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By J. R. Richardson

1. INTRODUCTION

The law of evidence, which may be described in simple but adequate language as the system of rules and standards by which the admission and exclusion of proof in judicial trials is regulated, must, perforce, be examined in the light of what it is and what it has been. Yet its future is equally important. The existing rules become more meaningful and understandable, in the light of legitimate objectives, when considered within the context of past experiences and proposed modifications. It is reasonable to assume that certain exclusionary rules of evidence emerged by accident in the development of our adversary system of trials. But, substantially, they represent an established legalistic consensus, reached through trial and error, on the desirability of

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1 The proffer of proof and possible objection to its admission on trial is the final step in a careful and sometimes lengthy pre-trial process of planning and production of testimony and real proof. See McCormick, Evidence, Chapter 1, Planning and Presenting The Evidence (1954). The study of evidence is "a study of calculated and supposedly helpful obstructionism."—Maguire, Evidence, Common Sense and Common Law, 11 (1947). Evidence is the method of satisfying the court of the truth or untruth of controverted allegations of fact made by the parties in their pleadings.—Tracy, Cases and Materials on the Law of Evidence, 1 (1938).
2 The common law system of evidentiary proof is rigidly exact in its insistence on the most reliable sources of information. For example, we have the opinion rule, hearsay rule and original document rule which seek for direct factual evidence as opposed to secondary matter. It is altogether possible that in this country our courts have tended to foreclose access to evidence of probative value though insisting on rigid adherence to first-hand factual data for after all:
1. Expressions of sense perceptions are always conclusions.
2. Admission or exclusion largely should be within the trial court's discretion in seeking the truth.
3. Rules of evidence should be treated as wise admonitions and not as sacred tablets.
See United States v. Petrone, 185 F.2d 334 (2d Cir. 1950), in which Judge Frank denounces the observance of canons which may become substantial obstacles to developing the truth.
seeking the truth through what is considered the best evidence available to finders of fact.\textsuperscript{3}

When we speak and read of "rules of evidence," one initially is led to think of distinct compartments in which unalterable precepts are stored until needed to supply invariable answers to new and recurring problems.\textsuperscript{4} To the contrary, many parts of the law of evidence fit flexibly into current trends in legal education and judicial decisions on policy thinking and policy making. The law of presumptions, burden of proof, best evidence rule, self-incrimination, parol evidence rule, judicial notice and even hearsay, to mention a few significant rules, involve policy considerations of considerable magnitude. In a substantial part of the subject, especially the exclusionary rules, the determination of policy through a balancing of the various and conflicting interests seeking recognition, affords the opportunity for the creation of a rule admitting or excluding testimony on facts in issue. Evidence is not often thought of in this light and yet, few fields of law employ a more realistic consideration of social and policy factors.\textsuperscript{5} And, contrary to what might be expected, rules of evidence have seldom, if ever, evolved from studies of probative force or value of proof in solving disputed issues of fact.\textsuperscript{6} Rather, rules of evidence are primarily designed to prevent certain types of evidence from entering into judicial controversies. In any event, rules of evidence as rules of procedure in regulating the course of trials, or as substantive proof in controlling the issues and outcome

\textsuperscript{3} Direct evidence, which is generally favored by the courts, tends to prove or disprove a fact in issue without resort to an inference or presumption, as in the case of circumstantial evidence. However, the concurrence of well authenticated circumstances may be more reliable and convincing than direct or positive testimony, lacking in logical basis and unconfirmed by circumstances.—Haffler v. McKinney, 288 Ky. 782, 157 S.W.2d (1942). This is so because eyewitness testimony is subject to (1) errors in observation, (2) defects of memory, (3) mistakes in relating observed facts, and (4) predispositional factors which subconsciously affect sensory perception.

\textsuperscript{4} Such a theory, logically untenable, is based on the formula, Law \times Facts = Decision. Actually, a decision in a given case cannot be an absolute because both law and facts are variables due to the human factors involved.

\textsuperscript{5} Perhaps, somewhat anomalously, there is no field of law better adapted to the development of logical thought and legal analysis, for perfection of skills in discrimination and for mental exercise in exact thinking, than is evidence.

\textsuperscript{6} Dying declarations are admitted as exceptions to the hearsay rule because deemed reliable and hence to possess probative value. Yet, no one has ever made a statistical survey to determine whether dying men do in fact tell the truth. Business records are admitted under the "shop book" rule under the untested assumption that merchants are honest and accurate in their bookkeeping. And coerced confessions are excluded on the basis of unreliability when, in fact, investigation might disclose that generally they are more reliable than voluntary confessions due to the difficulty of extraction,
of trials, must be treated and recognized as being deeply imbued with considerations of policy. These rules purportedly exemplify calculated but benign obstructionism. The wisdom or unwisdom of certain exclusionary rules presents an interesting problem for skeptical scrutiny in the light of modern trends in methods of establishing proof of facts to reach proper decisions.

What are desired objectives? How are they determined? And are exclusionary rules of evidence proper media for their achievement? Generally speaking, the law in its regulatory process seeks to resolve conflicts between men and men and between men and the state by making decisions which reflect the convictions of the majority, or of at least a substantial segment of society being governed. But conceding sincere motivation on the part of those bearing the burden of making decisions, the end result may be undesirable. This may be by reason of mistaken fact-finding or improper objective. Errors in the fact-finding process can, and do, lead to faulty verdicts in civil cases and conviction of the innocent in criminal prosecutions. These errors are traceable to:

1. Rules of evidence which improperly admit or exclude.
2. Misapplication of rules of evidence by the trial judge.

7 "I am especially interested in the field of procedure, because procedure stands between the abuse of the principles of law and their use for the benefit of mankind. You can have as high and as sound principles of law as possible, but if you have not the procedure by which you can apply them to the ordinary affairs of men, then it does not make any difference what the principles are or how erroneous they may be."—C. J. Taft, address to American Bar Association, 1928.

8 "I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent. This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law."—Mr. Justice Holmes, dissenting in Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539 (1905), in which the court held that a statute fixing minimum hours of labor per week interfered with freedom of contract and the liberty of individuals protected by the fourteenth amendment of the federal constitution.

9 Borchard, Convicting The Innocent (1932).—Contains the case history of sixty-five criminal prosecutions in which there were convictions with subsequent proof of innocence. Some had been executed and were beyond the aid of executive pardon.

10 Hearsay evidence is not rejected because it is unreliable but due to lack of opportunity to cross-examine the declarant according to most authorities. Rules of privileged communications suppress valuable sources of facts where the interest of society in protecting relationships is deemed paramount. But as to the individual, why shouldn't the accused criminal be required to give his version of the facts. The rule of privilege against self-incrimination is grounded in history rather than reason.

11 In State v. Whitener, 191 N.C. 659, 132 S.E. 603 (1926), the trial judge ruled that he could not "as a matter of law" hear the testimony of the defendant.
3. Mistaken identification or interpretation by honest witnesses.\textsuperscript{12}

4. Circumstantial evidence from which erroneous inferences are drawn.\textsuperscript{13}

5. Perjury due to prejudicial self-interest.\textsuperscript{14}

The above analysis highlights the difficulties which are inherent in striving to ascertain "social facts." That is, the establishment of what actually happened between people to make them party litigants.\textsuperscript{15} However, the facts of controversies cannot be isolated for weighing in a vacuum. They are considered in the light of principles of law which may be applied in a "balancing of interests" process. This process suggests selection or choice on the part of fact finding agencies. And the necessity of choice leads to establishment of policy which should be grounded in a sensitive awareness of the various interests which may be affected by decisions. In recognition of this criterion, Professor Pound has written that the aim of a sound legal system should be "to secure

\textsuperscript{12} Eyewitness testimony is often unreliable for the reasons set out in footnote 3, supra.

\textsuperscript{13} The advantages of circumstantial evidence are that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged. This means that falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are that a jury has not only to weigh the evidence of facts but to draw right conclusions from them, in doing which they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions. This is a source of error not existing in the consideration of direct or positive evidence.

\textsuperscript{14} Perjury produced by the accomplished liar is hard to detect. Cross examination has been lauded by Wigmore as the most effective means of ascertaining the truth. But it is often the case that the witness is as skillful as the examiner. Modern means of investigation such as the lie detector and narco-analysis have proven valuable at the investigation stage of criminal procedure.

\textsuperscript{15} The terminology "social facts" is used to denominate operative facts in human relationships. They are in some degree distinguishable from "economic facts", such as statistical data, which should possess a relatively high degree of certainty.
as much as possible of the scheme of interests as a whole as may be, with the least friction and waste; to secure as much of the whole inventory of interests as may be, with the least impairment of the inventory as a whole.”

Pound's advocacy of efficiency in securing the whole inventory of interests sounds idealistic, but the espoused theory is too broad and general in failing to define the nature and structure of the entire field of human interests. Recognition and attempted achievement of objectives or interests must be preceded by a decision as to what interests will be included in and excluded from a particular social pattern. This is necessary in order to avoid confusion and conflict. Thereafter problems of necessary compromise and required social controls can be effectively considered.

Compromises and adjustments are inherent in the judicial process if it is to be live, not static. Just as desired social change and increased efficiency in business and industry are the results of wise policy gleaned from new and at times radical ideas, so must the law be flexible and shrewdly aware of current trends in human affairs. As stated by Montesquieu, "Despots alone try to govern everything with a general scheme and a rigid will. . . . The contradictory elements frequently found in problems . . . throw us into a regime of concession or compromise . . . Thus we reach that middle ground which is all we can hope for in this world."

Absolutists may sneer at the compromising of interests, but actually we can have few, if any, absolute principles in the law, if the people, not the law, are to be masters. The rights of free press and free speech come as near to creating absolute principles as any fostered by our Constitution, but no informed person would argue that they can be exercised without restraint. This is fortunate since it would be perilous to unleash any principle.

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16 Pound, Contemporary Juristic Theory, 75-76 (1940).
17 See Lee, Social Values and the Philosophy of Law, 32 Va. L. Rev. 802 (1946), for an excellent analysis of the theory of “interests” as expounded by Pound.
18 Chrestensen v. Valentine, 122 F.2d 511 (2d Cir. 1941), where Judge Frank, in dissenting, stated that if courts take judicial notice of how shoeshine parlors are run and of the kicking propensities of mules, judges should not be so cloistered as to not know that the dominant purpose of most men when engaged in business is to seek customers and make profits.
19 Demogue, Analysis of Fundamental Nations (Modern French Legal Philosophy, in the Modern Legal Philosophy Series, 1921) 394, 413, 570.
regard it as absolute, and let it work its way, uncurbed, to its logical extreme.\textsuperscript{20}

Thus conceived, law is a conventional part of a social organization which controls the relationship of individuals. As such, it is an adjunct of community structure and not a quality or prerogative of individual conduct. This concept is the antithesis of the governmental doctrine that might is right and justice is the interest of the stronger. Conventional law, then becomes formal expressions of policy which are sanctioned by custom and usage. That is, custom and usage as exemplified by the people and intelligently propounded in statutes and decisions.\textsuperscript{21}

Rules of evidence are the very essence of law in action. One may argue extremely, as did Thomas Hobbes, that law exemplifies the absolute supremacy of political power over the individual. But zealous upholders of the rights of the individual against coercive state power—men like John Stuart Mill, Harold Laski and Bertrand Russell—recognize that legal coercion is necessary in order to prevent extra-legal coercion. We justify coercive action by formal legal authority on the practical grounds of maintaining peace and order, or the moral ground of establishing justice, or the libertarian ground of attaining the greatest amount of freedom for the greatest number and, finally, on the policy-oriented ground of securing to individuals the right to a fair return on their value judgments.\textsuperscript{22} These justifications defeat, however cogent, the argument that law is opposed to individual rights and demands. That is, the argument is defeated, if, as stipulated by John Locke, the people have a voice in the legal process and its results are in accord with the law of reason. In other words, where the people have political freedom and par-

\textsuperscript{20} Our constitution is a series of compromises. Constitutional, as well as other legal principles, have to live together in a democracy of ideas in which none is a dictator. And, for example, the fact that due process has to yield to other powers at times does not render it impotent. See Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854, note 19 (1935).

\textsuperscript{21} Judge Learned Hand quotes John Chipman Gray as saying of Dean Christopher Columbus Langdell that the Dean believed that the opinions of Judges, like the utterances of Balaam's ass, imported absolute verity but presupposed no conscious understanding in the being from whom they proceeded.

\textsuperscript{22} The right to realize both individual and group objectives results in equality of rewards and earned fruits of the fight. But it guarantees to all men a free and lawful choice of the means of acquiring and possessing property, and pursuing and, obtaining happiness. This concept is the opposite of social engineering which bulldozes peaks into valleys, a leveler which achieves an equality of objectives through the imposition of servitude.
ticipate in the selection of decision-makers, they give by implication, if not expressly, their general consent to sanctions that are employed for the good of the majority.

Under the foregoing conceptions of law, wisely applied rules of evidence are the primary procedural devices for achieving desired objectives through legal institutions in organized society. Presumably these rules have as their purposes the reaching of sound and just decisions under contemporary community standards by utilizing reliable sources of factual data, while:

1. Observing orderly judicial procedure,
2. Avoiding violation of fundamental rights,
3. Preserving certain social relationships, and
4. Recognizing basic human dignity.

It will be the purpose of this paper to examine policy considerations and certain rules of evidence in the light of current decisions in an attempt to determine whether or not proper and sound decisions, as above described, are reached by our courts.

II. POLICY CONCEPTS

In the introductory remarks something was said with respect to considerations of policy in its general relationship to rules of evidence. Now it is quite clear that policy can be as broad as the state's ability to entangle its national and international affairs in the eternal struggle for prestige and well-being of the whole, or

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23 It is quite conceivable that our courts have overworked the common law's search for the best or highest degree of primary evidence. Too often valuable opinion evidence is excluded and hearsay, though incompetent, may be highly material to the issues being tried.

24 Civil and criminal rules of procedure have been greatly relaxed. We no longer place a premium on form and the niceties of pleading and procedure. However, formality cannot be entirely disregarded in judicial administration. So written pleadings and rules of procedure, though simplified, still prevail in the expedition of trials.

25 Rules of evidence exclude coerced confessions as unreliable and prevent self-incrimination. An accused has the right to be present at all stages of a trial and to be heard in his own defense, contrary to the early common law, if he so desires.

26 Rules of privilege suppress valuable sources of evidence due to the fact that the preservation of certain relationships, as husband-wife, attorney-client, doctor-patient, priest-penitent and newsman-news source, is deemed to be an overriding factor.

27 Methods of securing evidence which are so brutal as to shock the conscience and smack of the rack and the screw, as the use of a stomach pump on an immobilized victim, are held to constitute a violation of due process of law. —Rothin v. California, 342 U.S. 165 (1952).
as restricted as the rules and limitations that circumscribe John Smith in his determined search for social status in suburban life. Policy can be a soothing panacea, as fascinating as a chimera and as slippery as an equititarian Marxist. It can be a smoke-screen for a lack of sound reason, an excuse for positive bureaucratic action, or a bastion for maintenance of the status quo. On the other hand, policy in the law can and should be no more than a basis for wise and conventional decisions. But the inherent danger in policy is the chameleon-like qualities which it possesses or with which it can be imbued. There is nothing so absurd but that it may be defended on the ground of policy. Yet, there is nothing so reasonable as that it may be explained or justified by policy.

A. Policy and Reason

Policy as a functional concept can be both logical and practical. This can be accomplished if policy exponents are willing to be disreputably intelligible and void of windy verbiage, qualities which are anathema to philosophers, or to stuffy pedants who are prone to promulgation of pompous phrases marching along in search of ideas. Thus, professional proponents of legalistic policy may reduce it to a science and, in the process, develop a technical phraseology comprehensible only by their exclusive devotees. This in turn may result in structural impediments which are a barrier to communication between those few who know and the many who ought to know. If policy precepts degenerate into pure scholasticism and consequent weak acceptance of authority then we are faced with a feudal-like system where, in the midst of an oasis of learning, popular ignorance

28 In V. T. C. Lines v. City of Harlan, 313 S.W.2d 573 (Ky. 1958), the court, in commenting on municipal immunity from liability in the exercise of governmental functions stated, "... the immunity rule (although never clearly defined) has become so imbedded in the common law of this state over the years that it has become a definite part of our mores. ... A change addresses itself to legislative discretion and we must content ourselves with criticism of the rule which we have created." The incongruity of this court's policy position is emphasized by Mr. Justice Frankfurter in Indian Towing Company v. United States, 350 U.S. 61 (1955), where he stated at page 63 of the opinion, "... and it (the Government) would thus push the courts into the non-governmental quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight states will disclose an irreconcilable conflict. More than that, the decisions in each of the states are disharmonious and disclose the inevitable chaos that results when courts try to apply a rule of law that is inherently unsound."
flourishes unquenched. This is an almost unavoidable evil if concepts of policy are monastically isolated within the framework of erudite structural terminology.

Policy as a mere word of convenience for the average man or governmental official is often overworked as a meaningless cover-up for meaningless action. However, in actual practice, policy may relate to family, business, or government with realistic force. The head of the family may enunciate policy standards designed to curb delinquency in his progeny and promote domestic tranquility. Primary motivation may be dual in nature. But perhaps parental satisfaction in the rectitude of offsprings takes precedence over the fact that society benefits from young men and women not running afool of the law. Likewise, in business the policy of merchants may be largely for the protection of self-interest. The policy of "no refunds" is intended to lend stability to sales, while the policy expression that "the customer is always right," if practiced assiduously, is calculated to prosper the business through satisfied customers. Finally, the legal presumption of innocence until proven guilty is a benign expression of policy by which the governed is protected from arbitrary inquisition and unjust conviction by the government. The benefits are mutual in that ordinarily such policy tends to stabilize government and guarantee the security of the person.

These commonplace illustrations represent three fundamental relationships in organized society. They demonstrate that policy considerations necessarily contemplate friction as a result of group and individual activity. They show that policy is sometimes grounded in reason and always selfish, whether self-imposed or pronounced by formal sanction. That is, the wise decision maker seeks a policy pronunciation:

1. That can be justified in reason and logic,
2. That will be respected and observed by those affected by its impact, and
3. That may be expected to add to the prestige and sense of well-being enjoyed by the source of authority.

By reason in policy we mean not ground or cause alone but rational justification. One may agree with Kant's denial of a rational theology with a reduction of religion to mere faith and
hope. And one may concur in Spinoza's conclusion that the purpose of the Scriptures is not to convince the reason but to attract and lay hold of the imagination, since man, as a part of the masses, wants religious beliefs substantiated by extraordinary manifestations rather than by commonplace forces of nature. But policy concerns itself with justice as a relation among individuals depending on social organization. In consequence, policy in the law must be justified, if at all, through worldly utility and even expediency at times.

The cynic may wonder why persons who boast of professing the Christian religion and its virtues—namely, love, joy, peace, temperance, and charity to all men—should quarrel with such rancorous animosity and display daily toward one another such bitter hatred, that this, rather than the virtues they profess, is the readiest criterion of their faith. But the realist knows that man is motivated by greed and the desire for luxury which tarnish his hope and reduce his striving for the unworldly and more remote immortality objective. Men are acquisitive, ambitious, competitive, and jealous. They soon tire of what they have, and begin to yearn for what they have not; they seldom desire anything unless it belongs to others since most things worth having are possessed. The result is the encroachment of one group upon the rights and territory of another with chaotic consequences, in the absence of controlling policy which is effective because respected and accepted.

The nadir of legalistic perversion is reached when policy becomes an instrument of oppression or of furthering selfish interest by means of arbitrary or reactionary government, or when decision-makers, whose function is to enlighten through reason and wise choice, become the tools of obscurantism and political tyranny. This process may exemplify practical expedients for

29 Kant, Practical Reason, 220.
30 Spinoza, Tractatus Theologico-Politicus, Chap. 6.
31 Justice is, of course, an abstract, or ambiguously relative and can be studied and analyzed only as part of the structure of a community rather than as a quality of personal conduct.
32 The rivalry of groups ranges from communities to countries. The latter instance usually concerns itself with the acquisition of the resources of soil. This almost inevitably leads to strife and subjugation of one group. If that day ever comes when those who must do the fighting have the right to decide between war and peace, the history of mankind will no longer be written in blood. That is, demands and expectations vary directly with the price one knows he will have to pay for their satisfaction.
the few, but it ignores reason, which can be rational and practical for all who are affected by formal sanctions. Generally, we think of knowledge as translated experience, but pure reason may exist entirely independent of anything empirical. This is so if it be admitted that moral sense is innate and not necessarily derived from experience. Proceeding on this thesis, it may be abundantly clear that the most astounding reality in all experience is a sense of rightness or wrongness when one is required or tempted to act. If the right decision is made, the imperative demands of that which is called conscience are followed. This avoids conduct which would render social life impossible. An inner sense of duty is followed and moral law legislates imperiously regardless of profit or loss to the actor, but regardful of benefit to the majority. So reason may be based on experience but in new situations it operates independently of experience. Thus justice is achieved through reason.

Where do rules of evidence fit into this picture of reason in law? Rules of evidence are a basic procedural part of the whole legal process dedicated to achieving the ends of justice within reason. They are the very hub of the wheel of justice in that they regulate the fact-finding process by a pre-determination of what facts have probative value and are competent for consideration in reaching decisions. In this respect, rules of evidence are significant, if not unique, in the legal process by standing not only for a right to justice under the law but for a way to justice as well. The crucial subject of inquiry is how well these laudable objectives are achieved in the process of formulating standards and exercising control over social behavior.

B. Activation of Legal Policy

Every society, with the exception of totalitarian states, and every social group, capable of consistent and effective action must be regarded as an organization to prosper the wishes of its members. This means that society furthers the natural desires of its members subject to disciplines and controls in the interest of the group as a whole. This generally accepted democratic postulate is contrary to the philosophic proposition that natural justice and nobility consist in every man allowing his desires to wax to the uttermost, with the courage and intelligence to minister to and satisfy them to the fullest. If such freedom of
action is accepted, justice becomes a morality not for men but for foot-men, and, as expressed by Stirner, "a handful of might is better than a bagful of right."

Fortunately, this is not the concept of a well-organized society as we know it in which the dignity of the individual is stressed. This is fortunate despite the fact that every government eventually tends to perish through excessive exploitation of its basic principles. Disregarding this unhappy thought, we may say that the state is the most significant and most fully developed institution in our society. And the standards of conduct which it formulates through institutional practices is the law. This is done through relatively formal methods of defining aims and formulating its policies to be realized through machinery or agencies established for that purpose. These facts are elementary. The why and the how of them are quite complex. This is so because men are complex contradictions. We have described men as acquisitive by nature. On the other hand, we have said that man has an innate sense of right and wrong. In our society, this has aided him in yielding to formal authority, whether by choice or of necessity. The desirability of fostering mutual or off-setting objectives is a result of choice. The requirement that one so regulate his conduct as to not violate recognized personal or property rights of others is dictated by necessity.

The state in a democratic society is organized on the basic premise which holds to the equal right of all its citizens to hold office and to determine public policy. As has been suggested this could lead to a disastrous excess of democracy. Perhaps an excess of democracy is as dangerous to the existence of a well-organized society as is an excess of totalitarianism, or any form of government for that matter. But the former only suggests a weakness which may ultimately lead to this excess, while in the

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33 An oligarchy ruins itself by the incautious struggle for immediate wealth. An aristocracy destroys itself by limiting too narrowly the circle within which power is confined. The same is true of a dictatorship. A democracy becomes decadent and bankrupt because its benevolence leads to destruction of initiative in the welfare state. The end result is upheaval or revolution in which the equalitarian terrorists consume their own. From the ashes a newly organized society emerges in the governmental cycle.

34 Advocates of states' rights can make a strong case to the contrary by arguing that federal subsidies and Supreme Court decisions have reduced states to a position of vassalage. However, we speak of states at this point with reference to dispensation of local justice, an area in which the federal octopus has made only small inroads as yet.
latter excess is from the beginning a \textit{fait accompli}. So, in a manner of speaking, we accept the lesser of two evils, and reject the idea that a democracy exemplifies the folly of leaving to mob caprice and gullibility the selection of political officials; officials who are mere puppets for wealth-serving strategists pulling the strings of special interests behind the democratic stage. Rather, we adhere to the view that free people do know what is best for them and are capable of selecting the proper rulers for charting the wisest courses and determining the soundest policies.\textsuperscript{35} If it be otherwise, then the governed do not deserve to be free and would be better served by a despotically imposed pattern of regulatory policy.

From the foregoing it may be concluded that the democratic process is predicated on the proposition that the controlled and the controllers are in harmonious accord to the extent that those who consent to be governed as members of a politically organized group recognize, tacitly or otherwise, that authoritative directives are actually the people speaking through their own agencies. In the abstract, this sounds ideal. In practice, it may be less than ideal. This does not mean that the system is bad. It simply indicates that since man is not infallible the state which he creates cannot be infallible.\textsuperscript{36} Man is avid and grasping but

\textsuperscript{35} Plato argued (Georgias, 588, Protagoras 317, 565) that the common people lacked the intellect and education to select political officers, and that mob-rule is a rough sea for the ship of state to ride when oratory stirs the waters and deflects the course. He, of course, spoke of his time and for his time in history. An analogy to this argument may be drawn from the retired J.A.G.C. officer who has written a book for the purpose of lauding military justice and condemning civil courts in bitter language.—Sullivan, Trial by Newspaper (Patriot Press, 1961). Perhaps military justice may be good for officers but buck privates think otherwise. It has its wealmess, but mankind has not yet devised a more just means of trial in criminal prosecutions than trial by jury. Similarly, free men prefer to govern themselves, capable or not by some standards.

\textsuperscript{36} It is interesting to note that in the slippery, shifting, self-seeking, cynical Renaissance politics of Europe a burgeoning consciousness of nationalism created a totally new concept of individualism and the state. It was nothing less than the infallibility of the state. That is to say, the infallibility not of a man, nor of a religion, but of a geographical area. That a Pope might claim infallible dominion over one’s conscience, or a king over one’s land was an ancient habit of thought deeply rooted in men’s mind and seldom questioned. But that the newly constituted national states, whose boundaries were hardening, might also lay claim to infallibility was new. Merely by being a patriotic Frenchman or a patriotic Englishman or a patriotic Spaniard, the meanest peasant, by the accident of his birth within certain confines of national boundaries, might arrogate to himself the infallibility of popes and kings. He could say to himself, with growing wonder and pride, “I too cannot err, since my nation cannot err, and I am a loyal national.” While this new spirit of well-being was growing, in Italy Niccolo Machiavelli was writing a book on the new philosophy. This is nationalism. Today, in Africa,

(Continued on next page)
knows right from wrong, since he has a conscience and the power to reason. So he yields, as a conforming member of society, and subordinates his personal demands for the good of the whole when contrary to group objectives. This he does by choice or perforce as the case may be. This observance of state policy standards can be expected to continue so long as formal policy truly represents the contemporary will of the people. But when, and if, policy becomes an arbitrary tool for exploiting the masses, for the benefit of those exercising political power, the result is an unjustified excess of the governmental function—even in a democracy. This leads to revolution and possibly a new political order in nation-states. Certainly freedom or subjugation of the people follows. If freedom, a vague term or status at best, results, there may be an excessive exercise of freedom, with anarchy rampant, until the fires of unlicensed disorganization burn themselves out and one of the contending power groups is able to acquire a position of authority. Unbridled power, be it exercised by a select few or the masses, and liberty are eternal enemies and lead to conflict. A state should never, willingly at least, abandon its fate to an authority it cannot control. Similarly, the people cannot, of choice, be expected to create a governmental Frankenstein.

In a so called democratic society, the state, as well as other institutions or organizations within the state, possess certain

(Footnote continued from preceding page)

Banteur, Bushman and Hottentot are emerging from their tribal society and acquiring a new sense of self-satisfaction and dignity in identifying themselves with the state and its supposed infallibility as a nationalistic unit.

The French revolution went out of control when it subordinated the liberties of men to the power of a government immediately responsive to egalitarian mobs. The libertarians, Turgot, Necker and Lafayette, were replaced by the radicals, Barnave, Condorcet and Mirabeau. In due course these were turned out by the more radical Girondons. They in turn fell—with heads off—before the ruthless Jacobins. Desmoulins, Robespierre, Marat. Ballaud played their brief parts and passed over the horizon of French history, many instigators of French liberty, who had fought in the American revolution, passed with it. The Duc de Lauzun and Victor de Broglie went to the scaffold. Barbe-Marbois, a friend of Jefferson, found safety in obscurity. Alexandre de Beauharnais was beheaded. Ethis de Corny, friend of Washington and Hamilton, lost his mind over the excesses of the revolution and died insane. Custine, who distinguished himself at Yorktown, was executed as was Arthur Dillon. D'Estainy, the great French admiral, was guillotined. Lafayette, shocked and heart-broken by the excesses of the revolution, to which he had helped give original impetus, left France to be cast as a prisoner of state into a dungeon at Olmutz. See, Rosenthal, America and France, 271 et seq. (1882).

The textual observation calls to mind the oft repeated statement of Lord Acton that "Power corrupts and absolute power corrupts absolutely."
features common to all. The essence of each is controlled delegation of power to effectuate common purposes deemed beneficial in the furtherance of individual and group objectives. These common features are:

1. Division of members into two functional parts: governors and governed,
2. Institutional or group objectives,
3. Standards of behavior for members (the governed),
4. Devices or methods for controlling those who exercise granted powers (the governors), and
5. Means for securing group objectives.

This simple but comprehensive break-down demonstrates of itself how people in a society seek to achieve desired goals through associated activity.

The group of persons involved may represent a state, municipality, labor union or medical association. Basically, we are concerned with politically organized groups which traditionally seek such contemporary objectives as:

1. Preservation of peace and order,
2. Security of acquisitions,
3. Security of transactions,
4. Protection of social institutions and standards,
5. Production of an adequate but not excessive supply of goods,
6. Favorable working conditions,
7. A fair distribution of goods,
8. Conservation of natural resources,
9. Development of knowledge,
10. Dissemination of knowledge,
11. Favorable living conditions for all, and
12. Unemployment and old age security.

The foregoing enumeration of objectives are representative of a highly developed state of society; a society which in its rudimentary stages first recognized the necessity of preserving peace and order; then from this starting point gradually becomes more complex as new objectives become desirable and possible of fruition. The most significant aspects of the enumerated objectives are:
1. The fact that time works a change in objectives as desires broaden in direct relation to the availability of services and things.

2. Objectives are evolving with respect to controllers and controlled. That is, the judge in criminal prosecutions may become a defendant in civil litigation. And a large corporation may find itself the subject of an anti-trust suit.

3. They evince a desire for the full and good life for all in enjoyment of material benefits.

4. Each and every one may be achieved through legal institutions in a self-governing society.

These objectives of a well-organized democratic society which we have listed are broad basic policy concepts which require origination, development, interpretation and application once accepted as sound policy objectives. For example, the basic premise that favorable working conditions for labor are desirable is subject to development and refinement under contemporary policy thinking. This is necessarily true because that which was accepted as sound policy a generation, or even a decade ago, may be regarded as absurd today. Again, with respect to courts, "coffee break" injuries may be held compensable; a court may discard negligence as a test for liability and adopt a rule of absolute liability in "blasting" cases, or abrogate the rule of charitable immunity for hospitals in view of present day changes in group objectives; a court may once again respect stare decisis and the venerable M'Naghten Rules, or break with tradition and accept realistic, modern views on mental disorders; and, conceivably might even let down the judicial hair and admit testimony by an expert, retired burglar that a particular job, in

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30 In 1845 a committee of the Massachusetts legislature investigated working conditions in the Lowell textile mills. The members were unmoved by the fact that women worked with woolen fabrics in ill-lighted, ill-ventilated factories from 5 o'clock a.m., and continued till 7 o'clock p.m. with half an hour for breakfast and 45 minutes for lunch, for wages averaging from $16 to $23 per month. One of the committee's conclusions in its report was, "It would be impossible to restrict the hours of labor, without affecting very materially the question of wages; and that is a matter which experience has taught us can be much better regulated by the parties themselves than by the Legislature."—Documentary History of American Industrial Society, Vol. VIII, 134, Massachusetts House Document No. 50, March, 1845.

30 Sweet v. Kolosky, 106 N.W.2d 908 (Minn. 1961).
32 Mary Kojis v. Doctors Hospital, 107 N.W.2d 131 (Wis. 1961).
his opinion, was performed by a rank amateur. These suggestions indicate that legal policy is essentially and necessarily progressive in nature if it speaks in terms of present needs.

In home and business the exercise of policy is substantially personal or private, although mutual benefits to the individual and the public result. In government, expressions of policy are fundamentally public in nature. This is so regardless of the fact that governing or regulatory bodies may hope to perpetuate themselves in office through wise admonitions or sound directives to the governed and, in this respect, possess attributes which are private or personal in nature. Thus, official control presumably is exercised in the general interest and is public. If the general interest is individualized by decisions which accommodate themselves to particular circumstances then public policy has no direct relationship to value judgments formulated by constitutions, statutes and prior judicial decisions. Rather, public policy becomes the product of individual judicial discovery of what is naturally and inherently right between man and man, and man and society in particular factual situations. This is, of course, not necessarily a subsersion of policy action and may even be desirable in relieving from the rigors of harsh justice— and may be so desirable as to evolve into a general rule of policy.

At times, public policy is declared by constitutions; at other times it is enunciated by statute or ordinance; and at times by judicial decisions. However, it has been argued that more often than not policy abides in the customs and conventions of the people—in their clear consciousness and conviction of what is fundamentally right and just in men’s relations. It may be true

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46 In Pittsburgh C. C. & St. L. Ry. Co. v. Kinney, 95 Ohio St. 64, 68-69, 115 N.E. 505, 506 (1918) the court held that a contract relieving the employer of liability for negligence causing injury to an employee was contrary to public policy. At the date of this case the decision was an innovation. It benefited a particular employee, but general application today makes the rule public in character. We accept the fact that a contract by which a person seeks to put another at the mercy of his own negligent conduct is unconscionable.
47 The Florida Supreme Court so described public policy in, City of Leesburg v. Ware, 113 Fla. 760, 153 So. 87, 89 (1934). Statements as to right and natural justice have always been under fire. Socrates in one of his Dialogues, which remain one of the priceless treasures of the world, wrote, "I proclaim that might is right and justice is the interest of the stronger."—The Republic, 338. Plato in the dialogue, Gorgias, 491, expounded that, "He who would truly live ought to allow his desires to wax to the uttermost; but when they have grown to their

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that public policy purportedly regards the primary principles of justice and equity and is at times formally expressed under concepts of social and industrial justice as conceived by our body politic. Further, if a course of conduct is cruel or shocking to the average man’s conception of justice, it may be that such conduct is obviously contrary to public policy, though it has never been formalized by constitution, statute or decree of court. But, if this hypothesis is accepted as a truism, how is the particular policy activated? If certain conduct is contrary to some provision of a constitution, is it sound to urge that it is prohibited by the constitution and not by public policy? If such conduct is contrary to a statutory provision or a settled line of judicial decisions is it correct to state it is prohibited by the law of the land rather than by public policy?

The fallacy of these statements on what public policy is not is obvious. Public policy, more often than not, is a composite of various elements. But, who is to brew this composite? A well-known example aids a search for the answer. At one time writers were vociferously divided on the question whether courts should enforce “yellow-dog” contracts by which employees agreed, as a condition to employment, not to join labor unions. In the Hitchman case, decided in 1917, the Supreme Court upheld such a contract as a matter of public policy.48 Years later, when Con-

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48 Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917). In Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court held that a statute which limited the working hours of bakery employees to ten hours a day and a maximum of sixty hours per week was an illegal interference with the freedom of contract. But Mr. Justice Holmes, dissenting wrote, “This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.” It is worth noting that the majority opinion was prophetic in remarking, “This interference on the part of the several states with the ordinary trades and occupations of the people seems to be on the increase.”
In 1930, just two years prior to this enactment, the Senate had rejected the nomination of Judge John J. Parker to a position on the Supreme Court, largely because he had followed and applied the rule in the Hitchman case. These actions represented a new philosophy for labor-management relations, spawned in the depression-fighting days of the New Deal government and fostered by defense spending under conditions of world turmoil and conflagration. But most significant of all, an awakening of formal authority to the existence of social and economic injustice in a particular area is indicated. This awakening was brought about by reason of:

1. Widespread economic distress,
2. Political power wielded by economic underdogs, and
3. Recognition of economic inequality by governmental agencies empowered to act.

Major policy decisions are almost invariably the result of a clash between interest groups with one yielding and the legislature, or other decisional agency, being moved to action when the weaker becomes strong enough to successfully challenge the stronger. To a lesser degree, and to a limited extent, this power struggle for recognition of human rights is imbedded in rules of evidence. This is, for example, evidenced by the change from inquisitorial to accusatorial methods of indictment and trial of criminal offenses. John Lilburn's trial before the Star Chamber led to this change and development of the rule against self-incrimination when he refused to answer to charges of sedition. Lilburn was a libertarian as obstinate as the court was high-handed. He was whipped and pilloried for his "boldness in refusing to take a legal oath." Three years later, when the Long Parliament met he laid before it his complaint of this treatment, and after four years more, the Lords set aside his conviction.
“it being contrary to the laws of God, nature and the Kingdom for any man to be his own accuser.”

C. Factors Influencing Policy

Law regulates human behavior. It suppresses behavioristic responses to stimuli when considered anti-social, and encourages that behavior when deemed socially desirable. The stimuli governing human conduct are those forces, tangible or intangible, which create desire, arouse emotion, or stimulate a quest for knowledge. These are the controlling factors or qualities of the personality structure which are the sources of behavior. All human value judgments can be categorized within the three.

Desire causes the acquisitive restless soul to be absorbed in quests for the material things of life. For those motivated by desire, existing gains are empty as compared with attainable goals. Desire caused men to rape, pillage and burn in feudal societies. Today, it causes men to manipulate stocks, dominate industry, consolidate efforts, mortgage the home, or buy cars and applicances on the installment plan in highly developed societies. Desire varies in direct ratio to the rationality of objectives, with the complexity of society as the polestar of behavior.

While some humans are the veritable embodiment of desire, others are completely the product of their emotions. They fight not so much for principles as for the pure joy of a fight. Their pride is in such manifestations as love, hate, power and justice. These men make and move armies and navies of the world and explore the cosmic unknown. Or, they may be crusaders with a cause. With pious dedication, they sought the Holy Grail in the age of chivalry. Today they strive for liberty, freedom and equality for all men, in the guise of democracy or, perhaps, under the hammer and sickle of communism.

Lastly, there are those men who find supreme gratification in meditation and understanding. Men of this group think not of material goods, nor of victory in combative activity. Rather, theirs is an endless thirsting for knowledge. If the desire is knowledge for knowledge’s sake, then they may stand in the

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69 Desire, emotion and knowledge as powers and qualities are present in all men in varying degrees. These basic constituents may lie comparatively dormant, or become compulsions which give driving force subderivatives as ambition, courage, devotion and intellectual curiosity.
wings of life's stage unused and unwanted by the world. But if they seek knowledge to impart knowledge and improve the lot of mankind, then they are a constructive adjunct to communal growth and development. The man of this division who once went about with a lantern cynically seeking an honest man now spreads the light of reason and knowledge by putting men in outer space.

In this picture of man in society, the law must fit itself in a meaningful way in order to promote desire, emotion and knowledge within the range of legitimate individual and group objectives. Those ends are sought through wise policy decisions, within the rule of law, by means of carefully chosen political leaders.63 Utopia may never be reached in any form of governmental structure, but it is a desirable goal in the social control of human behavior. Due to the inevitable presence of the human factor in all regulation of social intercourse, how far society falls short of or how near it approaches perfect achievement of desired ends depends upon perfection and imperfection in man and man-made institutions as influenced by internal and external motivating forces.64

Man is a complex contradiction, a dichotomous paradox. His desires, emotions and knowledge are locked in endless conflict. The struggle is exemplified by selfish and unselfish interests which are stimulated by the desire to gratify personal needs on the one hand and the desire to be socially in harmony on the other. These two objectives may, and often do, conflict. So man is moral and immoral, aggressive and non-aggressive, honest and dishonest, tolerant and intolerant in the never ending cycle of living in a world in which competition for advantage is ordained by nature. In this maelstrom of living, which is nothing more than the adjustment of personality structure to social environ-

63 In simple matters like shoe-making and watch repairing we insist upon technically trained men but, unfortunately, in politics and government we tend to assume that anyone who has the capacity to get votes knows how to legislate, make decisions and administer the affairs of a state or municipality. This is democracy. Not the most efficient method of government as such, but the best known means of insuring that the governed will keep control of the governors. And, through painful trial and error, competent leaders are secured or trained.

64 Plato emphasized that behind all political problems there lies the nature of man. Like man, like state. Governments vary as the characters of men vary. States are made out of the human natures which are in them. The state is what it is because its citizens are what they are. We need not expect to have better states until we have better men.—Protagoras, 544, 575.
ment, those persons who are chosen to make decisions are motivated and controlled by certain innate and acquired characteristics. They guide one’s hand, color his thinking and influence his decisions in varying degrees. They are:

a. Ethics and ideals
b. Intellectual capacity
c. Political inclinations
d. Environmental background; personality structure
e. Personal prestige
f. Social security

Sub-headings a and b are properly described as unselfish motivating forces. Factors c and d may be defined graphically as built-in controls. The final enumerations, e and f, are recognizable as selfishly motivated.

a. Ethics and Ideals

Perhaps the most astounding reality in all our experience is precisely our moral sense, our inescapable feeling, in the face of temptation, that this or that is wrong. We may yield but the feeling is there nevertheless. Le Matin je fais des projects et le soir je fais des sottises, but we know that they are sottises, and we resolve again. What is it that brings the bite of remorse and the new resolution? It is the categorical imperative in us, the unconditional command of our conscience, to avoid a social behavior. The conscience is a mental faculty or awareness that we must avoid behavior, which if adopted by all men would render rational social life impossible. The conscience of man gives him ideals and a sense of ethical conduct. To what extent do ethics and ideals control decisions which make policy statements to regulate the affairs of men? Is it measurable?

Legalistic policy is in reality practical or applied philosophy. It inquires into the values and ideal possibilities of things with regard to their total and final significance in legal controls for

55 “In the morning I make good resolutions; in the evening I commit follies.”
56 Conscience is the sense or consciousness of the moral goodness or blame-worthiness of one’s own conduct, intentions or character, together with a feeling of obligation to do right or be good. It is a faculty, power, or principle conceived to decide as to the moral quality of one’s own thoughts or acts, enjoining what is good. Conscience may be exaggerated or stilled by traumatic experience. In some respects it is purely contemporary. But properly developed in the socially adjusted person it is the intangible that chooses good over evil and makes group activity both possible and pleasant,
patterns of conduct. By and large policy, which seeks answers to new problems, involves hard and hazardous tasks not yet open to scientific methods. These problems often present choices between such matters as good and evil, order and freedom, and life and death. Science, as suggested in Turgenev's poem, is as impartial as nature and as interested in the leg of a flea as is the creative throes of genius. But law and policy are not content with study of isolated facts—they cannot be. Rather, they must relate facts to experience, which may or may not yet be formalized as legal sanctions, and get at their meaning and worth in the light of societal objectives.

All men of conscience and intellect are motivated by idealism and ethics, though just as assuredly this motivation must contend for dominance at times with other facets of the personality which are baser in nature. Likewise, men's sense of ideals and ethics are contemporary in that they are influenced by current thinking in social, economic and political arenas. Just as music moulds character and, therefore, shares in determining social and political issues, so do ideals and ethics tend to mould men and the government by law which they create. So influenced, men have a sense of duty and tend to do what they think is right and just when required to act. But since actions are outward manifestations of inward sensitivity, so may we expect differences of opinion as to what is right and just in particular cases. In brief, this explains to some extent the divided judicial decision, and the split vote on pending legislation. Absent evidence to the contrary, we assume that each legislator and each judge voted according to the dictates of his conscience—buttressed by his sense of ideals and ethics. The extent to which they guided and controlled the law-maker is not measurable, but we can be sure these intangible forces were at work.

Ethics and ideals as here used are closely related to morals and humility of man: Humility, which causes one to decide on a course of action irrespective of personal pride or gain, and

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67 Plato, Protagoras, 326.—"Damon tells me, and I can quite believe it, that when modes of music change, the fundamental laws of the state change with them." Daniel O'Connell: "Let me write the songs of a nation, and I care not who makes the laws."

68 True humility is strength not weakness. It is not the cloak of hypocrisy or the badge of a slave. True humility is the rarest of all human virtues. Even (Continued on next page)
morality, the good will—will to follow concepts of moral law regardless of profit or loss. Morality and humility clash with political inclinations and desire for prestige and security in the decisional process as we shall see. Yet they are the voices, at times wee small voices, which prod man's conscience and urge him to do his moral duty. In so doing he will not achieve the perfection that philosophers speak of, but he will treat others, in this instance the governed, in every case as an end, never only as a means.

According to our established postulate, men, including those called upon to make laws and decisions, engage in a struggle of contending forces, one of them being the sense of right and duty which is the product of ethics and ideals. Logically then, constitutions and statutes should constitute formal expressions of the ideals and ethics of a community as of the time, if decision-makers act by reason of a sense of moral duty, and if sensitive to the demands and desires of a majority of the community.

Constitutions and statutes reflect the ideals and ethics of the community—be it good or bad by extrinsic standards. The same is true with respect to judicial decisions interpreting these canons, as well as in applying rules of evidence in the process. For example, constitutions, state and federal, provide safeguards against self-incrimination and illegal search and seizure. Statutes, through “anti-sweating” acts prohibit the use of coerced confessions in criminal prosecutions. Courts then interpret and apply, or refuse to apply, these constitutional or statutory provisions in determining if particular testimony or evidence comes within the interdiction. These sanctions against conduct which shocks the conscience, ignores concepts of human dignity, and

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philosophers who write books in its praise take care to have their names prominently displayed on the title page.

69 Surely there is an innate sense of morality in man, even though it is subject to a process of evolution as is man. Just as surely ethical notions based on morality, were never more confused than today. The principles which we apply to our actual living are largely opposite to what we write in books and preach in our churches. Carried to its logical extremity this hypocritical incongruity leads to excesses of self-fulfillment and the eventual breakdown of legal and democratic processes.

69 The hypothetical "if" presupposes knowledge of what the people want and a sense of duty or obligation to serve those wants. The strait-laced legislator or judge with preconceived prejudices for conduct deemed undesirable or immoral by him, acts under a sense of duty to the people but is moved by what he thinks is best for the people rather than by what they think is best for themselves.
disregards the privacy of person and property are codified expressions of a particular society. The courts in applying these sanctions make policy decisions which regulate conduct and mutual rights. It is sound, practical policy if it has not become the monopolistic brain-child of an esoteric class and isolated from the people by the high birth rate of obscure terminology, and if it is expressive of the will of the majority.

The inquiry then becomes, assuming that judges do their duty as they see it, do decisions represent the ideals of the people or the ideals of the judges? This inquiry is illustrated by the issue as to the admissibility of evidence secured by unreasonable search and seizure. Certainly the security of one's privacy against arbitrary intrusion by the police is basic to a free society, is implicit in the concept of ordered liberty and grounded in due process of law. Yet Justice Cardozo once spoke out in favor of the traditional rule of admissibility in these words:

No doubt the protection of the statute would be greater from the point of view of the individual whose privacy has been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of admissibility strikes a balance between opposing interests. We must hold it to be the law until those organs of governed by which a change of public policy is normally effected shall give notice to the courts that the change has come to pass.

The contrary and more logical, although minority, view favoring the rule of exclusion has been commented on as follows by Justice Learned Hand:

As we understand it, the reason for exclusion of evidence competent as such, which has been unlawfully acquired, is that exclusion is the only practical way of enforcing the constitutional privilege. In earlier times the action of trespass against the offending official may have been protection enough,
but that is true no longer. Only, in case the prosecution, which itself controls the seizing officials, knows it cannot profit by their wrong, will that wrong be repressed.

In an issue on the admission or exclusion of illegally obtained evidence, it is difficult to see how admission strikes a balance between opposing interests, as suggested by Cardozo. More to the point, it is not difficult to understand how two outstanding jurists would take directly opposing views in a field or area of evidence so steeped in policy. The why of this judicial divergence on an issue where public and private interests clash presents, however, a most intriguing question. One judge votes to protect the public against the individual who has erred, while the other votes to protect the individual against unwarranted exercise of power by the state in identical situations. One sees the evils of crime and the need to suppress it, one sees excesses of police authority and the need to suppress it. Each is equally discerning and equally honest in convictions and dedication to duty. Why then do we get opposite views or results?

The answer to the question becomes apparent upon reflective analysis. Men of science with required qualifications can run identical tests or use certain formulae which are scientifically exact and will produce the same results or findings. But men equally trained in the law cannot be expected to examine a set of facts and invariably reach the same decision as to what is good or bad, or right or wrong. This is so because they inquire into values and the ideal possibilities of things. And man is not alone an ideal or ethical animal. His personality structure is integrated. It is the sum total of his traits of character. So what a particular judge decides is right or just depends not upon his isolated ideals, but upon ideals as conceived by him as a result of his entire personality. When a decision-maker’s field of inquiry yields knowledge susceptible of exact formulation it becomes a science. In that event, possibility of error is at a minimum as is policy making. The facts may conclusively prove intoxication or exclude paternity to which two or more judges would and must react alike. But in deliberating upon relativities such as good and evil, beauty and ugliness, hate and love, or order and freedom, lawyer or judge brings the entirety of his value judgments to bear on the problem in a process of interpretive synthesis.
The significance of the ethics and ideals factor in decisions is highlighted by the *Rochin* and *Breithaupt* decisions of the Supreme Court. In *Rochin*, the majority of the court found that immobilizing a suspect by force and pumping his stomach to secure incriminating evidence in the form of morphine capsules violated due process of law in that the police methods employed were such as to “shock the conscience” and “approach the rack and the screw”. Then in *Breithaupt*, the majority held that taking blood by hypodermic needle from an unconscious person to secure evidence of intoxication for use in an anticipated prosecution for manslaughter by motor vehicle was not “such conduct as shocks the conscience” of the community within *Rochin*. Both *Rochin* and *Breithaupt* were split decisions. In a dissent to *Breithaupt*, Justices Warren, Black and Douglas expressed the belief that the decision removed meaning and validity from the *Rochin* case and caused it to mean no more than personal revulsion against particular police methods.

It is not within the purpose of this writing to criticize or defend the two decisions by arguing that they can or cannot be rationalized or reconciled. Rather it is “personal revulsion” of the judges referred to in the dissent which raises an interesting and relevant point of discussion. The majority in distinguishing *Breithaupt* from *Rochin* stated that the taking of blood from an unconscious person by a skilled technician was not such “conduct that shocks the conscience—referring, not to the conscience of an inordinately sensitive person but the sense of fairness and decency of the whole community—under the indiscriminate conditions which prevailed in the *Rochin* case.”

In this statement by the court, we are faced directly with the policy-packed consideration of what is right and just. What is right and just depends on the ideals and ethics of the one called upon to make a determination. Can the Supreme Court, or any

64 *Breithaupt* v. Abrams, 352 U.S. 432 (1957). In *Ash* v. State, 139 Tex. Cr. Rep. 420, 141 S.W.2d 341 (1940), the Texas Court was not repelled by the forceful use of an enema to recover stolen rings which the suspect swallowed when apprehended. Yet, in *Aknowca* v. State, 140 Tex. Cr. Rep. 593, 146 S.W.2d 381 (1941), the same court a year later held that forcibly requiring a person, accused of drunken driving, to provide a specimen of urine and do such things as touch his nose and attempt to walk a straight line constituted compulsory self-incrimination. The cases are reconcilable but not on the basis of personal revulsion, or aesthetic considerations.
court, determine for the community that it would be shocked by enforced stomach pumping and not by taking of blood from an unconscious person? It cannot do so any more than a trial jury can objectively determine how the mythical reasonable man would act. In reality, the jury becomes the reasonable man and the judges become the conscience of the community in reaching required decisions. This is by no means inherently bad. Jurors can be reasonable men and judges can be fair men with unretarded consciences and well-developed senses of right and wrong. Thus equipped, the court inquires as to how an unduly sensitive person and an ordinarily sensitive person would react to the questioned investigative procedures. It then applies its own tests as to what is shocking and what is not shocking to the ordinary man in the community. The decision then becomes a policy expression acceptable to the community—the court hopes. In this manner, the judge's own sense of right and wrong as measured by the ideals and ethics he entertains is an integral and highly significant part of the decision making process.

b. Intellectual Capacity

In the preceding section the fact that a decision is the product of a judge's or juror's total personality was stressed. Factual situations which become operative facts of the law are derived not alone from special training but from total experience including peculiar drives and preferences. This means that there can be no decision in the law, or any other field of human endeavor for that matter, which is purely intellectual because these contributing factors inevitably detract from the purity of one's reasoning. Does this not also detract from Llewellyn's thesis that "wherever a rule is clear, and plainly wise, and plainly applicable, a judge not only can follow it, but it can be predicted that he will"? It does, even without recourse to the many variables in fact-finding and the well-known unpredictability of

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65 Llewellyn, My Philosophy of Law, 183, 191, 196, 197 (1941). Felix Cohen in discussing the prediction of rules and principles that courts will use stated, "There is at present no publication showing the political, economic and professional background and activities of our various judges. Such a reference work would be exceedingly valuable, not only to the professional lawyer who wants to bring a motion or try a case before a sympathetic judge, but also to a disinterested study of the law. Such a judicial index is not published however, because it would be disrespectful. According to the classical theory, those things (Continued on next page)
trial juries in applying the law for further detraction. Enough has been written about the desirability of predictability in the law, too much in fact, for the point to be conceded. At the same time, the fact-finder or decision-maker who applies legal rules mechanically is like the physician who preferred that patients should die by the rule rather than live contrary to it. But mechanical jurisprudence will never prevail so long as judges have imagination and are motivated by humanizing variables.

One of these humanizing variables is intellectual capacity. This reference is not restricted to the lack or presence of a high intelligence quotient and a conventional legal education. Rather, it is extended to include the degree to which a judge can exhibit tolerance, patience and understanding, and control emotions, prejudice and desires.

In discussing the intellectual capacity of judges as decision-makers, it is necessary to consider both trial courts and appellate courts. To be disturbingly practical, it must be noted that some critics and analysts in their ivory towers are becoming aware of the existence of trial courts and of the fact that they are the very hub of our judicial system. To be disgustingly candid, it must be noted that the masses of laws and decisions are vehicles of entanglement for the common man at the trial level. Laws and decisions are necessary because of conflicts between people and between people and the state. Most of these conflicts end in compromise rather than litigation, and most litigated cases are never appealed. These facts pinpoint the trial court as the workhorse of any court system. To be sure, the higher one goes in the echelon of courts the higher the level of policy decisions as a general rule. This is a fact for the simple reason that the wider the scope or the deeper the impact of a decision, the more need that it be thoroughly litigated to get the final and conclusive word in order to lay the matter to rest. But compromises always involve policy in a considerable degree, because men thereby relinquish rights to buy their peace. The same is true at the trial level. Such commonplace matters as continuance, change of venue, waiver of trial by jury, pre-trial orders and new trial

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have nothing to do with the way courts decide cases."—Felix Cohen, The Problems of a Functional Jurisprudence, 1 Modern L. Rev. 5, 24-25 (1937).
involve policy decisions in all cases and of considerable magnitude in some. Yet the busy trial lawyer uses these tools of the trade so mechanically that he does not consciously think of policy in most cases.

County magistrates, justices of the peace, county judges, police judges and circuit judges make judicial decisions and make policy in the process. All too frequently, the only evidence of their claim to competence as judicial officers is their own decision to run for office. Federal judges secure their offices for life and frequently as plums of political patronage, despite protestations to the contrary, and not on the basis of their merits. The longer they stay in office and the higher they climb in the federal system of courts the more removed they are from the people whose destinies their decisions control. In the vernacular, state law is local law and federal law is foreign law to the average man. This makes for abstract justice as opposed to personalized justice in lower state courts. Perhaps this type of justice is an aid to unpolluted purity of decisions. On the other hand, it has the potential for decisions to declare personal preferences of judges rather than those of the people. Such decisions are non-intellectual in that they do not exhibit the exercise of mental discipline in relation to the problem to be solved, preferably, in consonance with community objectives. True intellectuality in decisions does not mean that the judge will individualize all cases without regard to rules of law. Rather, it means he will recognize that a particular rule of substantive law may narrowly, obtusely, and callously foreclose certain factors which should be taken into consideration in reaching a wise and just decision. In that event, the judge with perspective and a vision will reach the right decision if ethically possible without blindly saying "the remedy, if any, is with the legislature." This is true intellectualism in decisions, provided the judge has his emotion and prejudices under reasonable control and is not legislating his own code of morals or social conduct for the community.

Lack of intellectual capacity as a maker of decisions may be demonstrated, not by conscious disregard of legal precepts, but by a lack of knowledge and insufficiency of background in the law. This defect in judicial thinking and action is not limited to state courts. This observation is given full credence by a Federal
District Judge's comment to the jury on the credibility of the defendant in a criminal prosecution in these words:66

And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and Gentlemen, that he wiped his hands during his testimony. It is a rather curious thing but that is almost always a sure sign of lying. Why it is so we don't know, but that is a fact. I think everything that man said, except when he agreed with the Government's testimony, was a lie. Now that opinion is an opinion on the evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

This comment is not a mere procedural mistake, something that occurs on every trial. It is a judicial tirade which demonstrates a biased attempt to influence the outcome of a trial through unfair comment and ignorance as to the meaning of physiological manifestations of a witness. Experienced trial lawyers often make the mistake of attributing various nervous habits to the fact that a witness is lying. In another federal case much was made of the fact that the trial judge had opportunity to examine the witness and observe his demeanor, and to judge his truthfulness and intelligence from his manner of testifying.67 But psychologists maintain that experiments indicate rather consistently the error in attempting to estimate intelligence or truthfulness from physiognomy or appearance.68

In another federal case, admission or exclusion of certain evidence erroneously turned on application of the best evidence rule.69 The trial judge refused to distinguish between direct oral testimony, based upon personal knowledge, as to partnership earnings and partnership books showing net earnings. He applied the best evidence rule on the basis of cases in which the contents of writings are to be proved and excluded the oral testimony. In so doing, he refused to listen to an argument for admissibility saying, "I am not going to hear an elementary argument on law school evidence." The distinction was not elementary and the Circuit Court, in reversing, indicated that the trial judge would have been well-advised to have heard the attorney. Here the

66 Quercia v. United States, 289 U.S. 468 (1933).
68 Burtt, Legal Psychology, 113 (1931).
trial judge demonstrated his impatience, intolerance and lack of knowledge of the law of evidence in acting so arbitrarily.

As a final example of judicial ineptitude, in a prosecution for murder a crucial issue was the admissibility of a confession, alleged by the defendant to have been obtained through coercion.\(^7\) The defendant, on trial, objected to admission of the confession. The jury was excluded from the court room and the trial judge heard the prosecution's evidence to the effect that the confession was voluntary. To rebut this evidence, the prisoner, through counsel, asked that he be allowed to take the stand, in the absence of the jury, and give his version of how the confession was obtained. The trial court simply ruled "as a matter of law" that it could not hear the defendant's testimony on the preliminary inquiry looking to the admissibility of the alleged confession. The conviction that followed was reversed on appeal and exclusion of the defendant's testimony was held prejudicial error since, if believed, it would have made the confession inadmissible. The trial court in this case made such a flagrant and one-sided ruling as to indicate near-stupidity and little regard for the rights of the defendant.

The examined cases are by no means unique, and in this fact lies their significance. They serve to portray only a few of many cases that receive rank judicial mistreatment at the trial level. And only the appealed cases have an opportunity at correction. Many go unappealed and the trial judge's lack of intellectual capacity goes undiscovered beyond those immediately affected by erroneous rulings. Further, these cases are, so to speak, run of the mill on the facts. It requires little imagination to realize how such judges would butcher new and different cases of significance from the formulation of policy standpoint. The logical conclusions to be reached from a review of these selected cases are that a judge is not necessarily competent merely because he decides to run for judicial office, and appointment of judges for life terms by political officeholders is not a valid certification of judicial qualifications. A method of recall other than impeachment for gross misconduct is sadly needed. Correction of errors by appeal is a costly, delaying procedure and is

\(^7\) State v. Whitener, 191 N.C. 659, 132 S.W. 603 (1926).
not a guarantee of sound decisions as the reviewing court may be unreviewable.

c. Political Inclinations

We have seen that judges are either elected or owe their offices to appointment as a result of political party affiliation. In either case, the party members in power at county, district, state or national level get to name judges of their party to office—judges who are presumably impartial arbiters and unfettered by obligations which may affect or even control their decisions. But this may mean that courts are strictly pro-administration with respect to decisions which are political in nature such as judicial and congressional re-districting, election contest cases, land value re-assessment, state merit systems and tax programs. The same court may become anti-administration with a shift in political power and tenure of the judges running beyond that of state administrative officers. This results in two branches of government being at odds, with each trying to hamstring the official activities of the other. A pro-administration court can definitely foster the political strengthening of an administration which seeks to build a political machine and perpetuate itself in office through naming its successors. On the other hand, an intraparty struggle between the judicial and executive branches in this arena can just as certainly hamper very seriously the political ambitions of a particular administration.

Identifying Objectives

Political objectives and policy objectives of governmental authority are not entirely separable. That is, the executive and legislative branches may be in accord with respect to the need for urban renewal, relief to depressed areas, wooing of industry and expansion of parks and recreational facilities. And these

71 In 1960, the Republican party, with President Eisenhower in office, sought a deal whereby about sixty additional federal district judges would be appointed under enabling legislation. Thirty of the judges would have been Democrats and thirty Republican. The Democrats elected to gamble on the outcome of the election and won. Now they have the opportunity to select only judges of their party.

72 This situation is by no means a rarity at the state level. The ubiquitous “Happy” Chandler of Kentucky feuded constantly with an anti-administration court during his second term as Governor. He threatens to return, when eligible to run again, and renew his feuds with all and sundry who oppose his political views.
matters may be part of a political platform designed to secure
election to office, but backed by sound policy thinking, neverthe-
less, in view of real needs of the community. Purely political
motivation has power and self-aggrandizement as its objectives.
Yet these purposes defy complete isolation. Even Hitler and
Mussolini accomplished some incidental good. At the other
extreme, self-effacement in the interest of dedicating one's life to
the service of others carries with it a sense of well-being and
self-satisfaction, even self-righteousness. So the decision-maker
in any of the three branches of government may act for personal
or public motives, but a little of both is present in any event.

A governor elected from a depressed area may feed state
funds into that area to finance rehabilitating projects. Public and
private purposes are present. The more efficiently the program
is administered and the more people it reaches, then the more
public is the purpose. But if the program is shot with graft in an
opportunity to pay off and hold local party stooges in line, the
political objective is dominant.

Legislatures are subject to the same pressures and conflicting
purposes. They may pass ripper bills to strip statutory power
from elected officers who are opposed to the administration in
power. They may redistrict, when required by population shifts,
in a manner to deprive a minority party of its present representa-
tion in a particular county or district. And they may vote pay
raises for themselves as a legislative body. Incidentally, its nice
to note that in this latter situation labor and management are in
complete accord as one. Labor demands a raise in pay, and
management says "you are certainly entitled to it." These ex-
amples show that legislatures are politically and personally
motivated. Fortunately, they recognize obligations, to their own
constituents first and then to the political unit as a whole, which
make most of their acts public in character and properly moti-
vated.

Next, as already briefly noted, judges, due to political affili-
ation, with their very official existence resting on political toler-
ance, are subject to having their legal thinking politically domi-
nated at times. This starts at the bottom, with traffic judges
"fixing" tickets for political friends, and works its way into higher
courts at the trial level. Some judges may, on motion or other-
wise, vacate the bench when personal and political inclinations conflict with judicial duties. Others are adamant in the face of such conflicts. However, judges may be faced with decisions in fields that are new and volatile, with public policy lying close to the surface. In such event, courts can articulate on lawful and unlawful purposes and objectives of society as the basis for decision, with political expediency no more than secondary. Perhaps their decisions will formulate policies upon which there is substantial agreement among the public.

One of the more serious problems faced by courts at higher levels is that of making antiquated constitutions accommodate themselves to present day needs of society—as determined by the courts. The court may breathe life and breath into a constitution and then, with tongue in cheek, state that the constitution is a living document devised to change and grow with society. The drafters would doubtless be either shocked or elated to realize that they possessed this clairvoyant perspicacity. On the other hand, other courts, baffled by the ancient chains of 100 year old constitutions may decide less subtly for effective action despite the constitution. This method of judicial disregard led one state supreme court justice to remark, "the constitution is what this court says it is." In these cases personal and political motives may be, and usually are, sub-currents, but, primarily, motivation is public-spirited.

Finally, the circle is completed by the people who attempt to speak their will, public or personal, through election of officers and votes on constitutional amendments. Imagine a people who are soundly oriented against a general sales tax. They elect a governor and at the same election approve a constitutional amendment for a veterans' bonus to be paid by a sales tax. The implementing legislation provides a three per cent sales tax. One per cent goes for payment of the bonus with two per cent being used for educational and health program expansion. The

73 The Kentucky voters have consistently refused proposals to change constitutional limits on state indebtedness and salaries to state employees and officers. The Kentucky Court of Appeals has in turn been forced to turn its back on violations of the state constitution in order that the state not stand still or go backward in the fields of health and education. The most recent decision in point is Board of Education of Graves County v. DeWeese, 343 S.W.2d 598 (Ky. 1961). The remark as to the court's treatment of the constitution was made to the writer by the late Judge James J. Cammack, Jr.
run-away legislature had power to enact the sales tax and required the constitutional amendment for the bonus. The "people" got a package deal for which they did not bargain, and feel double-crossed by the executive and legislative branches of government. The result is explosive because the people had a private not public purpose in speaking through an organized veterans' organization to swing the vote. This problem is always present. Voters tend to defeat school tax measures to build needed schools and hire new teachers. This tendency remains paramount until the situation becomes so critical that public need overrides private interests. Then the hue and cry about public waste and political patronage subsides in favor of positive action.

Control of Social and Economic Thinking

Political alignment may be inherited or by choice, but it always influences or determines social and economic philosophies and legal thinking. People with a voice in government seek legal sanctions calculated to foster the most idealistic form of a free society. What form of government will best put into action desirable political, economic and social theories they inquire? Hamilton had as his ideal a government by the rich, the well-born, and the able. Schurz saw government by civil service as an ideal. And Frankfurter entertained the gospel of government by experts. We, in this country, possess the potential for realizing some or all of these ideals in varying degrees at different times in history by reason of social unrest, political upheaval, economic crisis, and international turbulence through elaborate checks and balances in our tripartite form of government. Back of it all is the binary system of political parties exercising control over the three branches of government.

Office seekers and decision-makers in all fields are political party representatives, and, as noted, social and economic philosophies in government are controlled by political and legal thinking

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74 The described events took place in Kentucky a few years ago and the repercussions may be so loud and strong as to influence the next legislature to reduce the sales tax. This will necessarily curtail ambitious health, welfare and school programs.

75 Critics have seen our Constitution as a "conspiracy against government", and our government so complex and inefficient as to make it impossible for a great president, a competent governor, or able mayor to effectuate reforms of any significance and merit.—F. S. Cohen, Ethics, Vol. LV, No. 3, 167-170 (1945).
to a considerable extent. A legislative body tends to support the executive for this reason, particularly when there has been a general political turnover due to a shift in public sentiment. Court members due to tenure of office may be out of harmony with current trends in governmental activity as expressed by the other two branches of government. This in turn can lead to an impasse with a reactionary court, which does not represent new philosophies, blocking needed governmental programs. The result is a battle for power. If the executive, backed by the legislature, proves stronger, with the will to act, "court packing", as in the early days of the “New Deal”, is a means of break through.

A change in court personnel is not the sole means of bringing about a change in the legal philosophy of court members. Justice Frankfurter presents a living example. In his younger days he was considered the radical inspiration of the New Deal philosophy. From this position he gravitated to a sort of swing man, acting as something of a balance wheel between conservatives and liberals on the Court. Before his retirement he was found voting with the conservatives more and more. The reason for this cannot be fully determined. Perhaps age tends to dull the crusading fever of youth. But, certainly, a personality clash with Chief Justice Warren was a factor in influencing Frankfurter’s judicial attitude. In a recent five to four decision the majority reversed the murder conviction of a District of Columbia man because of a question asked of him by the prosecutor when he voluntarily took the witness stand in his third trial for the same offense. Justice Frankfurter wrote the opinion for the dissenters, but when it was read in open court he added a vigorous verbal condemnation of the majority opinion. He suggested that those subscribing to it were hunting through the record to find “what the mind is looking for.” He also charged that the majority opinion was an “indefensible” example of recent excessively finicky appellate review of criminal cases. Justice Warren answered with a rebuke which was mild under the circumstances, but a rebuke nevertheless.

The open, personal conflict within the court has its roots in a division of the court much more important than the occasion of the dispute itself. This dispute centers around the issue of

whether the government exists for the protection of the individual or whether individual rights must from time to time be sacrificed for the protection of the government. Chief Justice Warren and Justices Black, Douglas and Brennan are generally united in the opinion that the constitutionally guaranteed rights of the individual are being invaded by Congress, by state inquisitorial committees and occasionally by the courts. For a time Justice Frankfurter rather consistently agreed with this view, but was, nevertheless, a steadying balance wheel. Later, he was more definitely identified with Justices Clark, Whittaker and Stewart. These three seldom-varying conservatives recognize that individual rights must be subordinated to needs of government on critical issues, particularly national security. This leaves Justice Harlan, who has become the swing man of the court, agreeing sometimes with one side and at times with the other.

This is a very sensitive area of national policy and it is indeed unfortunate that personalities should affect political and legal thinking in this manner. Five to four decisions are often neither satisfactory nor consistent, yet they are the firmest of all, absent a change in court personnel or a shift such as Justice Frankfurter experienced. So these decisions will be with us until there is a basic change in the membership of the court or in the philosophy of the one or two members, who now swing from one side to the other in the borderline cases. Such change, if it comes, may well give a decided balance for or against the priority of individual rights so stoutly, eloquently and consistently advocated by Justice Warren, Douglas and Black.

We have seen that political party affiliation tends to color the

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77 The unanimous decision or decision with one or two dissenters is much easier to reverse upon petition for rehearing than is the five to four decision. The former may be hastily reached with some significant point having been overlooked. In the five to four decision, the battle lines have been drawn up on opposing philosophies and thorough argument and discussion have caused positions to become solidified beyond chance of change.

78 As of this writing, the majority of the Supreme Court retains its “liberal” approach in policy decisions. Justice Goldberg, as a member of a minority group and a former labor union attorney, can be expected to be a liberal in his legalistic thinking. Justice White is a moderate liberal, but may well become more conservative as time passes. It is not unlikely that the 1964 presidential election will have an impact on the Supreme Court, as well as upon the judicial branch of the government generally. Viewing the election as a monumental victory for the executive branch of government over arch conservatism, it follows that the judicial branch of government will feel more firmly ensconced in their seats of liberality.
policy attitudes of those empowered to make decisions, and that personality clashes, affecting decisions, are a closely associated ingredient of the whole. Fortunately, not all basic policy measures can be identified clearly by a particular political party label. This is true because so-called liberalism and conservatism, fountaineheads of policy, are not only many-faceted concepts but also tend to cut across party lines as an expediency for preserving the two-party political system. In turn, this tendency is radiated to and gives strength and integrity to our politically established institutions. Were it otherwise, political inclinations of policy makers would control absolutely the making of decisions and stultify reason in the law and the democratic process, even now facing its sternest test in history, could offer little to justify its existence.  

**d. Environmental Background; Personality Structure**

It is not our purpose at this point to attempt a settlement of an age-old controversy. We will simply observe that personality is a product of environment in a considerable degree. It is true, without any reasonable doubt, that environmental background and personality structure color a man's decisions be it on the bench, in business, or in a barroom. Just as it is trite but true that one usually inherits his religion and political affiliation, so do environment and personality influence one's thinking on things legal. This is to say that selecting or making principles of law for the settlement of controversies is inescapably subjective in varying degrees.

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79 Legislatures and courts tend to consist of "hard cores" of opposing philosophies. If the dominating political philosophy in a legislative body is in harmony with the executive branch of government, then much of the executive's policy as expressed by political platform will become law. But there are usually "swingmen" who act as balance wheels to curb the executive on "all-out" social and economic legislation. The result is compromise in particular areas. However, in times of national crisis such as great national economic depression, or threat to national security, opposing political philosophies will be subordinated to the public interest in a politically organized group which is sensitive to the welfare of the whole community. Courts tend to be less politically oriented than legislators. Judges may be politically appointed or elected but, at least ostensibly, assume the role of impartial arbiters. This is particularly true of courts which are called upon in a majority of cases to interpret and apply a rule of law based upon statute or judicial precedent. But with supreme courts of states having intermediate appellate levels and the United States Supreme Court, where many of the decisions require determination of policy measures, sharper divisions of legal thinking result. Here personality determinants rather than rules of law influence the making of decisions.
One's sympathy is aroused by causes he has espoused and one's thinking is influenced by his background in the law as well as in other fields of experience. For example, a prospective juror in a personal injury action against a railway company stated on voir dire examination that he had been a purchasing agent for a railroad company in the past and was biased in favor of the defendant in such an action. In a similar situation, involving an action against an electric power company, a prospective juror stated that he was the president of two corporations and was prejudiced against personal injury actions against corporations.

The same has to be true about judges who after all are only men. Federal judges in the south have been slow to enforce integration of the races simply because it is contrary to their culture and concepts of states' rights under the constitution. Such a judge sees the public accommodations law as infringing on private property rights, while his counterpart in the north views discrimination in public accommodations as a denial of due process. Such judicial prejudices are innate, and have a stronger opportunity to flourish where the problem involves one of policy rather than the rule of law.

A recent case in a federal district court of Vermont very clearly emphasizes how a judge's environmental background can shape his thinking. This was a personal injury action in which the trial judge charged the jury, in part, as follows:

1. This is the only opportunity for the plaintiff to have a jury decide her damages.
2. The jury should award the plaintiff such damages “as they would wish a jury to award them if they were in the position of the plaintiff.”

Met by the defense attorney's objection to this “golden rule” instruction, the trial judge inquired: “You are another fellow that doesn't believe in the teachings of the Good Lord that prevail in Vermont. Is that correct?” The verdict for the plaintiff was reversed on appeal as a result of the erroneous instruction and prejudicial remark.

81 Vessels v. Kansas City Light & Power Co., 219 S.W. 80 (Mo. 1920).
The Supreme Court and the New Deal

In the preceding subsection there was some discussion of the effect of political inclinations in shaping judicial decisions on matters of law and policy. Naturally, one's environmental background has much to do with political inclinations. The same is true with respect to personality structure. Personal differences on multi-judge courts can arouse such friction as to lead to emotional outbursts and a change in views on law and policy. We have mentioned Justice Frankfurter change in legal philosophy, but briefly. A bit more detailed comment on the "New Deal" court should be profitable.

It is entirely in keeping with the best traditions of New Dealers that the last two Roosevelt appointees to the Supreme Court should wind up with angry words after twenty-four years of close philosophical association. For nearly a quarter of a century, no two justices have voted as one quite as often as Hugo L. Black and William O. Douglas. So when Douglas hurled snarls and sneers at his "brother", thirteen years his senior in age, it was both astonishing and yet quite wholly in line with the relations among the six men Franklin D. Roosevelt sent to the court over a four-year period.

With the exception of Kentucky's Stanley M. Reed, the Roosevelt appointees engaged in battles among themselves so openly that they became common public knowledge. In the midst of nearly all those storms was the amiable, puckish, gentle but tenacious Black, who, although seventy-eight years old, appears likely to be the last of the New Dealers to sit on the court, just as he was the first of the six.

What made the June 7, 1963, attack by Douglas upon Black so notable was the fact that it was made in the very terms that so often have been used against Douglas. The sin Douglas attributed to Black was that of creating "judge-made" law by ignoring the intent of Congress in order to write his own views into law. Ironically, this precisely is what conservative groups and members of the radical right have been charging against the entire "Warren Court" for nearly a decade. And no two justices have created more judge-made law in the history of the court than have Douglas and Black, working together. Furthermore,
these two are the special targets of the group which has been engaged in pushing through State legislatures a three-piece package of constitutional amendments designed to curb sharply the law writing scope of the court.

A member of the John Birch Society could hardly have been more scathing toward Black than Douglas was on Monday, June 7, when he said in a dissent to Black's majority opinion: "Much is written these days about judicial law-making; and every scholar knows that judges who construe the law must of necessity legislate. . . . The present case is different. It will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature." This, of course, is what the critics of the court have been saying with increasing intensity since the school integration decision of 1954. Nor could any conservative critic of the court denounce it more vigorously for an alleged extension of the power of the Federal Government than did New Dealer Douglas.

Douglas stated further and most strongly in his dissent: "The present decision grants the federal bureaucracy a power and command over water rights in the seventeen western states that it never has had, that it always wanted, that it could never persuade Congress to grant, and that this court up to now has consistently refused to recognize."

The case in controversy was the forty-year old litigation between Arizona on one side and California on the other over use of water from the Colorado River. In his fifty-two page opinion, Black, speaking for a five-member majority, gave what is apparently final victory to Arizona.83 Joining Douglas on one phase of the case were Justices John Harlan and Potter Stewart. But on another phase, Douglas was the lone dissenter. Chief Justice Earl Warren, former governor of California did not participate in the decision.

This blast by Douglas at his fellow New Dealer was thought by many at the time to be his swan song. Douglas was sixty-five years of age in October of 1963, at which time he could have retired on full pay. But the retirement of Douglas with him

taking a prestige job with a big financial foundation did not materialize. There is Washington gossip to the effect that fellow Justices would look with favor on his retirement as they have not looked kindly upon his two divorces and two marriages while on the court.84

Justice Douglas in uttering words that the conservatives like to hear is following in the path of two other New Dealers who sat on the Supreme Court. Justice Black entertained a deep animosity toward Justice Robert H. Jackson which was prompted by the fact that he felt Jackson, who owed all his advancement to the New Deal, had betrayed that social and political revolution when he failed to uphold it as a Justice. So bitter was Black against Jackson that when the late Chief Justice Harlan Fiske Stone died, Black persuaded President Truman not to make Jackson the Chief Justice, as had virtually been promised by Roosevelt. To settle the quarrel among Jackson and other New Dealers, Truman appointed a Kentuckian, Fred M. Vinson, to Stone's place.

As we have previously noted, Justice Frankfurter was another New Dealer who turned to the right. So bitter was the philosophical quarrel between Frankfurter and Black that the two freely exchanged insults from the bench before the former retired in 1962. And included in the feuding among the New Deal appointees was the contempt that Jackson not infrequently expressed for the late Frank Murphy.

Douglas's worry about judge-made law and the extension of federal power may annoy or amuse those all-out liberals who for so long a period looked upon him as their champion. Before Roosevelt appointed him to the court at the age of forty-one, Douglas had served the New Deal as chairman of the newly created Securities Exchange Commission. For nine years after he went on the court in 1939, there was scarcely a time that Douglas was not being boomed for whatever important job the government had available. Roosevelt wanted him as his running mate in 1944 when the big city party bosses convinced him that Henry A. Wallace was an impediment to the fourth term campaign. In his letter to the Chicago convention Roosevelt said he

would accept either Douglas or Truman. The party leaders, of course, preferred Truman.

Four years later, when the Democratic presidential and vice-presidential nominations apparently were not worthy accepting, Truman tried to get Douglas to be his running mate, in an effort to keep the unhappy liberal bloc of the party in line. But Douglas was not attracted by the offer, so Truman turned to Kentucky's Alben W. Barkley. Since 1948, Douglas has figured in no more political speculation, though he is often in the public eye as an advocate of the rugged outdoor life who preached physical fitness long before the New Frontier came to Washington. His marriages also keep him newsworthy.

Prediction of Decisions

In the field of policy-making decisions it may be said that an informed observer may predict a decision but not decisions. That is, if a court, as the Supreme Court, has embarked upon a certain course with a fixed objective—such as the civil rights cases—its decisions in that area are predictable. Otherwise, the Supreme Court cannot be safely predicted because it is a splinter group, influenced by bickering backbiting and personality clashes. This was patently evident in the New Deal Court, but a bit less evident in the Warren Court. But the split vote—the five to four decision—remains prominent, perhaps due more to environmental factors than personality clashes. Different men think differently on new and many-faceted political, economic and social issues. One author suggests another and overlapping reason; it is the accept, or fight or compromise reaction of each separate liberal Justice, especially the New Dealers, to the views of his fellow liberal Justices when their ideas of legal liberalism differed from his. In short, there were and are personality clashes in the Supreme Court due to environmental background and personal differences arising therefrom. This means that the Supreme Court, or any appellate court, can and does have economic liberals and civil liberties conservatives, and vice versa.

Justice Black was one of eight children, born in a crossroads cabin in the small-farm cotton country of Alabama, with little formal education. His was a natural background for an ultra-liberal thinker. Justice Frankfurter was born in middle-class
comfort and well educated. Unfortunately his brilliance was in some degree lost to the Court through inability to cast aside his Harvard Law Professor background. He remained notoriously a professor, lecturing and heckling both attorneys and court colleagues alike. From the date of his appointment, the rugged outdoors-type Douglas voted consistently with Black, the other ex-poor boy on the Court until their recent breach. No Justice on the Court was more consistent and passionate in his defense of civil liberties than was Frank Murphy. Despite his federal law enforcement background, he was strong in protecting the constitutional rights of those accused of crime. Despite his ardent Catholic faith he voted to sustain the beliefs of the sect known as Jehovah’s Witnesses. Murphy once wrote, “The law knows no finer hour than when it cuts through formal concepts . . . to protect unpopular citizens against discrimination and persecution.” As for Robert Jackson, he was, as previously noted, a New Dealer who turned conservative. As Professor Rodell has written, Jackson was a man of property who very soon started to talk and write like a man of property.85

These thumbnail sketches point up the men who were the original architects of modern liberalism in legalistic thinking. We might add that Justice Rutledge joined the hard core of liberals and never shifted. They turned out a lot of law; a lot of it new. The Warren Court carries on in the same tradition, though less brilliantly.

e. Personal Prestige

Personal prestige is a two-edged weapon in the decision-making process. Prestige is a motivating factor in the lives of all men with any degree of ambition and desire to achieve status and respect. This position of personal advantage comes first from the acknowledgement of associates through demonstrated proficiency on the part of a colleague in his field of human endeavor. It may spread from there to the immediate community and on to the state, the nation, and even may become international in scope—all depending upon the source of prestige,

85 Rodell, Nine Men, 258 (1955). Professor Rodell has written penetratingly and thoroughly on the background and philosophies of members of the Supreme Court over a number of years.
its nature and the number of people who may become the subject of its influence.

Personal prestige imparts a feeling of well-being to the possessor, and it may be expected to be beneficial to those who are affected by the activity or product, intellectual or physical, which gave rise to certain prestige. For example, Washington, Babe Ruth and Billy Graham achieved personal prestige: In turn, colonials were freed and a new nation was born; sports fans basked in reflected glory; and many souls were saved—temporarily at least. The desire for personal prestige is a dominating force in many men, Freud to the contrary notwithstanding. We noted above that prestige-seeking was an objective of all men who desired worldly status and respect. There are those men, of course, who are motivated by intellectual curiosity with prestige only an incidental or by-product of their efforts.

These curious intellectuals are dedicated men, and we know from experience that it pays to be curious. It was because an obscure Austrian monk by the name of Mendel became curious about the laws that govern heredity that the famous Mendelian laws were discovered. Sixty years ago, a physicist named Roentgen became interested in the laws which governed the flow of electricity through a vacuum. As a result, X-rays were discovered. Scientific curiosity as to why the sun had not cooled to a dark red ball in its many hundred million years of known existence led to the discovery that under proper conditions of temperature and pressure two hydrogen atoms fuse into one helium atom, thereby releasing tremendous amounts of energy. Today, man can duplicate the solar process of the thermonuclear fusion on Earth. Yes, it pays to be curious. And this axiom is true in all situations where productive thought can lead to the betterment of mankind's existence in his many and complex relationships.

It will be argued by those who worship rules of law and the status quo that the law cannot rationally experiment with men

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86 It must be recognized that drives in men are like the tides. They ebb and flow in relation to intellect, experience, age, environment and opportunity. Furthermore, the desire for prestige is consciously willed, while in the world of Sigmund Freud sex is an instinctive drive—so even philosophers occasionally have children. The desire for prestige results from conscious intellect. Underlying this is the unconscious will, which is a striving, persistent, vital force; and which may even control the intellect where instinctive action is involved. But not always. For instance, it is said that Diogenes achieved death by refusing to breathe. What a victory for the intellect over the will to live!
and their social, material and spiritual rights, except in time of extreme emergency, or to avoid manifest injustice, as do men of science experiment with things in satisfying intellectual curiosity and the desire for prestige. But, nevertheless, there is a type of trial and error present in the law which is grounded upon curiosity—curiosity as to how the people affected will react as a determinant of whether the experiment was right and just. National prohibition was a "grand experiment" which failed because unacceptable to the people. "Integration" decisions play havoc with social relations and tradition. The first decision was a trial balloon with more to follow. They can never become fully operative unless accepted, reluctantly or otherwise, by those who bear the brunt of the decisions. As a final example of a venturesome decision, the Supreme Court of the United States recently upheld the validity of Sunday "blue laws" in various states. The decision rather obviously reacts adversely on the freedom of certain religions. Time will tell if this experimental probing by the Court will continue to withstand the test of constitutionality.

These few examples could be multiplied ad infinitum. They demonstrate that, when legislation and judicial decisions strike at human habits and social custom, curiosity and experimentation are involved in the changes or invocations sought to be wrought by law. And the change, or invocation, is desirable and operative if accepted by those subject to the sanction invoked. The process is by no means alien to the law of evidence. Rather, rules of evidence are an evolvement of the process, where fine distinctions are the rule rather than the exception. For instance, as we have noted, use of a stomach pump to secure incriminating evidence "shocks the conscience" under concepts of due process, while using a hypodermic needle to extract blood from an unconscious person does not; securing evidence by means of a detectaphone placed against a wall to overhear conversations in an adjoining office does not violate Fourth Amendment rights of the suspect, while, accomplishing the same purpose by means of a

91 Goldman v. United States, 316 U.S. 129 (1941).
“spike mike”, driven into the crevice of a wall until it made contact with a heating duct, which thereby acted as a sounding board within the suspect premises was a trespass by “physical penetration” which invalidated the evidence so secured; and a “second confession” may or may not be the product of the first, while the voluntariness of a confession is tested by the inquiry as to whether it was in fact the product of coercion, physical or psychological, and not by evidence that it was reliable thus negativing coercion. Such fine distinctions in the law are often necessary. On the other hand they may merely evince personal predilections of decision-makers for particular methods of securing evidence. If, however, the decisions prove to be sound pronouncements of intellectual analysis and curiosity they are accepted as such, and personal prestige or stature in the legal arena is enhanced.

In concluding our commentary on personal prestige of decision-makers, it is necessary to note that such prestige may be derived from such factors as political power, social status, personality, intelligence, experience and integrity. Hence, personal prestige can be viewed as cutting across all characteristics which affect the decision-making process; and the degree of prestige possessed by particular decision-makers determines to what extent they can influence the decisions of others.

f. Social Security

Economic or social security as a factor in the decision making process must, of necessity, be discussed in a manner which is largely abstract. However, economic well-being of decision-makers, or lack thereof, has two significant facets. First, there is the possibility that judges may accept bribes to control their decisions. Isolated cases of judicial bribery are revealed from time to time, but, largely, our judiciary is corruption free. Underpaid judges of ability are more likely to seek other fields of endeavor than to succumb to bribery.

This observation leads us to the second consideration raised by economic security. Judges cannot live on prestige alone, but, if our judicial offices are well-paid, then more competent judges

can be obtained. The writer once heard a Federal Court of Appeals judge complain that he was paid less than the magistrates in New York City, and could not make it financially except for writing and teaching on the side. This came from one of this country's most prominent federal judges. Fortunately, his honor and integrity was above the slightest suspicion. Furthermore, this statement was made to the writer a number of years ago, and the economic situation of our federal judges has been rather well taken care of by substantial raises in salaries since then. There is a great need for such adjustments in many state courts at both trial and appellate levels. Badly needed salary raises would attract men of greater competency to judgeships, with resultant improvement in the quality of decisions.

Conclusion

Let us consider our culture. Ours is the age of the big city and the machine, space travel and scientific investigation. New nations are emerging and minority groups clamor for recognition. There is no turning back or even standing still in these dynamic times. And it is incumbent upon the judicial structure to meet the challenge it is presented by the demands and expectations of a rapidly developing society. In this changing world courts cannot remain static. The population explosion coupled with urbanization are producing economic, social, and industrial problems which must be approached intelligently. The Supreme Court of the United States is meeting the monumental challenge of high policy decisions. The state courts must do likewise or wallow in the morass of judicial chaos. We have identified and discussed certain factors that influence the decision-making process. We have discussed certain cases which demonstrate wise policy in decision-making. We have seen others that show how arbitrary and reactionary courts can be. But we can be reasonably assured that our judges will be as modern as the times in which they live, if we select, by appointment or the electorate, competent, conscientious men who are paid to perform the duties expected of them. It is as simple as that.