Role of Law in Judicial Decisions, The

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Missouri Law Review

THE ROLE OF LAW IN JUDICIAL DECISIONS†

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The judiciary has long been a tower of refuge from the turmoil of American politics. Above and apart from the reckless exaggerations of partisan contests, the sometimes bitter struggles between the legislative and executive departments of government and the insidious threats or lures of lobbies and pressure groups, American courts have during more than a century and a half of our history gained a merited reputation for integrity, impartiality and outstanding ability. The shadow of corruption or sinister influence has much more rarely touched the judicial than the other two branches of government. The faith of the American people in their courts has, indeed, been so great that the judges themselves are sometimes appalled by the responsibilities placed upon them.¹ To change our figure of speech, the judicial process, it has been said, is the hub around which our free society revolves.²

Among the reasons for this high achievement of our courts two stand out. One is the judge's loyalty to the limited scope of the judicial function. Broadly speaking that function is to decide litigated disputes between man and man or between the government and the individual, and to state or restate the law to govern such disputes. It seems significant that the only two cases of judicial corruption, as far as I can recall, during the past thirty years, occurred in connection with the court's power to appoint receivers for property, a power which falls

†The first Earl F. Nelson Memorial Lecture delivered at the University of Missouri on March 12, 1954.


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outside the main outlines of the judicial function. The other reason referred to above is the law. American courts have inherited the chief English traditions of case law, the law that is built up cautiously from case to case; and yet American appellate courts have, at least avowedly, a greater power of innovation than do the highest courts of England, which deem themselves bound not to depart from their own precedents. Neither of these two factors, let me say once and for all, would alone lead to the high judicial achievement, without the able and expert personnel of bench and bar, and the support of a generally virtuous body of citizens.

The role of law in judicial decisions is a significant theme both for professional lawyers and for laymen. For legal practitioners because it is their primary duty to inform the court as to the law relevant to a litigated dispute, a duty which, I am sorry to say, they sometimes perform inadequately. For laymen the theme is significant because, whether they know it or not, the law is, as I have suggested, an important component in the highly respected judicial achievement. To sustain and yet limit these conclusions will be the chief objective of my address this evening. Additional reasons why the theme is an important one are the various critiques of the judicial process, from the standpoint of psychology, psychiatry, semantics and liberal skepticism, which were made during the first half of the present century. Without stopping to define my terms accurately, I shall use "law" to refer to the body of generalizations about human conduct which have the authority and ultimately the sanction of politically organized society (the state). Under "judicial decisions" I include not only the judgments and orders of courts but also their opinions, if any. The term "role" is frankly ambivalent, since I shall sometimes describe the role which law does play, and sometimes the role which it ought to play, in judicial decisions.

At the outset of our inquiry some loyal and trusting layman may ask, how can there be any question about the role of law in judicial decisions? Are not the judges sworn to uphold the Constitution and the laws, do they not continually profess in their solemn public statements to be "bound" by the law? Are you now suggesting that these gentlemen violate their oaths of office and cover up their sinister biases and secret hunches by a learned show of legal reasoning, in which humbuggery they are abetted in every case by at least two lawyers? When the late President Franklin D. Roosevelt's proposed "court-packing" bill was introduced in 1937, a friend of mine, a business executive with
engineering training, asked me how and why, in the interpretation of the Constitution, a Democratic judge would differ with a Republican or a liberal with a conservative. I explained that a good many decisions under the "due process" clauses of the Constitution, for example, could not be calculated in advance with the accuracy which he found in using a slide rule. The reason why the state could regulate the rates of grain elevators in Illinois or North Dakota, but not the price of ice in Oklahoma, did not leap to the eye as self-evident truth. Still, the opponents of the "court-packing" bill aroused public opinion in support of the independence of the judiciary and along with it a firmer belief that law and not politics should be dominant in the judicial process.

But now let us ask our loyal layman a question: Are not courts established to administer justice? When the application of the law would lead to an unjust result, should not the court reject the law and decide in accordance with justice? Substantially the same question was discussed more than two thousand years ago by Aristotle. The Greek philosopher argued that, since even the wisest law-makers cannot foresee every contingency that will arise, every law will sometimes produce by its strict application inequitable hardship which the judges should be authorized to alleviate by applying a discretionary "equity" rather than the law. If now our trusting layman agrees that the judges should have such discretion, we can now turn upon him and ask: "Do you want a government of laws, rather than of men? If justice is not the proper administration of law, then is it not the emotional hunch of a judge? Is not justice, indeed, the wise and orderly guidance provided by regularly adopted rules and principles which apply to all cases alike? Is it not a prime virtue of our democratic and representative polity that the law-making power belongs to the legislative body elected by the voters for that purpose, and the pardoning power belongs to the executive? For courts, then, the application of law is the administration of justice?"

At this point the dialectic of our theme may lead a loyal layman to retire from the scene in confusion, with an injured sense that somebody has been pulling his leg. Quite characteristically, as a distinguished psychologist pointed out some years ago, the layman goes on day by day harboring contradictory sympathies, a sympathy for a general principle along with a sympathy for the emotional appeal of the individual.

3. ARISTOTLE, ETHICA NICOMACHEA Bk V. (10), 1137a-1137b (Ross trans. 1942). "Equity," he says, is a better kind of justice than the justice of the laws.
case. "He is well able to cherish bigamously a love for the status quo and a love for his Utopia."\textsuperscript{4} Philosophers feel the need for developing a consistent set of values, and lawyers, at a lower level of generality, feel this need even more acutely. While no court wants to be a slave to logic and consistency, yet no appellate court, at least, wants to lay down contradictory legal propositions, so that eventually it will meet itself coming in the opposite direction.

Now the layman's concern that our courts shall do justice is a sign of a virtuous body of citizens, without which neither law nor courts would be effective to attain that end. Yet when laymen try to devise their own ways of correcting the administration of justice by courts, they sometimes produce unfortunate consequences. One example is the general verdict of a jury in civil litigation ("For the plaintiff, $10,000") which expresses its view of the merits of the case, untrammeled as far as possible by either the law or the facts. The late Dean Wigmore, commenting upon this aspect of jury trial, said:

"Law and Justice are from time to time inescapably in conflict. That is because law is a general rule (even the stated exceptions to the rule are general exceptions); while justice is the fairness of this precise case under all its circumstances."\textsuperscript{5}

Now all the circumstances of a case will include many of the qualities and relations of persons, things and events which the law does not take into account, such as the wealth of the defendant in an action based on negligence or his tactless insistence on his legal rights. The jury's general verdict is often a hindrance to the legal control of judicial decisions.

Another unfortunate consequence, I believe, of the layman's attempt to correct what he considers to be the defective justice of our courts, is the practice of addressing communications to courts about cases pending before them. The Supreme Court of the United States has been the target of a good many such communications in cases which have aroused public interest. Some of them are submitted under the guise of, or in connection with, briefs of amici curiae (friends of the court), to which a list of names of philanthropic organizations, well-meaning

\textsuperscript{4} ROBINSON (Edward S.), LAW AND THE LAWYERS 234 (1935).
\textsuperscript{5} Wigmore, A Program for the Trial of Jury Trial, 12 J. AM. JUDIC. SOC. 166, 170 (1929). Wigmore argued that the power of the jury to apply its own notions of justice was an advantage of jury trial.
scientists and theologians, and others, have been appended. The ancient and honorable practice by which a friend of the court (ordinarily a lawyer) may call the court’s attention to some error of law or fact which might be overlooked, has, I believe, been far too often perverted to propaganda purposes. The rules of the Supreme Court, revised in 1949, permit the filing of such briefs, but where the parties to the litigation (or the United States, if a party) do not consent, the rule states that such motions "are not favored." These formalized pressures upon the courts may lead in time to serious impairment of the independence of our judiciary. The informal communications to judges, such as the picketing of the court house in New York city during the lengthy Communist trial of 1948-49 and the numerous threats and warnings sent to Judge Harold R. Medina, show this perverted notion of the judicial function at its worst.

So much for the basic dialectic of our theme, for the pull between law and justice which we cannot hope to abolish but only to control. Now let us turn to some other objections to the view that law plays a predominant role in judicial decisions.

**Psychology**

Among these objections were several based upon theories of psychology, psychiatry or psycho-analysis. As far back as 1918 a psycho-analyst wrote a law review article\(^7\) intended to show that judges do not decide because they find that the law and the facts lead, or should lead, to a certain conclusion, but rather because of some deep, inscrutable and sub-conscious drives. Every choice revealed in the opinion, it was said,

"is a fragment of autobiography because it reveals not only the present conscious motive, but also the still potent, past and immature experiential causes, which determined the unconscious impulses submerged in, but controlling the avowed motive."\(^8\)

Now the view that a man's choices are determined in a good many instances by his traits of character, and that these traits have been shaped in part by his previous experiences, is a common sense observa-

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8. Id. at 97.
tion which needs no support in a mystical sub-conscious. The psychoanalytic hypothesis has not, I believe, led to any fruitful conclusions as to the prediction or explanation of judicial decisions. On several grounds it seems unlikely that it will. For one thing, many psychologists have become "increasingly suspicious of the instincts and urges which are supposed to be the underlying reality of overt behavior." Furthermore, if we try to apply the gross factors of sub-conscious drives or frustrations to the decision of a nicely balanced legal issue in litigation, one in which neither love nor violence (the stock in trade of psycho-analysts) is involved or is decisive, the likelihood of successful prediction seems slight, even in the case of a single-judge court. When we come to the multi-judge appellate court, whose Id or libido is to be decisive?

In saying this, I do not deprecate the usefulness of psychiatry in the treatment of criminals and juvenile delinquents. A recent excellent treatise on this topic\textsuperscript{10} shows how case-history studies have revealed motivations for anti-social behavior, of which the actors were previously unaware. For example, a very personable young woman who displayed a persistent behavior pattern of committing violent assaults on policemen and judges (symbols of authority) was found to have been maltreated in early childhood by her alcoholic father, who thus expressed his disappointment that she was not a boy.\textsuperscript{11} If a judge of the Missouri Supreme Court were suddenly to commit violent assaults upon his colleagues, his psychiatric history might help officials to clear up the mystery and help him to cure himself. By no means does it follow that any judge's decision in a case of real-property title or contract law can be predicted by subjecting him to the ordeal of the psycho-analyst's couch.

A much more plausible psychological theory of judicial decisions is that judges are influenced by their beliefs on political, social and moral questions. A generation ago it was argued by liberals, quite plausibly, that the judges who voted to declare unconstitutional such statutes as those requiring the payment of wages in money rather than in merchandise at the company store, or those prescribing maximum hours of labor, were applying the premises of Adam Smith's free-enterprise theory rather than any compelling language of the Constitution. Nearly a half

\textsuperscript{9} ROBINSON, LAW AND THE LAWYERS 175 (1935).
\textsuperscript{10} See GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW (1952).
\textsuperscript{11} Ibid., 19.
century has passed since Mr. Justice Oliver Wendell Holmes, in a famous
dissenting opinion, reminded his colleagues that the Fourteenth Amend-
ment, with its “due process” clause, did not enact Herbert Spencer’s-
theory that only the fittest should survive.¹² In contrast with the psycho-
analytic influence referred to above, this kind of extra-legal influence on
judicial decisions is more plausibly relevant to the exercise of the judicial
function as a rational process because an economic or political theory
is a generalization which can be logically related to the decision, and can
be debated as such. During the period between 1880 and 1930 the
principle of freedom of enterprise was considered to be logically relevant
to the decisions of courts on the constitutionality of many types of
statutory regulation of business and industry; it was rarely stated as an
economic or political theory; it was transformed into a constitutional
principle. In passing upon the constitutional validity of legislation a
court exercises a power not unlike the veto power of the executive, and
some resort to legislative grounds is inevitable. While the conception of
free enterprise is not obsolete, since 1939 the Supreme Court of the
United States, and other American courts of last resort, have been less
sensitive to that conception than to the principles of free speech and civil
liberties. Possibly another generation of judges may find some other
values to be paramount.

The judge’s beliefs on political, economic and social questions can
be limited and controlled in several ways. First, as a part of the selection
of judicial personnel, one can learn from an individual’s utterances and
other conduct what his beliefs and attitudes are likely to be. Hence it
seems proper for a Senate committee, before confirming a nominee for
the Supreme Court of the United States, to inquire into such matters.
Secondly, in most courts of last resort the proportion of litigated cases
dependent upon such beliefs is relatively small. For this and other rea-
sons I think it highly objectionable that a candidate for election to a state
judicial office should make political speeches announcing his “platform.”
Finally, the judge who is aware of the possible influence of his personal
beliefs in certain types of cases can by an effort of loyalty and reason
avoid such influence. Judge Jerome Frank has recently proposed that
judges should undergo a kind of examination which would make them
aware of their prejudices (including other attitudes than the ones
mentioned above) and would thus enable them to reduce the con-

sequences of their implicit beliefs. Probably many conscientious judges have already done this. I have no doubt that such men as O. W. Holmes and Harlan F. Stone voted to uphold the constitutional validity of statutes that conflicted with their personal political beliefs, and that they did so because of their loyalty to a paramount principle of the Constitution, that the limited scope of the judicial function does not authorize the courts to substitute their own views of public policy for those clearly expressed by the elected and supposedly representative legislature.

The first half of this century has witnessed a good deal of sham battling over the judiciary. At one extreme are those who believe literally that we must have a government of laws and not of men. What would a government “not of men” be like? Can one conceive of such a thing, except perhaps among the ants or the bees or the penguins? At the other extreme are those who assert that there is no guaranty of justice save the personality of the judge, that his personal traits are vastly more important than his legal knowledge and skill. This is likewise a gross exaggeration. Despite the too frequent use of judicial office as a political reward, and the failure to choose for the bench a uniform procession of saints and wise men, our American judiciary has a good record for honesty and impartiality. My own observation of judicial appointments or elections leads me to believe that no public office so firmly grips and moulds its appointees with a deep sense of responsibility as does judicial office. Men who become judges are not transformed psychically into a different species of animal, but they are transformed in their dominant loyalties.

THREE STAGES IN JUDICIAL PROCESS

The affirmative side of the thesis that law has a dominant role in judicial decisions can best be shown by dividing the process into three stages: The preparatory, the deliberative and the expository. These divisions are, roughly, parts of a temporal sequence, yet the stages overlap and influence each other.

PREPARATION

In the preparatory stage law plays an important role in respect to

13. See FRANK, COURTS ON TRIAL 250 (1949). Professor Lasswell's three “personality probes” of judges include class prejudices, political beliefs, character traits and bits of psychiatric biography. LASWELL, POWER AND PERSONALITY 65-88 (1948).

the personnel, the powers and the procedure of the judiciary. These functions are well known to lawyers, yet their influence upon the judicial process is sometimes overlooked. As to the personnel function, consider the difference between having an arbitrator already chosen and having to jockey for advantage when an arbitrator is to be chosen after a dispute arises (as in disputes between employers and labor unions). The choice of judicial personnel is not merely a matter of finding honest men of good will; it is important to find men who have the intellectual ability and training to make the best use of our legal system. It still happens too often that incompetent, ignorant or lazy lawyers are chosen for judicial office because of political pressures. The Missouri plan for the selection of Supreme Court judges has been favorably commented upon in the East. Let me call the attention of Missourians to valuable improvements in the judicial system of New Jersey under a revised Constitution and under the able leadership of Chief Justice Arthur T. Vanderbilt. Our legal system, in spite of some surviving anachronisms, is a product of several centuries of judicial and legislative experience. Our law is a product of the social cooperation of many men, striving to establish guides for the future which are responsive to the material needs and the ideals of our society. The law is a learned discipline like medicine or engineering and like them it is worthy of the best efforts of our ablest minds. To utilize this valuable part of our culture for the best interests of the whole of society, we need judges of first-rate ability with first-rate legal training.

The law sets the stage for the judicial decision by limiting the powers of judges, and thus it protects individual liberty. Typically the American judge has power in criminal cases, after conviction by a unanimous jury, to impose a term of imprisonment or a fine, and in civil cases to award, or deny, a judgment for money. The American fear of official power has led to some restraints on the judiciary, notably in respect to the jury, which are not in the public interest.

A third aspect of the preparatory stage is procedural. The law of procedure is designed to break down the claims of the respective parties, in civil litigation, into issues of law and issues of fact, and to select the evidential facts presented to the court for the purpose of determining these issues. The rules of pleading, evidence and substantive law are designed to, and tolerably well do, eliminate the "accidentals," the unessential or irrelevant items of witness proof. Every mature lawyer
knows the difference between the client's long-winded story when he first came into the office, and the neatly processed summary of the facts in an appellate court's opinion. Mr. Justice Holmes expressed this in a colorful passage:

"The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head."15

Not only the law of judicial procedure, but also the substantive law of contracts and torts and property sets the scene for judicial action in a way which lawyers sometime overlook. In an action to recover damages for breach of contract, for instance, the legal issue may be, was there an acceptance of an offer? This issue would be moot but for the assumption that there was an offer, a consideration and a breach or repudiation; without these the action must fail. Thus the legal rule or principle that is assumed to be fixed in one case may be in the spotlight of legal controversy in another.

The role of law in a judicial decision is to provide reliable and fairly predictable guidance to a wise and expedient decision on the facts; and its effectiveness is considerably hindered by the uncertainties of fact-finding. Judge Frank, who has made this an important theme of his book, Courts on Trial,16 advocates the abandonment of jury trials in civil litigation. In my limited experience as a practitioner I always felt uneasy about the general verdict of a jury. Well do I remember that night, nearly forty years ago, when I lay awake until five o'clock worrying about the outcome of a jury trial. As it turned out, the uncertainty was not as great as I supposed. The judge promptly granted my request for a directed verdict for the defendant. Two weeks later a member of that jury stopped me on the street and said: "Why didn't you let that case go to the jury? We all saw from the beginning that the plaintiff didn't have any case!" I hope that some of my younger hearers may remember this episode in their dark hours of doubt. Still, I believe that one of the major obstacles to the most useful and beneficial role of law in judicial

15. Holmes, The Path of the Law, in Collected Legal Papers, 167, 168 (1920); also in 10 Harv. L. Rev. 457, 458 (1897).
decisions is the power of a jury to give a general verdict in civil cases, along with the prevalent conception of jurors that they are called in, not just to decide certain issues of fact, but to determine the merits of the controversy. I believe, despite the argument of the late Dean Wigmore, that it produces on the whole more “unjust” verdicts than just ones, and that, by encouraging a gambler’s view of litigation, it brings about a vast waste of human effort. The supposed educational advantage of jury service, as it works out in urban communities, does not appear to outweigh these disadvantages.

DELIBERATION

The stage of deliberation in the judicial process is the period of reflective thinking by the judge. Here the judge is, as I see it, trying to find concepts, guides, premises that will clarify and simplify the issues and lead him to a correct solution. If the advocates have done their jobs well the judge has alternative theories of the case, or contradictory legal propositions submitted to him. Perhaps there have been judges who seek merely a verbal formula which, combined in a logical sequence with some assortment of the facts of the case, will lead to the result. Typically appellate courts are, I think, trying to “find” in, or to create from, the accumulated legal system a rule or principle which will have the character of universality, that is, it will work well in other cases. The nature of law is such that it is designed to fulfill this function. The imaginative viewing of long-range consequences is the chief distinction between lawyer’s law and the common sense ad hoc intuitions of laymen. The generality of law enables it to be an impartial guide, to promote equality of treatment between persons and to include within its meaning newly arisen facts. It is not to be supposed that the judge (or judges) in a genuinely contested case, sees in a flash the rule which alone applies to just these facts, and applies it with apodictic certainty. This may have been the conventional explanation of the judicial decision a generation or two ago. The work of the judge is not merely to construct a formally valid syllogism. Now I personally believe that the logic of the syllogism is, because of the structure of our law and our language, properly deemed to be implicit in typical judicial deliberation. While judges often give us incomplete syllogisms (enthymemes), they rarely give us formally invalid ones.

The process of deliberation is one of continuous interplay between the sources of the law and the statement of facts: First a look at the proved
facts (already partly processed) and then a look at the competing rules
and concepts which may plausibly be applied to this case; and beyond
this, in many cases the court, especially an appellate court with more time
for deliberation, should and does consider the policies or principles under-
lying a rule, even the rationale of a large area of the law. Here we
border upon dreamland, the professor's ideal of what judges should do.
In the vast majority of cases the court cannot and need not overhaul the
basic policies of a large area of law. The law is designed to enable them
to avoid this.

The account of judicial thinking which I give here is based in part
upon my numerous talks with judges, in part upon my limited experi-
ence as a labor arbitrator and in part upon my experience in the
use, in my own thinking, over many years, of the late Professor
John Dewey's instrumental logic.17 Directly or indirectly, through
their law-secretaries, a number of judges have consulted me about
cases pending before them, before they had reached a decision.
Now our skeptical law students, and perhaps some of yours, have a way
of saying that judges first make up their minds how they "want" to
decide a case, and then look around for a formal justification. If there
are such judges, they have stayed away from me. The responsibility
of judging is, for all but the worst pachyderms, so acutely felt that the
judge does not want to decide the case "alone"; he wants the support
of his fellow men; and the legal system of a mature society provides such
support. Dewey's instrumental logic, to which some philosophers deny
the name of logic, is not a set of rules for testing syllogisms; it is a descrip-
tion of reflective thinking at its best, and is thus normative rather than
descriptive. Judges who use it thereby increase their chances of avoiding
the perils of, on the one hand, mechanism, and, on the other hand, emotionalism.

An ounce of illustration is worth a pound of precept. A case from
every-day life will show the difficult choices with which appellate courts
are confronted in administering justice according to law. A woman
entered a self-service grocery store on a warm day, began selecting
purchases, and picked up from a window space a warm bottle of beer,
which promptly exploded in her face. For the injuries so caused is the
store-proprietor liable? Her lawyer sought to recover for breach of

implied warranty that the bottle was safe. But a warranty is created only by contract, and, said the court, no contract had been made at this time; the contract is made when the customer takes the goods to the cashier and the cashier accepts payment. The other basis of recovery was tort. Here the difficulty was proving fault of the proprietor. Unless the court was willing to classify warm beer as inherently dangerous, along with wild animals, the claimant would have to prove negligence. The New York court which decided this case on appeal\(^1\) agreed with a prior Massachusetts decision\(^9\) that no contract had been made and therefore no warranty arose; yet it stretched a well known rule of tort law to hold that the facts above stated made a case of prima facie negligence. While my torts-expert friend regards this conclusion with raised eyebrows, maybe a new rule as to self-service stores and their customers is in the making.

Now a great many decisions, of all sorts, are made quickly, and usefully, without reflective thinking; that is, by instinct or intuition. The bird jumps at the shadow of a swooping hawk. Here is no time for reflection. The artist puts a touch of Chinese white at a selected point on his picture. Here is a learned response, intuitive rather than reflective. A trial judge hears a counsel’s question put to a witness, followed by an objection from opposing counsel. Very often the judge rules instantly: “Sustained” or “overruled”. A Federal judge once told me that in such a situation he decided by “hunch”. Yet this is highly trained and expert “hunch”; a trained intuition can and does use legal guides without formulating a major premise. As Dewey said,

“A map is no less a means of directing journeys because it is not constantly in use.”\(^2\)

Theories of meaning, called semantics or semiotics, have been solemnly urged as providing the path to salvation; and, in a more modest vein, they have, I believe, been found useful in legal deliberation. If a judge becomes aware that a statute or a rule of case law is susceptible of several different meanings, is there any reason why he should not give preference to that meaning, or to those meanings, which seem most likely to promote the ends of the law, such as certainty, expediency

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\(^{20}\) Dewey, Logic 136 (1938).
and justice? The conception of law as a norm having the authority and sanction of the state, sometimes called "legal positivism" to distinguish it from "legal mysticism", does not, as has sometimes been supposed, preclude a judge from construing the meaning of the content of a particular law as a human creation intended to implement principles or policies that the judge regards as good. He may be obliged to abandon this construction upon further investigation; for not every law—perhaps, indeed, no law—can be made to fulfill every one's heart's desire. Still the administration of law will be better if judges look for the considerations of social advantages, as Holmes put it, in every part of law. These considerations are now referred to as policies. They are not, as I conceive them, extraneous to the law but are a part of the body of law to which officials and citizens are referred for their guidance. In law school classrooms they are given far more attention than they were thirty years ago. Law teachers and student law review editors are still more explicit in their avowals of policy grounds than are the judges.

Some judges and legal practitioners are distrustful of policy arguments, chiefly for two reasons. One is that policies are vague guides and therefore by establishing them as official guides the courts will make the law uncertain. One answer to this is that the policy of maintaining legal certainty, that is, predictability, where it is most needed, is itself one of the major policies of a mature legal system. A second answer is that, as Holmes and Pound have pointed out, judges have long been relying upon "public policies" without recognizing them as such. A third argument is that broad and somewhat vague policies (and principles) are made concrete at a lower level of meaning by the decisions which implement them. Yet these are not complete answers, and I hope, for my part, that the commoner transactions of property law and commercial law will continue to be canalized in definite rules. Rules have their place in a mature legal system, for they often represent a compromise between the general policy of making the law dependable, and several other policies which explain the content of the rule. An example is the set of

21. Holmes, op. cit. supra, n. 15 at p. 184. He also referred to "rational policy". Id. at 192.
22. "The existence of a legal order is more important than its justice and expediency, which constitute the second great task of the law, while the first, equally approved by all, is legal certainty, that is, order or peace." Radbruch, Legal Philosophy (1932) in "THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN 108 (Wilk trans., 1950).
23. Supra, n. 21; and Pound, A Survey of Social Interests, 57 Harv. L. Rev. 1, 4-8 (1943).
rules and definitions that control the legal meaning of "negotiable instrument". The second reason for alarm over the policy method is its radicalism; policies have been most frequently invoked to support legal reforms. Yet this is not necessarily so, for there are conservative policies as well as radical policies. Thus the conservative policy of construing penal statutes strictly, as a protection of individual freedom, was deemed to outweigh the policy in favor of construing a statute regulating the fees to be charged by employment agencies broadly ("liberally") enough to include the fees paid by employers. The role of law in judicial decisions includes the use of both rule and policy evaluations.

What other influences besides "the facts of the case" and "the law" play a part in judicial decisions? The individual judge's cherished and peculiar beliefs, which are partly cancelled out on a court of five or more judges, have been mentioned above. Three other influences need to be briefly referred to. One is the mores of the society, the prevalent beliefs as to what is right and wrong. Sometimes a statute, as by prescribing a test of "good moral character" for naturalization, directs the court to resort to this guide. In a broader sense every American judge deliberates in what may be called the cultural matrix of American society. So much has been said to glorify the mores that it needs to be pointed out that often the state has to act in contravention of a practiced moral belief. A second influence on judicial decisions is societal facts. In passing upon the constitutionality of legislation courts have frequently taken judicial notice of such facts: The effect of long hours of labor on women in industry, the relative effects of cedar trees and apple orchards on the economy of Virginia, and the like. Such instances should not alarm any one, for the practical evaluations of both legislation and judicial decisions will be better if they are empirically grounded than if they purport to be derived a priori or in vacuo.

What about justice? Would any judge be willing to say that he upholds the law regardless of justice? Under one interpretation of "justice," he strives to attain justice through law, which is the politically

25. Repouille v. U. S., 165 F. 2d 152 (2d Cir. 1947) (applicant who had been guilty of "mercy killing" was not of good moral character").
27. Miller v. Schoene, 276 U.S. 272 (1928) (upholding a statute requiring the destruction of cedar trees within a specified distance of apple orchards).
organized community's expression of justice. Thus the judge administers justice when he gives effect, as I suppose he sometimes does, to a statute which he regards as "unjust," i.e., by his own sense of injustice. In this latter meaning, justice or injustice is primarily an emotional pull toward one side or the other, which a long-range view of legal policy may dispel. Sometimes it persists and influences the decision. If the court publishes an opinion the "hard case" may make "bad law" by merely confusing previously established rules, or by narrowly interpreting the facts to evade a previous rule, or the "hard case" may make good law, as in some of Lord Mansfield's decisions.

What can be said, in view of these diverse influences, of the rule of law in producing legal certainty? The late Judge Cardozo, after ten years of experience on the New York Court of Appeals, asserted that "nine-tenths, perhaps more" of the cases were predetermined, that is, predestined to be decided just one way. Judge Jerome Frank, of the Federal Court of Appeals for the second circuit, has apparently approved this estimate. It probably includes those cases which were affirmed without opinion. If not, it seems much too high.

**Exposition**

Let me say a few words about the role of law in the third stage, exposition. This is the stage of writing the opinion or opinions and filing them. Fortunately not all judges are required to write opinions. In Anglo-American jurisdictions the opinions of most appellate courts and of some trial courts are published and are cited, in briefs and later opinions, as expressions or "evidences" of the case law of the jurisdiction. During the past thirty years the significance of judicial opinions has been denied or minimized on a variety of grounds. Indignant liberals denounced 5 to 4 decisions of the Supreme Court on the ground that the opinion did not reveal the "real" reasons for the decisions. The analogy

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29. See Hynes v. N.Y. Central R.R., 231 N.Y. 229, 131 N.E. 898 (1921) (boy on the springboard case). Here the decision is generally approved but the rule as to trespassers was left uncertain.
30. See Kingston v. Preston, Lofft 194, 2 Doug. 689 (1773), the leading case on constructive ("implied") conditions in contract. See Patterson, Constructive Conditions in Contracts, 42 Col. L. Rev. 903, 909 (1943).
31. Cardozo, the Growth of the Law 60 (1924).
of the conditioned reflex led to the view that a court responds by its judgment to the stimulus of the facts of a case, and the opinion of the court is only a ceremonial afterthought. Perhaps the most popular version was the theory of rationalization, as set forth by the late Professor James Harvey Robinson, in his popular book, *The Mind in the Making* (1921). Robinson's view was that people often give "good" reasons for their beliefs on social questions, rather than their "real" reasons, such as family background or social status; it was apparently derived from the analogous behavior of inmates of insane asylums, who often give fantastic "reasons" for their actions. On these tenuous analogies it was argued that the opinions of appellate courts do not give the "real" reasons for their decisions but only the "good" reasons, the rationalizations. The rationalization theory found its way into some college curricula and into many law classes.

The theory does find some support in the way a good many published opinions are constructed. A tedious recital of the facts is followed by some quotations from prior opinions and from legal encyclopedias. The latter usually supply their customers with rules, on different pages, which will be adequate to decide the case either way. Such opinions give slight evidence of reflective thinking by the judges. Yet at their worst they constitute an authoritative statement of grounds which the court (or a majority) deems adequate to justify the decision, and they provide some guidance for future decisions. Aside from these, the opinions which do give some evidence of the process of deliberation that I have described above, are, I believe, fairly indicative of that process; and they are, or can be, as expressive of what the judges genuinely believe about the case as one is likely to get. Both John Dewey and the late Professor E. S. Robinson, the Yale psychologist, have stated adequate reasons for believing, as I do, that typically the anticipation of the necessity of writing an opinion profoundly affects the process of deliberation and causes the judge to clarify his own thinking.

A story told about a distinguished judge of the Supreme Court of Iowa seems to me to be typical. Sometimes after having been assigned to write the opinion of the majority upholding its decision of a case, he

34. See Patterson, op. cit., *supra*, n. 14, 551.
35. See Robinson, op. cit. *supra* n. 4, 177.
36. The story was told about Judge McClain by Judge Ladd, of the same court.
would return to report to his colleagues: "Gentlemen, the opinion won't write." The logic of deliberation and the logic of exposition are different processes, yet it is a grave error to say that they are unrelated. Except in so far as the theory of rationalization has led to a healthy skepticism about the reliability of the generalizations in any one judicial opinion, it should be discarded as an outmoded fashion. Not the legal doctrines of one opinion but the interrelated and systematic legal norms of case law and legislation, with an increasing reliance upon the great systematic treatises of legal experts, offer to the judges, the profession and the public the best working guides for the role of law in the administration of justice.