1964); D. LLOYD, *INTRODUCTION TO JURISPRUDENCE* 497 (3d ed. 1972), and the German Free Law movement, see D. LLOYD, *supra*, at 830. The Scandinavian Realists are a school of positive, empirical thinkers who wish to eliminate metaphysics from the study of jurisprudence. D. LLOYD, *supra*, at 498, 500. Led by philosophers such as Hägerström, Olivecrona, Ross and Lundstedt, the Scandinavian Realists attempt to explain the law "purely in terms of observable facts." *Id.* at 500; see R. DIAS, *supra*, at 484-92. The German Free Law movement, however, accords a judge wide discretion in applying a rule of law. D. LLOYD, *supra*, at 830. The judge "may disregard [the rule] if . . . the wording is calculated to lead to injustice. . . . [H]e is under a duty to apply the rule which he conceives would have been formulated by the legislator if he had been aware of the consequences." *Id.* at 830; see also Bodenheimer, *Seventy-Five Years of Evolution in Legal Philosophy*, 23 AM. J. JURIS. 181, 198 (1978). American Legal Realism also was distinctly hostile to the British empirical school derived from Hume and followed by Bentham, Austin and Mill. Lloyd states:

For while it is true that these thinkers were positivist and anti-metaphysical, they were for the anti-formalists, not empirical enough, since they were associated with a *priori* reasoning not based on actual study of the facts, such as Mill's formal logic and his reliance on an abstract "economic man," Bentham's hedonic calculus of pleasures and pains, and the analytical approach to jurisprudence derived from Austin.

D. LLOYD, *supra*, at 399-400 (footnote omitted). It should be apparent, therefore, that substantial differences exist between American Legal Realism and apparently similar European movements.

¹⁰ One commentator suggests that American Legal Realism developed as early as 1897, when Oliver Wendell Holmes' famous address, *The Path of the Law*, was published. See Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 429 (1934); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). The realist approach experienced a "systematic formulation" by 1912 with the writing of Joseph Bingham. Fuller, *supra*, at 429; see Bingham, *What*

Throughout the Great Dissenter's judicial opinions and legal writings—and perhaps most clearly in *The Path of the Law*,¹¹ which Jones calls “the most influential piece of writing in the history of American jurisprudence”¹²—Holmes laid the foundation of skepticism upon which would rise the school of American Legal Realism.¹³

Receiving renewed impetus from Dean Roscoe Pound¹⁴ and Justice Benjamin Cardozo,¹⁵ the new school developed rapidly through the first third of the 20th century, peaking about 1930. From that point on, despite the efforts of American Legal Realism's most respected apologist, Karl Llewellyn,¹⁶ the school slowly declined, until by the late 1960's, little, if any material specifically identifiable as American Legal Realism was being produced.¹⁷

is the Law?, 11 MICH. L. REV. 1, 109 (1912). John Chipman Gray also deserves note as a pioneer of American Legal Realism. See J. GRAY, *THE NATURE AND SOURCES OF THE LAW* (1916). See generally L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 538-46 (1973).

In a sense, the roots of legal realism may be said to reach back to the Middle Ages. See Clanchy, *A Medieval Realist: Interpreting the Rules at Barnwell Priory*, Cambridge, in PERSPECTIVES IN JURISPRUDENCE 176 (E. Atwooll ed. 1977). Clanchy discusses a register of cases, compiled by a monk at Barnwell priory in the 1290's, which juxtaposes formal texts from the plea rolls with a vernacular explanation of the origin and outcome of each action. *Id.* at 176-77. According to Clanchy, “[l]ike an analyst of the judicial process of the realist school, the author of the Barnwell register is an empiricist who reports cases in circumstantial detail; although his purpose is not to draw general jurisprudential or sociological conclusions, but to give practical advice on litigation.” *Id.* at 177.

¹¹ Holmes, *supra* note 10, at 457.

¹² *The Practice*, *supra* note 2, at 139 n.9. See generally G. CHRISTIE, *JURISPRUDENCE* 645-48 (1973).

¹³ The exponents of realism insist there is no realist “school” of legal thought, but rather, a movement with diverse positions representing a variety of viewpoints. See R. DIAS, *supra* note 9, at 470-71; Fuller, *supra* note 10, at 430; Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1254 (1931).

¹⁴ See, e.g., Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 709-11 (1931).

¹⁵ See, e.g., B. CARDOZO, *THE GROWTH OF THE LAW* 81-95 (1924) [hereinafter cited as B. CARDOZO, *GROWTH*]; B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) [hereinafter cited as B. CARDOZO, *NATURE*].

¹⁶ See, e.g., R. DIAS, *supra* note 9, at 473-75; D. LLOYD, *supra* note 9, at 403-13; E. POLLACK, *JURISPRUDENCE: PRINCIPLES AND APPLICATION* 788 (1979). Jones repeatedly calls attention to Llewellyn's decisive role in the development of American Legal Realism, noting especially Llewellyn's two pivotal law review articles, *Some Realism About Realism—Responding to Dean Pound*, *supra* note 13, and *A Realist Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). The best one volume collection of Llewellyn's legal thought is his work, *JURISPRUDENCE* (1962). Readers of this journal need no reminder of Llewellyn's instrumental service as Reporter in the drafting of the Uniform Commercial Code. See Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 813 (1962). See generally K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960); K. LLEWELLYN, *BRAMBLE BUSH* (1930).

¹⁷ See D. LLOYD, *supra* note 9, at 414-15. Legal realism has engendered indirectly two other movements still present today—Jurimetrics and Judicial Behavioralism. *Id.* at 415-23.

But to say that American Legal Realism has virtually disappeared as a movement is not to say that its influence has suffered a similar fate. To the contrary, American Legal Realism has left an indelible mark on the American legal landscape. Judge Jerome Frank's one-man wing of "fact-skeptics," though criticized for conceptual overindulgence, has called permanent attention to the problems pertaining to judicial fact determination in a given case, even before moving to questions of applicable law.¹⁸ Moreover, the spirit of the "opinion-skeptics" lives on in a healthy tradition of suspicion that the rationale offered by the court as justifying its holding is of little importance to it.¹⁹ Finally, the dominant branch of "rule-skeptics"²⁰ has introduced a potentially long-lasting "'distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions'."²¹ It has been this aspect of American Legal Realism which has spawned the most rebuttal and re-

Jurimetrics "signifies the scientific investigation of legal problems, especially by the use of electronic computers and by symbolic logic." *Id.* at 415-16. See Loevinger, *Jurimetrics—The Next Step Forward*, 33 MINN. L. REV. 455, 474-93 (1949). Behavioralism, a relatively new movement, has yet to develop a consistent theory regarding its aims and methods. D. LLOYD, *supra* note 9, at 419. This movement evolved from realism and political science. "From [realism, behavioralism has] taken the faith that judicial behaviour is predictable and [has taken] the aim of developing means of predicting decisions. From political science . . . [it has] taken such techniques as scaling and small group psychology." *Id.* See generally JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH 443-60 (G. Schubert ed. 1964); Schubert, *Behavioral Jurisprudence*, 2 LAW & SOC'Y REV. 407, 411-20 (1968).

¹⁸ See D. LLOYD, *supra* note 9, at 404-05. "Fact-skeptics" attribute the unpredictability of judicial decisions to the "elusiveness of facts." *Id.* at 404. They were primarily concerned with the trial courts, since the "major cause of legal uncertainty [could be traced] to trial uncertain[t]y." Frank, Book Review, *Cardozo and the Upper Court Myth*, 13 LAW & CONTEMP. PROBS. 369, 384 (1948). Not surprisingly, fact-skeptics urged students to "abandon an obsessively exclusive concentration on the rules." *Id.*; see D. LLOYD, *supra* note 9, at 405. Critics of the fact-skeptics note that it is impossible to anticipate how a court or jury will handle particular fact issues, while "innumerable factors combine to promote such uncertainty and . . . render it ineradicable." D. LLOYD, *supra* note 9, at 404-05 & n.27.

¹⁹ See D. LLOYD, *supra* note 9, at 403 n.24. Opinion-skeptics espouse the position that "judicial reasoning is *ex post facto* decision making." *Id.* Karl Llewellyn, for example, has been labeled an "opinion-skeptic" by one commentator, and his writings appear to support this charge. *Id.*; see, e.g., Llewellyn, *supra* note 13, at 1238-39. Not all observers agree that American Legal Realism should be divided into three groups; most would drop "opinion-skeptics" from the list. See D. LLOYD, *supra* note 9, at 403 n.24.

²⁰ "Rule-skeptics," according to Frank, concern themselves solely with appellate courts and legal rules. Frank, *supra* note 18, at 384. He faults their position, primarily for the following misconception: "if, at any time, the legal rules and principles of a legal system are in pretty good shape, then . . . so also is the judicial process of that system, regardless of whether the decisions of the courts are needlessly unfair or unjust." *Id.* at 385.

²¹ Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 799 (1961) [hereinafter cited as *Law and Morality*] (quoting Llewellyn, *supra* note 13, at 1237 (emphasis in original)).

joinder,²² and it is this branch which most clearly represents the ideas of Harry Jones.

Professor Jones' "conversion" to American Legal Realism came at the hands of Karl Llewellyn,²³ but the roots of that conversion reach back to Jones' first days in law school,²⁴ if not beyond. "All my life," writes Jones,

I have been more interested in processes than in products. When I see a great picture in the Louvre or the Metropolitan Museum, the first thing that occurs to me is not how beautiful the picture is but how the artist did it [Likewise in law, I find] far greater interest in exploring the materials and methods of judicial decisionmaking than in formal analysis of the logical content and possible doctrinal implications of specific judicial opinions, however important.²⁵

Before turning to the jurisprudence of Professor Jones, an understanding of the way in which he uses the term "jurisprudence" must be acquired. Generally, the term "jurisprudence" connotes the study of legal principle and theory, the philosophy of law.²⁶ A second and less frequently used meaning of "jurisprudence" is the study of legal method and

²² See *Law and Morality*, *supra* note 21, at 800-02. An accounting of the polemical exchange engendered by the appearance of American Legal Realism will not be attempted here. The breadth and depth of the debate is obvious upon even a cursory examination of the literature. The Realists' focus on the decisional process as it actually existed was bound to clash with the emphasis on justice and righteousness of the Natural Law tradition. See *id.* at 800. A distinctive softening in the tone of the debate appeared around 1950. See Bodenheimer, *A Decade of Jurisprudence in the United States of America: 1946-56*, 3 *NAT. L.F.* 44, 50-53 (1958). Bodenheimer suggests that his softening was due to the fact that the movement's "assault upon traditional legal doctrine" had subsided. *Id.* at 50.

²³ *An Invitation*, *supra* note 2, at 1033-34.

²⁴ See *The Practice*, *supra* note 2, at 133-34.

²⁵ Jones, *The Brooding Omnipresence of Constitutional Law*, 4 *Vt. L. Rev.* 1, 25 (1979). This strong interest in the methodology of judicial decisionmaking is, I suggest, related to the widespread interest in scientific method often found in liberal thought during the first part of this century. Liberal thought was characterized by the idea that "[m]ethod is king—because things are [real] only in proportion as they are discoverable by the scientific method; with the result that method logically directs all intellectual . . . traffic." W. BUCKLEY, *UP FROM LIBERALISM* 144 (1968). The criticism brought to bear against such general emphasis on methodology similarly may be directed against American Legal Realism. *Id.* at 179-82.

²⁶ J. HALL, *FOUNDATIONS OF JURISPRUDENCE* v (1973); G.W. KEETON, *THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE* 4 (2d ed. 1949); M. SETHNA, *JURISPRUDENCE* 1 (2d ed. 1959). The term "jurisprudence" has its roots in the Latin word "*jurisprudentia*," which means "knowledge of the law." M. SETHNA, *supra*, at 1. That term had no generally accepted meaning until the 19th century. R. DIAS, *supra* note 9, at 2. During the 19th century, due to the writings of Bentham and his disciple, Austin, the word "jurisprudence" took on the meaning "formal analysis of legal concepts" in both English and American law. *Id.* at 2-3.

practice.²⁷ It is this understanding of the term that lies at the heart of Jones' jurisprudence and American Legal Realist thought, and both major legal theories in the United States—Natural Law²⁸ and Legal Positivism²⁹—have been criticized by American Legal Realists for neglecting this secondary understanding of "jurisprudence" in their studies.³⁰

Although we shall not take time here to develop the point, I would suggest that much American Legal Realist literature, while renouncing all interest in or need of statements of normative legal principle, actually made such statements, though usually in such a manner as to blur the distinction between their explicit descriptions of what the law *is*, and their implied conclusions as to what it *ought* to be.³¹ One of the distin-

²⁷ *An Invitation*, *supra* note 2, at 1032; see D. LLOYD, *supra* note 9, at 10; *infra* note 30 and accompanying text.

²⁸ Natural Law, though defined in a number of ways, generally is thought of as a principle, innate to the human mind, which guides human conduct. See H. ROMMEN, *THE NATURAL LAW* 215 (T. Hanley trans. 1979). This jurisprudential position can be traced back to ancient Greece and the origins of philosophy itself. *Id.* at 3. It often has been espoused by Christian thinkers, who posit that such law comes directly from God. See Constable, *What Good is Natural Law?—A Lawyer's Perspective*, 26 AM. J. JURIS. 66, 79 (1981). St. Thomas Aquinas, one of the greatest Natural Law scholars of all time, defined Natural Law as "the rational creature's participation [in] the eternal law." I THOMAS AQUINAS, *SUMMA THEOLOGICA* 997 (Fathers of the English Dominican Province trans. 1947).

²⁹ Legal Positivism is antonymous to the concept of Natural Law. See H. ROMMEN, *supra* note 28, at 247. Its advocates contend that there is no such thing as innate law; there are only commands promulgated, administered, and recognized by the state. *Id.* At least one commentator traces positivism back to the early 19th-century attempts by philosophers such as Bentham and Austin to "distinguish law as it is from law as it ought to be." Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594 (1958).

³⁰ The Legal Realists stress the study of law in terms of legal method and process. See E. BODENHEIMER, *JURISPRUDENCE* 124 (rev. ed. 1974) ("[Llewellyn] proposed that the focal point of legal research should be shifted from the study of rules to the observance of the real behavior of the law officials . . ."); R. DIAS, *supra* note 9, at 475 (Realists examine, among other things, what judges and courts do); E. POLLACK, *supra* note 16, at 787 (Realists pronounce "that the law is what the courts and the officials do regarding legal cases"); *Law and Morality*, *supra* note 21, at 802 ("The interplay of law and conscience is better seen in the context of the decisional process than in disputations about the 'morality' or 'policy' of general legal rules and principles"). Natural Law advocates and Legal Positivists, by contrast, are concerned primarily with the relationship of law and morality. See, e.g., D. LLOYD, *supra* note 9, at 8-10. One of the effects of the Legal Realist movement might well be a lasting union of the two concepts of jurisprudence into one general study. See Twining, *General Preface* to N. MACCORMICK, H.L.A. HART (1981).

³¹ For example, Jones quotes with approval Llewellyn's summary of the Realist position as a "distrust of traditional legal rules and concepts insofar as they purport to describe what either courts or people are actually doing," and thus a reluctance to use such rules in the analysis of judicial opinions. *Law and Morality*, *supra* note 21, at 799 (quoting Llewellyn, *supra* note 13, at 1237) (emphasis in original). Yet, in a later essay, Jones sets forth a definition of a good law as one that fosters a social climate in which the quality of human life is enhanced. See *infra* text accompanying note 40. In this statement, we see not only Jones'

guishing characteristics of Professor Jones' work, however, is that, with only a few well-delineated exceptions, he does not concern himself with considerations of legal theory. Instead, he concentrates almost exclusively on the study of legal method and process. His approach is distinctly descriptive, not normative. It reflects his very understanding of the American Legal Realist phenomenon: "American legal realism is not a systematic philosophy of law but a way of looking at legal rules and legal processes. It has nothing whatever in common with realism in general philosophy; indeed, legal realism's identifying characteristic is a skeptical temper towards generalizations."³² Whatever the merits of this sharp distinction between philosophy and practice,³³ Professor Jones' adherence to this separation greatly aids analysis of his legal thought.

UTILITARIANISM

Professor Jones' jurisprudence ultimately rests on the basic premise that law is a means to social ends.³⁴ Of course, the ramifications of such a

definition of a good law—with its strong utilitarian bent—but a rare (for Jones) normative-like statement concerning the ends to which law is a means. By defining the role of the law in society in this manner, Jones has established a "norm" by which a law's goodness can be measured—an approach that apparently conflicts with his professed preference for judging a law by the outcome of its application. See, e.g., *An Invitation*, *supra* note 2, at 1025; *Law and Morality*, *supra* note 21, at 808.

³² *Law and Morality*, *supra* note 21, at 799; see G. CHRISTIE, *supra* note 12, at 641-42 (Legal Realism characterized by a suspicion of all generalizations). Jones notes that Karl Llewellyn had expressed a "distrust of the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions," *Law and Morality*, *supra* note 21, at 799 (emphasis in original), and that Holmes had once said that "[g]eneral propositions do not decide concrete cases," *id.* (footnote omitted).

³³ Realist writing is replete with defenses of the analytical separation of the *is* from the *ought*. Jones stresses that Llewellyn referred to the division of *is* and *ought* as "temporary"; to be made "during the investigation of the facts" as an aid to analysis. *Law and Morality*, *supra* note 21, at 808 n.32 (citation omitted). For a cogent criticism of this separation of *is* from *ought*, see Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 468-73 (1954). Compare Fuller, *A Rejoinder to Professor Nagel*, 3 NAT. L.F. 83, 86-92 (1958) (evaluation of a law is incomplete without an examination of the value it is meant to serve) with Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, 3 NAT. L.F. 77, 78-80 (1958) (Fuller's attack on the separation of *is* from *ought* assumes the existence of the separation).

³⁴ R. DIAS, *supra* note 9, at 474; see *An Invitation*, *supra* note 2, at 1024-26; *infra* notes 69-86 and accompanying text. Specifically, Jones observes "that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." *An Invitation*, *supra* note 2, at 1024 (quoting Holmes, *supra* note 10, at 485-86). Jones felt that this "ends-in-view" approach to the law was an internal process "inescapable in the system's functioning." *An Invitation*, *supra* note 2, at 1025.

Jones' views were influenced in part by the adherents of sociological jurisprudence, a school of thought that arose in the first part of the 20th century. See R. DIAS, *supra* note 9,

statement are immense, and notwithstanding Professor Jones' disinterest in doctrinal implications, two comments are in order. First, standing alone, this position directly implies that the value or worth of a law (and here it would appear that Jones speaks of law as *lex*, as opposed to law as *jus*)³⁶ is to be measured in utilitarian terms, that is, in terms of the ability of the law to bring about certain unspecified social ends. Under such an approach, the moral content of a law is definitionally of no consequence. Second, questions as to the authority to create law are irrelevant, unless the method of creating the law somehow affects its utility. We are right to ponder the desirability of either implication.

Professor Jones then moves to an interesting twist on typical American Legal Realist thinking. While refusing to incorporate *ought* considerations into his analysis of the *is*, he introduces a hybrid factor in describing it, namely, what law is *for*.³⁶ For Jones, descriptive analysis of what the law *is* is not to be found in normative principles, but in utilitarian service to social ends.³⁷

From this pragmatic evaluation of law, Jones derives two attributes of law: durability and goodness. According to Jones, "the durability of a legal principle, its reliability as a source of guidance for the future, is determined far more by the principle's social utility, or lack of it, than by its verbal elegance or formal consistency with other legal precepts."³⁸

at 453. Among the prominent Americans who subscribed to this school was Dean Pound. *Id.* Justices Cardozo and Holmes also shared the belief that policy considerations play a key role in judicial decisionmaking. See E. BODENHEIMER, *supra* note 30, at 121-24.

³⁶ Law, in the abstract sense, is known as *jus*. M. SETHNA, *supra* note 26, at 110. Law, in the concrete sense, is known as *lex*. *Id.* The difference between the two is that *lex* refers to specific laws, *id.* at 110-11, while *jus* refers to laws and legal principles as a whole, *id.* at 109-11. Therefore, when Jones speaks of the utilitarian nature of a law, he is speaking of a specific law and not of law in the collective sense.

³⁷ *An Invitation*, *supra* note 2, at 1024. "[Q]uestions of what the law *is*, or is likely to become, are inextricably bound up with questions of what the law is *for*." *Id.* Jones suggests that the law should be shaped according to the ends it is meant to serve. For example, if it can be established that an existing law serves socially disadvantageous ends, "more likely than not . . . [it] will be abolished." *Id.* at 1025. Jones points out, however, that this view does not put him in agreement with Fuller, who states that the "is" of a legal rule must be viewed in terms of its purpose. Fuller, *American Legal Philosophy*, *supra* note 33, at 470-71. Jones explains that Fuller believes that "the sharp dichotomy between fact and evaluation cannot be maintained," *id.* at 470, because fact is not static, but rather reaches toward an objective, and thus can be understood only in terms of that reaching, *id.* To Jones, however, "the distinction between fact and value is . . . inescapable." *Law and Morality*, *supra* note 21, at 808 n.32.

³⁸ See *An Invitation*, *supra* note 2, at 1053. One commentator has noted that "[i]t is perhaps the most characteristic facet of the realist movement in jurisprudence that its representatives tend to minimize the normative . . . element in law." E. BODENHEIMER, *supra* note 30, at 124.

³⁹ *An Invitation*, *supra* note 2, at 1025.

Jones notes that the process of reevaluation of law, whereby the utility of legal precepts is tested, occurs much more slowly in private fields of law—such as contracts or property³⁹—where the parties are likely to have made their plans in accordance with the known state of the law, thereby avoiding undue hardships in the wake of swift changes.

Building upon this conception of a durable law, Jones proposes his definition of a good law: "A legal rule or legal institution is a *good* rule or institution when—that is, to the extent that—it contributes to the establishment and preservation of a social environment in which the quality of human life can be spirited, improving, and unimpaired."⁴⁰ This, then, is what law is *for*.

It might be argued that under Jones' analysis, we have a guiding principle for law—utilitarianism. Moreover, this utilitarian principle is flavored by quasi-normative concepts of "spiritedness" and "creativity." But if man and society are to be spared the risks of moral relativism attendant to utilitarian legal systems, substantive considerations beyond spiritedness and creativity are needed. Additionally, these considerations must be spelled out clearly.⁴¹

In the remaining materials surveyed in this study, Jones offers an elaboration on the goal of a human society that is spirited, improving, and unimpaired. He casts the ends of law themselves as a means to human "contentment, creativity, and happiness."⁴² Recognizing Jones' utilitarian perspective on law, we may now consider the five ways in which he suggests that law contributes to a society.

SECURITY, RESOLUTION AND DIRECTION

Characteristically, Jones limits his discussion of the task of law to contemporary human society. More precisely, he sees law as the means of establishing "certain minimum conditions" which human experience has found to be essential in fostering societal creativity and order.⁴³ Jones asserts, moreover, that these conditions can be brought about and maintained by law alone.⁴⁴

The first two of these minimum conditions (and Jones does not claim

³⁹ *Id.*

⁴⁰ *Id.* at 1030 (emphasis in original).

⁴¹ I am grateful to Dr. Peter Markie, University of Missouri at Columbia, Department of Philosophy, for calling this additional point to my attention.

⁴² *An Invitation*, *supra* note 2, at 1026.

⁴³ *Id.*; see also J. GRAY, *supra* note 10, at 89 (the law of courts is derived from the "common consciousness of the people"). See generally Ehrlich, *The Sociology of Law*, 36 HARV. L. REV. 129, 130-31 (1922) (universal legal ideas are based on fundamental social institutions and relations).

⁴⁴ *An Invitation*, *supra* note 2, at 1026.

to have identified all of them) are necessary to society's very existence: the maintenance of the public peace and safety, and the establishment of reliable procedures for dispute resolution.⁴⁵ Jones, with little comment, ranks these among law's highest social-ends-in-view.⁴⁶ He then considers three of law's other social ends-in-view, which are necessary to social tranquility if not to basic social existence. Jones derives these conditions from his observations on the good society.

By almost anybody's definition, a good society is, among other things, a society in which creativity is unhobbled by constant apprehensions, diversity flourishes without group or class hostility, and inevitable social change is accepted not as something terrifying but as something to be planned for. We are brought, then, to three other of law's social ends-in-view: (1) the maintenance of a reasonable security of individual expectations, (2) the resolution of conflicting social interests, and (3) the channeling of social change.⁴⁷

In establishing security of individual expectations as one of law's social ends-in-view, Jones relies heavily on Jeremy Bentham, "whose ideas on man and society retain a surprising freshness for those who will read him without textbook preconceptions."⁴⁸ Bentham viewed security of individual expectations as being of paramount importance.⁴⁹ He had gone so far as to argue that even constitutional liberties were, in actuality, guarantees of individual expectations of freedom from arbitrary governmental interference.⁵⁰

Jones illustrates the law's solicitude for individual expectations with three examples: the constitutional prohibition against *ex post facto* laws, the policy of prospective overruling of prior decisions, and the special force of *stare decisis* in contract and property law.⁵¹ In this last example, Jones directs attention to the work of legal counsel, who likely are seeking the best means to secure their clients' expectations on such matters as

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*; see also *The Creative Power*, *supra* note 3, at 142.

⁴⁹ *An Invitation*, *supra* note 2, at 1026-27; see J. BENTHAM, *THE THEORY OF LEGISLATION* 67-68, 90-91 (R. Hildreth trans. 1975). Bentham identifies security as a distinctive quality of civilization which the law alone insures. *Id.* at 67. "Expectation," in his view, is man's unique ability to make future plans and commitments. See *id.* at 68. The law thus should serve as a continuum that not only secures man from current loss but "guarantees him, as far as possible, [in his expectations] against future loss." *Id.*; Montague, *Introduction to J. BENTHAM, A FRAGMENT ON GOVERNMENT* 38-39 (F. Montague ed. 1980) [hereinafter cited as J. BENTHAM, *FRAGMENT ON GOVERNMENT*].

⁵⁰ *An Invitation*, *supra* note 2, at 1026-27; see J. BENTHAM, *FRAGMENT ON GOVERNMENT*, *supra* note 49, at 39-40; *The Creative Power*, *supra* note 3, at 142.

⁵¹ *An Invitation*, *supra* note 2, at 1027.

wills, trusts, negotiations, and settlements, rather than trying to remedy past difficulties.⁵² He concludes that assessment of a judicial opinion or a legislative enactment is incomplete if it does not ask Bentham's question: how does this decision affect the individual's expectations?⁵³

Dean Roscoe Pound provides Jones with the second element of social tranquility which is to be served by law: the resolution of conflicting social interests.⁵⁴ Examining Pound's *A Survey of Social Interests*,⁵⁵ Jones concurs with Pound's view that one of law's central tasks is the management of inevitable group conflicts.⁵⁶ Dean Pound asserts:

Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands . . . so as to give effect to the greatest total of interests or the interests that weigh most in our civilization, with the least sacrifice to the scheme of interests as a whole.⁵⁷

Of course, the resolution of major conflicting social interests, at least in a democracy, should be undertaken by the legislature, a point too easily overlooked by modern courts. But for Pound, judicial treatment even of constitutional issues was to be assessed not in terms of "correctness" of the decision, but by considering how thoughtfully and disinterestedly a

⁵² *Id.* According to Jones, the legal services programs of the 1960's can be viewed as a means whereby the law worked to secure the expectations of the poor—not merely to afford guarantees to the more affluent. *Id.*; see *Law and Morality*, *supra* note 21, at 808-09. Daily choices made by practicing lawyers, such as moral choices, shape the course of the law. See *id.* See generally J. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 271-72 (1977) (categories of law's social involvements).

⁵³ *An Invitation*, *supra* note 2, at 1028; see J. BENTHAM, *FRAGMENT ON GOVERNMENT*, *supra* note 49, at 39.

⁵⁴ See Pound, *A Survey of Social Interests*, 57 *HARV. L. REV.* 1, 2 (1943); *An Invitation*, *supra* note 2, at 1028-29. Social interests, as opposed to individual or public interests, are "claims or demands or desires involved in social life in civilized society." Pound, *supra*, at 2. Pound describes the 19th-century distrust of public policy, based on "a weighing of the social interest in the general security against other social interests which men had sought to secure through an overwide magisterial discretion." *Id.* at 6. Pound acknowledges that there is no comprehensive scheme of public policies, but recognizes three general types of social interests—those ensuring stability of social institutions, those maintaining general morals and those promoting individual freedom of action. *Id.* at 7-8. The law works "to satisfy, to reconcile, to harmonize, [or] to adjust" competing and conflicting interests—either by securing individual interests or by sacrificing them to the overall interests of society. *Id.* at 39; see R. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 99 (1977). Pound hopes to find in legal history a record of a "continually more efficacious social engineering." *Id.* at 99; see also Jones, *Law and the Idea of Mankind*, 62 *COLUM. L. REV.* 753, 761-62 (1962) [hereinafter cited as *Law and the Idea*] (discussion of conflicting group interests).

⁵⁵ See *supra* note 54.

⁵⁶ See *An Invitation*, *supra* note 2, at 1028; see also Pound, *supra* note 54, at 9 (the legal means of satisfying conflicts must be flexible).

⁵⁷ Pound, *supra* note 54, at 39.

court weighed the conflicting social interests presented in a case.⁵⁸ Again, methodology, not substantive content, is the key for the American Legal Realists. This idea of deliberate and disinterested decisionmaking will reappear strongly in Jones' approach to the appellate process. Jones does not assert that the mere existence of law will bring about the tranquil resolution of conflicting social interests. Instead, he contends that the law has only the goal of striking a delicate balance, of finding a "reasoned accommodation" among competing social interests.⁵⁹ Compromise is thus an important jurisprudential technique.⁶⁰

The third contribution of law to social tranquility that Jones presents is the channeling of social change. Jones, as we have seen, accepts the inevitability of social change, though he acknowledges that not all change has been for the better.⁶¹ The task of law, according to Jones, is to respond to and keep pace with social change in such a manner as to minimize impairment of other social ends-in-view, such as the preservation of the public peace and safety.⁶² Jones focuses attention on the importance of judicial character in the process of legal development: "[t]he channeling of social change can be accomplished only through continuing acts of creative and informed intuition by men and women who combine genuine mastery of legal techniques with equally profound understanding of social forces."⁶³ Not only should law adequately reflect social change, Jones asserts, but it should responsibly facilitate beneficial changes occurring in society as well.⁶⁴ Jones also notes the oft-overlooked role of law as teacher. "More often than not, a legal principle, if soundly conceived and resolutely enforced, becomes a kind of self-fulfilling prophecy and creates the social climate necessary for its acceptance."⁶⁵ He speculates as to whether this teaching aspect of law might not be the most important way in which law affects social change.⁶⁶ This raises some interesting points.

There is no question that Law does, at times, act as teacher in soci-

⁵⁸ See 3 R. POUND, JURISPRUDENCE 351-52 (1959); *An Invitation*, supra note 2, at 1029.

⁵⁹ *An Invitation*, supra note 2, at 1029.

⁶⁰ See *id.* at 1029-30.

⁶¹ See *The Creative Power*, supra note 3, at 138.

⁶² *An Invitation*, supra note 2, at 1030.

⁶³ *Id.* at 1031.

⁶⁴ See *id.* at 1030-31; *The Creative Power*, supra note 3, at 136.

⁶⁵ *An Invitation*, supra note 2, at 1031; see *The Creative Power*, supra note 3, at 135-38; see also Gellhorn, *The Law's Response to the Demand for Both Stability and Change: The Legislative and Administrative Response*, 17 VAND. L. REV. 91, 99-100 (1963) (the legislature may act creatively to restructure society by "stimulat[ing] correct conduct" and "avoid[ing] error or abuses"). But see J.S. MILL, ON LIBERTY 9 (1978) ("The only purpose for which power can be rightfully exercised over any member of a civilized community . . . is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant").

⁶⁶ See *An Invitation*, supra note 2, at 1031.

ety, and little question that it should, at times, so act.⁶⁷ But in recognizing the teaching aspect of law, the issue of *which* normative principles should guide law itself must be considered. Is it enough to assert that law acts as a director of social change without inquiring as to *which* principles should direct the law itself? For so long as one fails to ask the question, one has answered it, in effect, affirmatively. A continuing failure to specify normative legal principles is to admit as valid any normative legal principle purporting to direct the law. While one might hope that the principles eventually adopted result in the advancement of common good, one must be prepared to confront a legal system which, like that created by the German National Socialist Party of the 1930's, cloaks the most despicable of programs in the respectability of apparent legality. Law can indeed create the climate for its own acceptance.⁶⁸

THE ETHICS OF DECISIONMAKING

In the last part of this study, we consider Jones' application of his general observations on law to the specific task of judges. As we shall see, a utilitarian emphasis is given by Jones to his analysis of judicial decisionmaking: "Judicial decisions, like other legal phenomena, must be appraised in terms of their consequences, that is, in terms of their service—or disservice—to the achievement of law's social ends-in-view."⁶⁹

Jones divides judicial decisionmaking into two functions: "judicial dispute-settlement"—the settlement of concrete disputes, and "judicial law-making"—the creation of law through the doctrine of precedent.⁷⁰ The latter term is not used in any pejorative sense by Jones, nor does he suggest that the two functions are unrelated; only that, for the purposes of study, it is useful to consider the functions separately.⁷¹ In our present discussion, we must limit our remarks to Jones' observations on judicial lawmaking.⁷²

The essence of Jones' presentation of judicial lawmaking—which relies largely upon the respective philosophies of Dewey and Holmes—is

⁶⁷ See *id.*; *The Creative Power*, *supra* note 3, at 139.

⁶⁸ See *The Creative Power*, *supra* note 3, at 138-39.

⁶⁹ *An Invitation*, *supra* note 2, at 1032.

⁷⁰ *Id.* at 1032-33.

⁷¹ *Id.* at 1033.

⁷² Jones views the process of dispute resolution as being more important than the substantive principles generated through judicial decisionmaking. See *Law and the Idea*, *supra* note 54, at 761-62. This is because it is through the process of settling disputes that legal principles are formed. *Id.* at 762. Dispute resolution, in Jones' view, is one mechanism by which decisional law can shape social change and achieve other social ends-in-view as well. See *An Invitation*, *supra* note 2, at 1032-33. As long as this role of judicial dispute settlement is borne in mind, it is not inappropriate to concentrate on Jones' ideas concerning the judicial decisionmaking process in general.

that "judicial logic must be a logic relative to the social consequences of a chosen rule rather than to its doctrinal antecedents."⁷³ Despite the strongly consequentialist phraseology of this statement, Jones actually does not work such a complete exclusion of other normative principles. "The general rules found in the precedents are by no means to be ignored in this process . . . but it is to be kept in mind that these inherited rules are 'working hypotheses' and need constantly to be retested by the way they are actually working out in society."⁷⁴

Jones continues this consequentialist emphasis in his central statement of ethical theory. Note, again, the emphasis on methodology:

The ethical theory to be drawn from legal realism is, I suggest, that the moral dimension of law is to be sought not in rules and principles, or the higher law appraisal of rules and principles, but in the process of responsible decision, which pervades the whole of law in life.⁷⁵

Next, Jones adopts Holmes' definition of the good judge as one who "knows exactly what he is doing, and has to be doing, in this decisional context and so considers definitely and explicitly the social considerations on which the rules courts lay down must be justified."⁷⁶ Jones acknowledges three ways by which judicial decisionmaking is restricted so as to make suspect the claim that judges do, and should, engage in extended policy consideration of social values. First, judges are "'generally bound'" by the authoritative sources in their jurisdiction; second, they regularly employ a "received technique"⁷⁷ in their deliberations, which itself often limits available options; and third, courts are under political restrictions due to the separation of powers doctrine, which directs major policy questions to the legislature.⁷⁸ Jones, however, addresses these restrictions as follows:

These special ground rules for judicial decisionmaking are considerations to be kept in mind in appraising the social consequences of judicial decisions, but they in no way rule out the pragmatist-utilitarian approach to evaluation of judicial law-making. . . . However arguable my evaluative hypothesis may be as applied to any single case, certainly a body of judge-made law, a whole line of judicial decisions in an area like manufacturer's liability or

⁷³ *An Invitation*, *supra* note 2, at 1036.

⁷⁴ *Id.* This concept is also noted, with some additional caveats, in Bodenheimer, *supra* note 9, at 209-11.

⁷⁵ *Law and Morality*, *supra* note 21, at 801; *see id.* at 808-09.

⁷⁶ *An Invitation*, *supra* note 2, at 1037.

⁷⁷ *Id.* at 1038 (quoting Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 *TUL. L. REV.* 475, 481 (1933)). The term "received technique" refers to the traditional and established methods of using authoritative sources to which judges are committed. *An Invitation*, *supra* note 2, at 1038.

⁷⁸ *An Invitation*, *supra* note 2, at 1038.

holder in due course, must be appraised in terms of how it is working in society.⁷⁹

It should be noted that Jones does not claim that every case that comes before the bench is ripe for social-consideration analysis. In fact, a number of lawyers and judges believe that as many as three-fourths of these cases leave little or no room for judicial discretion, though Jones himself prefers a "far lower" figure,⁸⁰ and most realists admit that about three-fourths of all cases fall outside the scope of social consideration analysis.⁸¹ Curiously enough, such observations apparently concede the very point which American Legal Realism found so objectionable in both Natural Law and Legal Positivism: their inability to account for concrete decisions.⁸²

Professor Jones has shown his jurisprudential position to be one which holds law to be a means to social ends-in-view. He has distilled this idea into an ethical duty of judges to engage in a process of responsible decisionmaking in furtherance of those social ends-in-view, and has generally questioned the ability of traditional legal precepts to provide the necessary guidance to the courts in that decisionmaking process. In light of this, Jones raises one final question: "If judges are to reach their decisions by way of a genuinely informed evaluation of the probable consequences of their action in the quality of human life in society, where do they get the data they need to accomplish that design?"⁸³ His answer is simply to reiterate Cardozo's classic response: "[H]e must get his knowledge . . . from experience and study and reflection; in brief, from life itself."⁸⁴ As a result, Jones concludes that the quality of decisional law is limited by the quality of the judges who make it.⁸⁵ Interestingly, this conclusion would seem to argue, not for greater judicial discretion and activity, but rather for increased fidelity to sound legal principles.

Let us allow professor Jones to summarize his advice to judges in his own words:

⁷⁹ *Id.* at 1038.

⁸⁰ *Id.* But see B. CARDOZO, *GROWTH*, *supra* note 15, at 60 (estimating that at least nine-tenths of all cases are "predetermined").

⁸¹ See *An Invitation*, *supra* note 2, at 1038-39.

⁸² Natural Law's lack of influence on modern-day legal reality in general, and judge-made law in particular, has been conceded even by its supporters. Constable, *supra* note 28, at 68-70. The positivist's difficulty in explaining the outcome of the judicial reasoning process is of a different kind—positivism has no explanation for judicial decisions not based on express statutory commands. See H. ROMMEN, *supra* note 28, at 248-49. It is suggested that by admitting that many judicial opinions are, in fact, predetermined, legal realists implicitly concede that their origins are unknowable.

⁸³ *An Invitation*, *supra* note 2, at 1041.

⁸⁴ *Id.* at 1043 (quoting B. CARDOZO, *NATURE*, *supra* note 15, at 113) (footnote omitted).

⁸⁵ *An Invitation*, *supra* note 2, at 1043.

What does the rule of law require of [the judge]? [A]t least this: that he be independent in the largest sense of the word, free from external direction by any superior in the cases that come before him, and inwardly free from the influences of personal gain and partisan . . . bias. His decisions must be reasoned, rationally justified, in terms that take proper account both of the demands of ongoing principle and the demands of the urgent concrete situation presented for adjudication.⁶⁶

⁶⁶ *Law and the Idea*, *supra* note 54, at 768.