CHAPTER 3
Standards for Official Acts

Sec. 3-01. Regulative function of government—analysis. To regulate the behavior of the individual, A, is the primary function of government. The regulative process involves on the one hand activities of A whose conduct is controlled; and on the other, activities of officials in a complex governmental organization intended to control A’s behavior. We began our study of the regulative process by analyzing it first in terms of A’s acts and of the significance of his acts to B and to A himself. These and other aspects of A’s acts were covered in the last chapter. But A’s acts may be significant not only in relation to B and to A himself; they may be significant also to the state and to officials. In other words, significance in the latter respects represents two other ways in which A’s acts are meaningful. They call for attention before we move on to the main topic for discussion in this chapter, “Standards for Official Acts.”

Sec. 3-02. Significance of A’s acts in relation to state and to officials. The significance of A’s acts to the state can be represented in relational terms similar to those which were used when we were discussing the acts of A and their signific-

1 Hereafter, I shall speak of “the state” or use the term “government” when I wish to refer to government in general; I shall speak of “the federal government,” or “the states,” or use the name of a particular state, e.g., state of Michigan, when I want to make a distinction between the specific parts of our federal system.

2 In sec. 2-16, we noted in passing that the significance, or operation, of A’s act can be expressed in several ways:
1. Significance in relation to the other person, B.
2. Significance in regard to A himself.
3. Significance to the state (or legal system).
4. Significance to officials.
The first and second of these ways of stating significance were considered in secs. 2-17 to 2-25. The third and fourth ways, significance to the state and significance to officials, now call for discussion. See sec. 3-02.
The state can be treated as another individual which is affected by A’s acts, or by A’s acts in combination with B’s:

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<tr>
<th>Standard Act</th>
<th>Standard Significance</th>
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<tr>
<td>Of A (or of A and B)</td>
<td>Rights, powers, etc., of A</td>
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<td>and of the state</td>
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Thus A is said to owe to the state a duty not to be cruel to animals, and the state is regarded as holding a corresponding right that A refrain from this type of action.* And a man and woman, M and W, owe a like duty to the state not to cohabit without the sanction of marriage. Certain acts of A may be regarded as obligatory in relation to the state; for example, A is obliged to register for the draft and to file an income tax return. Indeed, similar rights of the state and duties of A can be taken to be the legal meaning of each and every criminal act defined by law.¹ A’s freedom of religion and freedom of speech are outstanding instances of A’s privileges in regard to the state. And all of A’s powers, e.g., his power to make a will, or his power to maintain a lawsuit, involve acts by which A calls upon the state for its

*(I.R.) General usage decrees that we speak of a duty of A not to be cruel to animals, and of like duties not to commit other crimes. But there is no agreement as regards the corresponding rights and their allocation. Some writers ascribe the rights to the state; others ascribe the rights to the public; others refuse to speak of, or allocate, any rights whatever corresponding to these duties. Actually, the matter is merely a problem of definition. If one defines duty as the invariable correlative of a right, then if A owes a duty not to commit crimes, corresponding rights must be conjured up and allocated to someone, i.e., to the state or to the public. Some definers prefer one of these allocations, and some the other. On the other hand, if one does not define duty so narrowly, but recognizes duties which are owed to no one in particular (i.e., if one defines duty independent of any correlative right) then one has no real trouble with the placement of these cases; they are simply cases in which there is a duty without a correlative right. See on this point, SALMOND, JURISPRUDENCE sec. 72 (6th ed., 1920); POUND, INTRODUCTION TO STUDY OF LAW sec. 6 (1924); and PATON, JURISPRUDENCE 217 (1946).

¹ Usually, however, we speak in such a case of a crime against a particular state, such as the state of Michigan, or a crime against the federal government. The crime is created and defined by the law of a particular government, and is prosecuted in its name.
aid. The state makes A's act effective upon his demand. In the case of A's contract with B, the state attaches legal effect to their conjoint acts. Under its own promise and undertaking, the state makes itself liable or subject to A's and B's calls for assistance.

The significance of A's acts can also be expounded in the form of fixed relations between A and various officials (O). The operation of his act can be spelled out in terms of official duties, powers, liabilities, etc., which attach to it. The meaning or bearing of A's act is indicated in some such form as this: if such and such an act is done by A, then such and such an act must be done by O (duty), or can be done by O (power), with such and such effect. Indeed, this is a favorite mode of statement with lawmakers; most statutes take this form:

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But either the action picture or the picture of legal significance may be complex. As in other cases already mentioned, the essential action picture may consist of B's act as well as A's. A may make a defamatory statement about B, but this defamatory statement has no special meaning to courts and other officials unless and until B brings suit. Only when suit is brought does O have the various powers and duties involved in adjudicating B's claim for relief. And the standard significance of A's acts is, even more often, complex. It consists of duties and powers not of one official, but of many. For example, if A kills X, his act imposes duties on a number of officials, and invests them with powers to act. One official agency is bound to charge A with crime. Another is bound to arrest him. Another is bound to try him. And each of these agencies has powers in acting in regard to A, and A is subject to liabilities correlative to these official powers.
Finally, it ought always to be remembered that there is no reason why the significance of A's acts must be stated solely and exclusively in any one of the four ways that I have mentioned: in relation to B, in relation to A himself, in relation to the state, or in relation to officials. They can be combined; and we have a more complete view of the significance of A's acts if we do combine them. For instance, the significance of A's tortious act in striking B is better understood if we see not only what it means to B but what it means to officials who may be involved in a suit by B against A. Likewise, the legal operation of A's breach of contract involves both claims and powers of B and powers and duties of officials. Moreover, it is quite common to express the significance of A's acts in hybrid form. For example, A's criminal acts are usually spoken of in terms of duties to the state, but the processes of prosecution are more often analyzed and described, not in terms of powers of the state, but rather in terms of duties and powers of specific officials.

Sec. 3-03. Scope of chapter—official acts. But one can begin with an analysis of the regulative process at the other end. Instead of starting with the acts of A, one can take the acts of government as a starting point. In this sense, one can treat the state as an actor and expound the significance of the state's acts to A in terms of the conventional legal relationships: rights and duties, powers and liabilities, etc.¹

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<td>Rights, duties, privileges, powers, liabilities of A and of the state</td>
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¹ As lawgiver, the state speaks as an entity. It speaks to A as one person addressing another. And in its declarations it relates itself to A and declares what it wants A to do, not to do, etc. See sec. 2-11. The state speaks in the same manner as an individual person who says to another, "I want you to remember that you owe me $10."
There are many clauses in the federal and state constitutions wherein acts of the federal government and acts of the states are referred to. And there are likewise clauses in which their powers and duties are declared. For example, the Federal Constitution provides that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; . . ." and provides that "No Title of Nobility shall be granted by the United States"; and declares, "No

2 In the United States, the function of regulating the behavior of A is divided between the federal government on the one hand, and the several states on the other. Accordingly, when relations between government and A are stressed, these are most often stated as relations of A to the federal government, or relations of A to a specific state, such as the state of Michigan.

Each state has its sphere of action, and corresponding powers, defined by its own constitution; its sphere and powers are also limited to an important extent by the Federal Constitution. The federal government has its sphere and powers fixed by the Federal Constitution.

The state's powers are general and varied. The state controls almost all matters which fall in the fields of contract, property, tort, crime, and personal and domestic relations. The state also possesses extensive powers of taxation; it lays taxes on property, on incomes, on transfers (sales), on inheritances and on licenses and franchises. In fact, the state issues the great bulk of the laws and fiscal regulations which the legal practitioner is called upon to use and apply in this practice.

Among the matters subject to state regulation is the practice of law. The state in which a lawyer practices establishes standards of education and conduct; it provides for the issuance of a license and for the forfeiture of the license for misbehavior. To be sure, a lawyer must also apply for admission to practice before the federal courts; but the admission to practice therein is usually a mere formality; if he is a state practitioner in good standing the federal courts admit him to practice as a matter of course.

By contrast with the state, the federal government is one of limited powers; it exercises only those powers which are specifically granted to it by the Federal Constitution or which are necessary and proper for the execution of the granted powers. The federal powers of greatest importance are the regulation of interstate and foreign commerce, the collection of taxes and expenditure of public funds to provide for the general welfare, the control of money and currency, the establishment and maintenance of armed forces, and the control over foreign affairs. But the limits on federal powers are rather apparent than real. While it is true that federal powers are formally specific and limited, they are not so in practical operation. In actual fact the owners of the federal government are so far-reaching that they touch almost very aspect of the life of the country; especially its control over commerce and its vast fiscal powers give the federal government such dominance in the economic sphere as tends to throw the state's activities into the shade.

3 Art. IV, Sec. 4.
4 Art. I, Sec. 9, Cl. 8
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state shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin money; . . .”

And the Fourteenth Amendment provides that, “No state shall deprive any person of life, liberty, or property without due process of law.” This provision is at once an expression of a type of prohibited state action, a declaration of a duty of each state not to take this kind of action, and an implied assertion that this kind of action, if attempted, will be ineffective. The same can be said of the Fifteenth Amendment which provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state on account of race, color, or previous condition of servitude. These constitutional clauses are prohibitions of governmental action which can be regarded and interpreted in terms of governmental duty to refrain from action, and of corresponding claims or rights which can be asserted by A. But it is not necessary to list further examples. Much of the material in the remainder of this chapter can be regarded as illustrative of acts of government which are obligatory or effective in regard to A, or which are prohibited for his protection.

However, when we talk of the state generally, or of the federal government, or of a state government, and say that any of these entities performs acts or owes duties, or has powers, or holds rights, we must realize that we are speaking in terms of rather “high order” abstractions. Government is an organization of people—a very important organization, to be sure—but still an organization of human beings. Government does not act in the ordinary sense; only individual human beings do acts. The acts of government are the acts

5 Art. I, Sec. 10, Cl. 1.

6 However, for the most part, the Federal Constitution refers not to acts and powers of the United States but to acts and powers of particular organs or officials of the United States, such as Congress (to regulate commerce), the Senate (to ratify treaties), the President, and the Supreme Court. Such acts and powers come properly within the scope of the following sections where we deal with acts and powers of officials.
of particular officials. These officials act on behalf of government or in its name. Governmental control is control of one man's activity by another's activity, control of some persons by others. A government acts through its lawmaking organs to establish standards of behavior for individuals and officials. It acts through other officials to effectuate these standards, and it acts through its courts to administer justice in controversial cases. Hence, it is clearer and more realistic, and is, in fact, more common, to analyze and represent regulative function of government in terms of acts and powers of officials rather than in terms of acts and powers of the state or of the federal government. And this is the method of exposition I shall adopt throughout the remainder of this chapter.

Accordingly, I shall now turn to an examination of the acts of officials and the standards which regulate them. The persons who perform public functions are as much in need of guidance as the ordinary man is. I shall deal with their acts and the standards which guide them in a manner parallel in all essentials to our treatment of standards for the individual's acts. This subject matter will be taken up under the following heads:

Official Acts and Their Significance
Effectuation of Standards for Officials
Use of Standards for Officials

Official Acts and Their Significance

Sec. 3-04. Official acts—standards—kinds of acts. Acts of officials are standardized. The standards are verbal patterns, and similar in most respects to standards applicable to the individual's acts. It will not be necessary, therefore, to repeat here, in full detail, what has already been said about the standardization of acts.¹

¹ See secs. 2-03 to 2-14, inclusive.
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We classified the acts of the individual, A, into six kinds: prohibited and permitted, obligatory and discretionary, effective and ineffective. We can classify official acts on the same bases, and in the same manner. However, we find that the relative importance of these kinds and the relative frequency of acts of these respective kinds are not the same in regard to O's acts as in regard to A's.

Whereas the number of acts which A is prohibited from doing is very large, embracing most crimes, torts and breaches of contract, the number of acts which the official, O, is explicitly forbidden to do is relatively small. And whereas permitted acts of the individual loom large in any discussion of his significant acts, the permitted activities of O are, by contrast, not too frequently mentioned. Partly no doubt, this reduced attention to prohibited and permitted acts of officials is due to the fact that O is supposedly a properly bred animal and not expected to stray off the reservation as often as a member of the common herd might. But partly, the small number of expressly forbidden and permitted official acts is due to the fact that O, as an individual, is subject to the same general rules of law as A, so that the standards provided for A also cover the bulk of possible deeds and misdeeds by O.

In speaking of the individual's acts, I distinguished between physical and verbal acts. Official acts may be divided and classified in the same terms. Most official acts are verbal. Now and then an official act may require the use of physical force; the policeman may suppress by physical force a person who is committing an assault on another. Much more often the policeman acts verbally, as when he arrests A by declaring to him: "You're under arrest; come with me." There is a threat of physical compulsion behind the invitation to the arrestee to come along to the police station; this does not alter the fact, however, that the normal activity of the officer is verbal. The prosecutor likewise carries out his functions almost wholly through verbal acts; he questions suspects; he interrogates possible witnesses; he frames a written charge and a sequence of other written papers; and he does all the oral acts which are involved in the trial. Similarly, the chief executive acts almost invariably in oral or written form. The jury's verdict is, of course, a verbal act. Practically all the acts of the judge are verbal; these include rulings on motions, orders to parties, orders to witnesses, orders to attorneys, and the final judgment or sentence. So that we can say that, all up and down the line, official activity is predominantly verbal activity.
The number of acts which are obligatory on O is relatively large. You will remember that we were able to mention only a few acts which A must perform, outside of those which he undertook by contract to perform. But officials perform many obligatory acts. The sheriff is bound to serve process upon the defendant when it is delivered for service by the plaintiff or his attorney; the policeman is required to arrest the speeder whom he catches in the act of reckless driving; and the judge is bound to instruct the jury at the proper time and pass sentence on a convicted defendant, and so on. And the discretionary or nonobligatory character of certain official acts is also not infrequently recognized in legal provisions. Discretion is very common where O is given authority to do an effective act. He is left free to exercise this authority when, as, and if he thinks proper.

Moreover, standards defining official acts which will be effective are, like the similar standards defining effective acts of the individual, numerous and very important. The constable can levy on the goods of a judgment debtor with certain effects; the policeman can arrest A with specified legal consequences; and the judge can render judgment in a civil case with predetermined legal results. And ineffective acts are also frequently defined in provisions relating to officials. This is due to the fact that O's acts are limited by a great number of constitutional and statutory provisions, so that it often becomes important both to O and to other persons to know whether a certain act of O transcends the limits of his powers. The instances in which his acts are ineffective as well as those in which his acts are effective tend to become crystallized in standard forms. An arrest in a certain manner is effective; an arrest in another way is ineffective. A levy in a certain way is legally approved and fully operative; a levy of another type is invalid and in-
operative; an instruction in certain terms is proper; an instruction in other terms is a ground for reversal.

To sum up: whereas in regard to A, prohibited and effective acts are the types most commonly defined and most important in practice, in regard to O the most common and important standardized acts are the obligatory, the effective, and the ineffective.

According to our American tradition, official acts and powers are divided on another basis. They are separated into three kinds: legislative, executive and judicial. This division is made in regard to the acts and powers of federal officials. It is made in regard to the acts and powers of all state officers. Certain persons constituting the legislature, make the laws; other persons who collectively compose the executive branch, enforce the laws; and other persons, the courts and their functionaries, adjudicate controversies regarding the laws.

Despite certain inadequacies of this traditional threefold division, which I shall point out later, I shall use it in developing the ensuing analysis of official acts. I adhere to the traditional division of functions, first, because it is a classification which is adopted by our constitutions; second, because it is the classification which is ordinarily used in elementary and college courses in government so that you are already familiar with it; and third, because this classification works out conveniently for the purpose of dealing with the processes of regulation in which we are primarily interested.

However, I do not intend to follow the conventional order of treatment. This would require us to begin with the legislative process, then to discuss executive activities, and then to treat the activities and functions of the judicial branch. Instead of following this order I shall deal first with the

3 See especially secs. 3-20 and 3-21.
4 The lawmaking process will be the subject of chapter 4.
activities of executive officials and then with the functions and activities of the courts. The activities of these two branches of government are closely interwoven with one another; I shall not try to keep them neatly apart. They constitute together the official acts with which we shall deal in this chapter.

Sec. 3-05. Significance of official acts. In the last chapter I spoke of the significance of individual acts in terms of fixed legal relations between the actor and other individuals. A similar analysis can be made of the significance of official acts in terms of standard relations between the official actor and the individual:

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This mode of stating significance is especially appropriate in regard to executive and judicial acts. These acts are chiefly concerned with the effectuation and enforcement of the standard applicable to A. As such, the standard applicable to A's act is merely an empty pattern.\(^1\) It is like the pattern for a dress or the architect's plan for a house. It is only the design for an act which may, or may never, be executed. Whether or not A does an act which fits the standard, depends upon A's motivation. The threat of penalty and other devices for controlling A's motivation are reducible in the last analysis to acts of officials, threatened or promised: the threats of penalties or threats of official activity, and the promises of benefit or assurances to A of beneficial acts by officials.

Some of O's acts are done or threatened for the purpose of preventing prohibited acts by A. By physical force O

\(^1\) As I have already pointed out in sec. 2-29 et seq.
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prevents A from doing a physical injury to B. By the threat of arrest, to be followed by prosecution and punishment, O preserves the public peace, and deters A from the commission of thefts. By patrolling the highway O forestalls such acts as driving at excessive speed; the speeder checks his propensity to hurry in a locality where he knows that police officers may be encountered. It is a distinct advantage from everybody's point of view if prohibited acts can be thus prevented, rather than punished as a deterrent to others.

Other official acts are done or threatened for the purpose of inducing performance of obligatory acts by A. Thus, A is induced to perform his contract by fear of the consequences which will ensue if he fails to perform the acts which he has bound himself to do. Where a statute requires the factory owner to install certain safety devices to protect his workmen from injury, the threat of prosecution or suit for damages may operate as an adequate incentive for the performance of his obligation. But probably more effective will be the expectation of periodic visits from a safety inspector whose business it is to make sure that proper safety devices are installed and in operation. Even though failure to install such devices is threatened with heavy penalties, common experience shows that some employers will take a chance on such consequences unless they are continuously checked by official inspection. Lesser penalties are far more effective than heavy, if the lesser penalties are backed up by regular inspection and the certainty that the penalties will be exacted.

I shall not dwell again on the use of rewards or subsidies to induce acts by A; this matter has been adequately covered in sec. 2–39.

Official action is no less essential to A's privileges and liberties. The founding fathers did not have a clear appreciation of the positive functions which government must serve. They were chiefly concerned to prevent abuses of powers such as had characterized the activities of the government of Great Britain. (See further discussion of this point in secs. 7–05, 7–12, and 7–17.) They did not realize how fully A's liberty, as well as his security, depends on governmental protection against aggressive acts by B. A's freedom of speech, for example, is not merely the privilege of speaking without inter-
Our legal system and how it operates

Other official acts may be regarded as essentially remedial in character. The acts which O does where A has already committed an injury to B are of this type. O's acts are intended to force A to compensate B for the damage which he has done. Similar observations apply to O's acts intended to compel A to pay damages to B for a breach of his contract with B.

And many acts of O simply represent the performance of services which government has undertaken to render for A. Here, of course, fall all those official acts which are done by government agents when A calls upon them, by doing an effective act: the acts which O does by way of securing A's claims to property, the acts that O does by way of carrying out A's testamentary disposition, the acts which O does by way of recording and preserving deeds, mortgages, and so forth for the benefit of A.

But an act of O does not ordinarily stand by itself. Seldom, and perhaps I should say never, are the functions of government served by an isolated act of an official. An official act is normally a part of a complicated series of acts which are, in combination, significant. The series contributes to one common purpose or function. Thus, for example, as we shall see later, the enactment of a statute is not a simple single act. The process of putting a law on the books involves many distinguishable acts of different persons. A law is suggested, formulated, debated, adopted by each of the two houses of the legislative branch, and is then approved by the chief executive. All these acts enter into the legislative process; they culminate in the establishment of a statute. Then, after the statute is on the books, establishing, let us say, a speed regulation for those who drive on the public highways, this

ference by the federal government and without interference by state government, though both are important. To be fully secured, A's freedom to speak must also have governmental protection against interference by B, the other individual.
statute must be enforced; and here again we encounter a series of acts contributing to one general function, the function of enforcement. The policeman's act in arresting A for exceeding the speed limit is merely the initial step in a succession of acts which carry the process of enforcement through the courts. While we shall talk henceforth chiefly about separate acts of officials and about the standards applicable to these acts, we must not lose sight of the important fact that any one of these separate acts is really just an element in a complex series of acts, which have a combined significance.

Furthermore, the relations of O and A do not exhaust the legal significance of O's acts. An official act may be important to other officials as well as to A. One official act may be a condition precedent to another, as is suggested by the material in the last paragraph. The jury cannot try and convict a man until he has been charged by the proper authorities, and the judge cannot sentence him until he has been properly charged and properly convicted. So that we could, if we wished to pursue our methods of analysis further, state the effects of the acts of O on the powers and duties of other officials. And by the same token, we might point out that the acts of O are important to the state itself. And we might express this importance in terms of duties which O owes to the state, as well as powers and liabilities, operative between O and the state for which he acts. But I do not feel that it is necessary to pursue these lines of analysis further. My main point has been to show the various directions in which official action has legal import, and I believe that I have now sufficiently developed that point.

Sec. 3-06. Acts of executive officials. In the last two sections, I have classified official acts and suggested the ways in which these acts may be significant. In this and the following
section, I propose to specify, more definitely, the officials who do acts on behalf of government, the acts which these officials do, and the ways in which their acts are significant. I begin with acts of executive officials.

Inferior executive officials do many acts in the processes of effectuating standards applicable to A. The acts of police, sheriffs, constables, and other peace officers come first to mind in this connection. Their acts are involved in the enforcement of both prohibitive and obligatory standards. Their acts are involved also in the execution of a court’s order or sentence, as when they serve papers for the court, seize and sell property of a debtor, imprison or execute a convicted criminal.

To these acts of peace officers in enforcing standards must be added executive acts which impose special obligations on A, such as the tax assessor’s act in levying assessments on A’s property. Then there are the acts of such officials as the register of deeds who makes and preserves records of conveyances by and to A. Also to be counted among minor executive acts are those of various officials who issue licenses to A on his application, such as the building permit, the license to drive a car, and the license to engage in the liquor business. Their acts make effective A’s demand for the privilege of engaging in certain activities, a privilege which he would not otherwise enjoy.

The acts of inferior executive officials are commonly governed by standards similar to the standards which are applicable to the acts of individuals. Their duties and powers are set forth specifically and in detail. Thus legal provisions specify the situations in which an officer can make an arrest and the manner in which he is to make it; they determine what the effects of an arrest are to be, as regards the arrestee, the arresting officer, and interested third parties. In a similar way legal provisions prescribe every step to be taken in the levy and collection of taxes. They prescribe the way in which
a deed is to be filed for record and the way in which land records are to be kept, and they fix the consequences of recording as regards the grantor, the grantee and other parties.

Furthermore, the acts of inferior executive officials are largely controlled by general rules or specific orders of their superiors. In a police department, for example, many routine matters are regulated by general rules. The hours of duty may be fixed in this way as well as the occasions for making reports and the methods of making them. And the chief of the police department, or one of his lieutenants, may order an officer to investigate a particular case, send him out to stop a disturbance, or direct him to make a report on an investigation which he has already made.

Nevertheless the control of the minor official’s acts is never complete. The legal system does not attempt to control all of the acts of A, as I have already pointed out. Neither does it undertake to furnish the individual policeman with patterns for all the acts he must or may do. It would neither be practical nor desirable for the lawmaker or for his superiors to provide the policeman with complete standards to go by. It is not possible to foresee all the contingencies which the policeman will have to face. His acts have to be adapted to circumstances. Life is too complicated and variable to be foreseen and regulated to the last detail. Accordingly, the policeman is left with a substantial degree of discretion or freedom of action. He is left to decide, for example, whether the fair speeder shall receive a traffic ticket or be let off with a warning. And generally speaking, as we proceed upward in the executive hierarchy the extent of discretion increases.

The governor of a state is the chief executive of the state government; the President of the United States is the chief executive of the federal government. Each of these officials

1 See secs. 2-01, 2-05, and 2-07 regarding the extent to which A’s behavior is left free from legal control.
is the principal law-effectuating agent of the government which he represents. He directs the operation of his government from the top. However, we must not suppose that the executive branch in either of these governments is a well integrated hierarchy with complete and perfect control from the top. Rather the lines of control are loose and indefinite so that many parts of the executive branch have no effective superiors. Thus the mayor of a city or a local public prosecutor or the head of a government department may be subject to hardly any control from above, especially if he is an elective official and answerable only to local or state voters for his acts.

In the ordinary case the acts of the chief executive affect the individual only indirectly through the activities of subordinate officials to whom he issues general directions and specific orders. However, his effectuative acts are nonetheless important though their effects are indirect and though they are hardly noticed when affairs run along smoothly. The importance of his powers becomes apparent when it is necessary to exercise the whole power of government to enforce the order of a court in a time of public clamor, or when the governor finds it necessary to issue a declaration of martial law. Such a declaration is made when serious disorder occurs or impends in a community. The executive issues his declaration and sends a detachment of soldiers into the community to keep order. This declaration changes the whole status of law enforcement in the community affected. It confers enforcement authority upon the military commander and supersedes the authority of local officials to a very large degree; it works important changes likewise in the liberties and rights of individuals, to assemble together, to have access to the courts, and so on.\(^2\)

\(^2\)See 34 Mich. L. Rev. 417 (1936) for a discussion of the effects of a declaration of martial law.
The acts of the chief executive are controlled by standards just as the acts of his inferiors are. These standards are found in the constitutions and the statutes, state and federal. He is charged in general terms with the duty of enforcing the law. Typical is the provision in the Federal Constitution which declares that the President "shall take Care that the Laws be faithfully executed." Some duties of more specific character are imposed on chief executives by the constitutions; and somewhat more frequently specific duties are imposed by statutes; but duties of general character are more characteristic. In fact, as we proceed upward in the executive hierarchy from minor officials to the governor or the President, duties are more and more broadly and generally expressed.

Most of the standards which apply to the chief executive are cast in terms of power, rather than duty, to act. The executive is empowered to do this or that. Such powers, like executive duties, are commonly expressed in the most general terms. Typical are the two following sections of the Federal Constitution:

"The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other officers of the

3 Art. II, Sec. 3.
And as you will notice even the exercise of these very broad powers is left to the President’s discretion. He has power to grant pardons, but is not required to do so in any case whatever. He “may require the opinion” of the head of a department, but again this is a matter lying wholly in the President’s good judgment.

Sec. 3-07. Problems. 1. Suppose a policeman, O, commands a speeder, A, to pull over to the curb and stop. A stops as directed and O gives A a traffic ticket. How is O’s act related to the standard applicable to A? Would you regard O’s act as obligatory? As effective?

2. The Fourth Amendment to the Federal Constitution provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.”

Translate this passage into standards applicable to the acts of enforcement officials. How do A’s acts enter the picture?

3. A statute provides: Sec. 1. Every register of deeds shall keep an entry book of deeds and an entry book of mortgages, each page of which shall be divided into six columns, with title or heads to the respective columns, in the following form, to wit:

<p>| | | | | | |</p>
<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>(1) Date of Reception</td>
<td>(2) Grantors</td>
<td>(3) Grantees</td>
<td>(4) Township where the land lies</td>
<td>(5) To whom delivered after being recorded and date</td>
<td>(6) Fee Received</td>
</tr>
</tbody>
</table>

4 Art. II, Sec. 2, Cls. 1, 2.
Sec. 2. In the entry books of deeds, the register shall enter all deeds of conveyance . . . , and in the entry book of mortgages he shall enter all mortgages . . . noting in such books, the day, hour and minute of the reception and other particulars, in the appropriate columns in the order in which such instruments are respectively received, and every such instrument shall be considered as recorded at the time so noted.

The statute then specifies the effects to be attached to the entry of deeds and mortgages in the entry books aforesaid; in particular, the statute provides that the entry of these instruments in the record books shall constitute notice of the instruments and their contents to all subsequent purchasers and mortgagees.

The register of deeds, R, is obviously an executive official. Where do R's acts, here defined, fall in our sixfold classification of standard acts? Are they prohibited? Obligatory? Effective?

How would you classify A's act of filing a deed for record? What is the relation of R's act of recording to A's act of filing for record?

4. The American League of the Friends of the New Germany of Hudson County v. Eastmead et al.\(^\text{1}\)

Bigelow, V. C. (in part):

"Complainant proposed to hold a meeting in Union City in a hall hired by it for the purpose, but the police acting under order of the city commission forbade the meeting. Complainant applies for an injunction to restrain police interference.

. . . The defendants (i. e., the police) say, in effect, that if the meeting takes place speeches will be made extolling the present government of Germany and advocating measures to abridge the rights of Jews in the United States; that Jews will thereby be incited to riot, and that defendants forbade the meeting in order to avert disorder and possible bloodshed.

\(^{1}\) 116 N. Y. Eq. 487 (1934).
The explanation does not, in a legal sense, excuse defendants. Our law does not prohibit the public expression of unpopular views. It is lawful to advocate, for instance, the establishment of a dictatorship in America, or a soviet form of government, or a hereditary monarchy, or the abolition of religious freedom, or other changes in our political, economic or social system, no matter how unwise or how shocking. If lawless elements in the community, instead of ignoring such propaganda, or meeting it by sound argument, resort to riot, it is the duty of police to protect the lawful assemblage and to repress those who unlawfully attack it." (Injunction denied on other grounds.)

What is the significance of the fact that complainant league is held entitled to hold a meeting and entitled to police protection in so doing?

Would you say that the league has a right to hold a meeting? A privilege to hold a meeting? If so, against whom is the right or privilege respectively available?

5. In section 2–25, problem 20, we discussed the case of a landowner, A, who made a deed of his home to B as a result of coercion exerted by B. The deed would be invalid; the court would order its cancellation in a proper action. How would you express this result in terms of A's relations to the court (O)?

Sec. 3–08. Courts—functions—questions of fact and law. Courts serve important functions in the processes of effectuating standards applicable to A. Primarily courts deal with and settle cases in which the actual application of a standard is controverted. This is what is meant when it is said that courts are established to decide controversies.

The questions which the court may have to determine are of two sorts: questions of fact and questions of law. When the court has to decide what A did on a particular occasion or whether he did a particular act or whether he had a specific intent when he acted, we say that the court has a question of fact to decide. Was A present when X was killed? Did A
strike the fatal blow? Did A drive at sixty miles an hour on a particular occasion? Did A hand a deed to B merely to look over, or did he hand it to B with the intent to make an immediately operative conveyance? These are all questions of fact. They all take the form of a dispute about whether an act of A actually occurred or whether some essential feature of the act actually existed.

But the controversy may involve a question about the nature or scope of one or more standards, not about the facts of a particular case; it may involve a question of law. The controversy may turn on the question whether a particular standard is properly applicable to the act which has occurred or which is assumed to have occurred. Thus the question may be whether a particular act constitutes larceny, e.g., whether driving away an automobile to take a joy ride fits the standard for this prohibited act.\(^1\) Or the controversy may involve the question which of several standards is properly applicable to the act which has occurred or which is assumed to have occurred. Does the act with which A is charged constitute murder or manslaughter, i.e., which of these two prohibitive standards does his act fit? Or the controversy may involve the question of law, just what elements go into the standard itself. What are the elements of arson or the elements of an oral gift? The questions here relate to the essentials of the standard itself. The constitution of the standard is doubtful or uncertain in some respect. We have already dealt with two cases which illustrate this type of controversial question of law. In *State v. McGowan* the court had to decide whether a house, which had been finished, but which had not yet been occupied as a habitation, was a dwelling house for the purpose of the law of arson.\(^2\) The controversy turned on a doubt as to the meaning of one element in the definition of arson: what is a dwelling house. The court held that a dwelling house

\(^1\) This case is discussed in sec. 2–45.

\(^2\) See sec. 2–48, problem 2.
must be inhabited. In so deciding the court settled a question of law; it made clear an uncertain feature of the standard for a prohibited act. In the other case, *Cochrane v. Moore*, the court also settled a question of law. It had to determine what are the essential elements of an oral gift. It held that this effective act requires something more than mere words of present gift; it requires also an actual handing over of the thing given, a delivery. In so deciding the court determined a controversy regarding the essential elements of a legal standard; it decided a question of law.

Most actual cases involve both questions of fact and questions of law; the court may have to determine both what A has done and what legal standard covers what he has done. And usually the two kinds of questions are so intertwined that they have to be considered and weighed in connection with one another; both kinds of questions ordinarily have to be settled together in the decision of one case.

*Sec. 3-09. Trial courts—jurisdiction.* Courts can be divided into two general kinds: trial courts and appellate courts. Both kinds handle controversial cases and both kinds deal to some extent with disputed questions of fact and law. The general distinction between the two kinds of courts is that the trial court gives the initial hearing and decision of a controversy; the appellate court reviews the job which the trial court has done. It will be convenient to examine the work of each of these courts separately. I shall begin with the work of the trial court, and treat first its field of work.

3 See sec. 2-48, problem 4.


1 The distinction between trial jurisdiction and appellate will be further developed in sec. 3-18.

2 The work of the trial court is covered in secs. 3-09 to 3-17; the work of the appellate court in sec. 3-18.
The trial court's field of work can be designated and described in various ways. It can be called the role of the trial court, or the scope of its functions, or the extent of its powers. The common legal designation for this field, which I shall use from now on just because it is the common expression among lawyers, is the jurisdiction of the trial court.

No court is ever invested with authority to try all cases whatsoever; its competence is always limited to the trial of certain cases; and this fact is what makes it necessary to talk about jurisdiction and its limitations. The limitations on trial jurisdiction are commonly defined in terms of territory (place), or subject matter (kinds of cases), or both.**

In the states, the jurisdiction of the trial court is almost invariably limited to a specified district or area such as a county, a group of counties, a city, or a township. For this reason the trial court often bears the name of the County Court of X County, or the Circuit (or District) Court of the Second Judicial Circuit, or the Municipal Court of the City of Y. The trial court's jurisdiction is also usually defined in terms of subject matter. It may be given authority to dispose of all types of cases within the area where it sits, or it may be authorized to deal only with specific kinds of cases. If the court is authorized to handle all kinds of cases, large or small, civil or criminal, legal or equitable, we call it a court of general jurisdiction; and most states establish one trial court of this type for every community so that the entire state is blanketed by a system of trial courts of general jurisdiction. Most states also establish some courts whose juris-

** (I.R.) Two other common jurisdictional distinctions are passed over without mention here: (1) the distinction between jurisdiction of the person and jurisdiction of subject matter; and (2) the distinction between acts and transactions within the court's jurisdiction, and acts and transactions which fall outside it. The first of these distinctions is covered in courses on procedure; the second is treated in courses on conflict of laws and constitutional law. Both distinctions seem to me too difficult and refined for discussion in an introductory course.
diction is limited to the handling of specific types of cases. The court may, for example, be authorized to try only criminal cases; the Recorder's Court of Detroit is limited in this manner. Or the trial court's jurisdiction may be confined to the administration of decedents' estates and related matters. This is the limitation of jurisdiction characteristic of the county, probate, surrogate, or orphans' courts which one finds in most states. And almost everywhere one finds petty courts which have jurisdiction of small money claims (not over $100, or some other fixed amount), of petty criminal cases, and of the preliminary steps in major criminal cases; the latter are usually called by such names as justice of the peace courts, justice courts, or municipal courts. Almost always, as I have already suggested above, the court whose trial jurisdiction is limited in terms of the kinds of cases to be handled, is also limited in terms of place, so that a county court which is restricted to the handling of decedents' estates can only do so within the bounds of a particular county.

In the federal court system, trial jurisdiction of practically all matters is vested in the district courts of the United States. There is at least one district court in every state. In

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3 The supreme court of a state and other appellate courts are sometimes given jurisdiction to try limited types of cases. The following provision from the Michigan Constitution is typical: "The supreme court . . . shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo and other original and remedial writs, and to hear and determine the same. . . ." Art. VII, Sec. 4, Constitution of 1908. This jurisdiction is not very frequently exercised.

4 The principal matters falling within the competence of the federal courts are:

(1) cases involving the application or interpretation of the Federal Constitution;
(2) cases involving the application or interpretation of federal statutes (including crimes against the United States);
(3) cases involving the application or interpretation of treaties of the United States;
(4) controversies between citizens of different states ("diversity of citizenship"). Such cases are disposed of in a federal court but the law which is applied is the law of a particular state.

However, trial jurisdiction in these four types of cases (with the exception of a trial of federal criminal charges) does not belong exclusively to the
the less populous states, such as Nevada, the federal district is coterminous with the state. The more populous states are divided territorially into two or more districts. Michigan, for example, is divided into two districts and New York into four.\textsuperscript{5}

On the whole it is agreed by writers on court organization that both the common kinds of limitation on trial jurisdiction can be obstructive of efficiency in the administration of justice. Territorial limitations and limitations on subject matter both tend to clog the wheels of the judicial machine. In the first place, such limitations involve a great deal of litigation about the question of jurisdiction itself. Which court is the proper one to try this case? Has this court jurisdiction to try it? Such questions consume an extraordinary amount of the time of courts yet they do not seem to add much to the output of justice if we can assume that all our courts are able to dispense the same product. Second, as population shifts and as business needs change, the amount of judicial business to be handled in the various judicial districts and in the different types of courts also shifts and changes. The result is that frequently one trial court is overwhelmed by work and badly in arrears, while courts in neighboring areas and courts which handle federal district courts. Many cases of these types arise and are tried in the state courts; if they reach the federal system at all, they do so only by way of appeal to the Supreme Court.

Certain minor matters are handled not by the district courts, but by United States commissioners. The latter issue warrants and take other steps involved in the preliminary stages of criminal cases. They occupy a position in the federal system roughly analogous to that of the justices of the peace in the states' systems. However, they are appointed by the district judge and are, therefore, quite directly answerable to him.

The Supreme Court of the United States also has a very limited trial jurisdiction. The Constitution, in Art. III, Sec. 2, Cl. 2, provides: "In all cases affecting Ambassadors, or other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction." The occasions for the exercise for this jurisdiction are, needless to say, very rare.\textsuperscript{6}

\textsuperscript{5}Where a federal district contains a large city, such as New York City, Chicago or Detroit, there are several district judges over whom the senior judge in point of service presides.
limited kinds of cases, do not have enough to do. And the ups and downs of judicial work are often merely temporary so that they do not call for permanent additions to court personnel. Accordingly, it may be regarded as preferable to create just one court with the widest possible jurisdiction as to place and subject matter, and to provide that judges can be assigned freely to try cases in any place and to handle any type of case as the burden of work requires.

However, there are real obstacles to the simplification of trial jurisdiction which has just been mentioned. The federal system of courts approaches the ideal inasmuch as all federal trial jurisdiction is vested in one district court which operates in a rather wide area. But the adoption of the same plan in the states is not so easy. The state constitutions often fix the jurisdiction of courts from the highest to the lowest. Where this is the case, the simplification of court organization and the reduction of the number of the different kinds of trial courts, can only be brought about by the cumbersome process of constitutional amendment. Moreover, there is a serious practical objection to the complete simplification which I have suggested, even if it is constitutionally feasible. The state courts have to dispose of a vast number of petty cases, civil and criminal. It is most important to bring the handling of such cases as close as possible to the persons affected and to make the handling of the cases simple, cheap and expeditious. The best way to meet these objectives apparently is to create an ample number of local courts to dispose of petty cases. If this is done the state will continue to have at least two

6 Without constitutional amendment some degree of alleviation of congested dock-... can be achieved by the statutory authorization of the assignment of judges for work in districts and courts where help is needed. Usually the power to assign is vested in the chief justice of the supreme court or in some other presiding judge.

7 The problem of handling petty cases is not so serious in the federal system. Most of the cases which are handled therein are important. While there is a certain amount of petty and routine criminal business to handle, this business is for the most part disposed of by United States commissioners.
STANDARDS FOR OFFICIAL ACTS

Types of trial courts: petty trial courts and trial courts to handle more important matters. The correctness of this solution is confirmed by the fact that in England and on the continent of Europe, where thoroughgoing court reorganization has been undertaken in recent decades, this twofold scheme for handling trial work has been adopted.

Sec. 3–10. The public prosecutor—functions—criminal charges. In the last section I pointed out that each state is divided into judicial districts in each of which one finds a trial court of general jurisdiction and that the United States is similarly divided into judicial districts in each of which is a federal court of general jurisdiction. The next point to note is that in each of its judicial districts the state has an attorney who represents the public interests and that in each of its judicial districts the federal government has an attorney who acts as its representative. This legal representative is known variously as the state’s attorney, the prosecuting attorney, the county attorney, the district attorney (the name used in the federal system), and known generically as the public prosecutor. I shall refer to all of them henceforth by the generic name. The public prosecutor’s primary function, from which he derives his name, is to prepare and prosecute criminal cases.¹

The criminal prosecution is brought in the name of the state or the federal government, as the case may be. It begins with the filing of a formal charge, although sometimes the formal charge is not filed until after the accused person is in custody.² In many of the states and in the federal system,

¹The prosecuting witness, or other person with information about a criminal act, may be responsible for the filing of a charge in the sense that he makes a preliminary complaint, or that he tells what he knows to the prosecutor or the police.

²Actually several steps often precede the formal charge: (1) the making of a sworn complaint by a prosecuting witness who has knowledge of a crime; (2) the issuance of a warrant for the arrest of the accused; (3) the actual arrest of the accused; (4) the production of the accused before the magistrate
the formal charge for the more serious crimes is known as an \textit{indictment}. The indictment is found by a \textit{grand jury}. This jury is a group summoned by the court to investigate possible public offenses and public grievances; it consists of not less than twelve nor more than twenty-three persons. The grand jury calls witnesses and examines evidence; it carries on its investigations with such assistance from the public prosecutor and other officials as it requires. If it finds that there is probable cause to think that someone is guilty of crime, it draws up a formal charge and presents it to the court. As a practical matter the charge is usually drawn up for the grand jury, by the prosecutor, as the jury is composed of laymen. The grand jury serves two general functions. On the one side, the grand jury is intended to represent the government interests by initiating criminal charges on its behalf; on the other side, the grand jury stands as a safeguard, since it is composed of laymen, against the filing of unfounded or improper charges against the individual.

The Federal Constitution and the constitutions of many of our states require that serious criminal charges be initiated by indictment.\footnote{The Fifth Amendment to the Federal Constitution provides: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; . . ."} The constitutions of other states authorize the prosecutor alone to initiate criminal proceedings by filing a formal charge, called an \textit{information}.\footnote{However, the information cannot be filed until the accused has had a preliminary examination before a magistrate (justice of the peace or judge). In this examination the magistrate must satisfy himself that the prosecution has sufficient evidence on which to hold the accused for trial. The preliminary examination is intended to protect the accused person against the filing of unfounded or improper charges (compare the next preceding paragraph of the text).} Sometimes this infor-
mation practice is made exclusive; sometimes either information or indictment may be used. Even in the federal system and in states where indictment must be used for serious charges, the information can be used in the commencement of proceedings against minor offenders. The information practice is less cumbersome and less costly than indictment by grand jury; for these reasons the information is much more commonly employed wherever its use is permissible.

In both the indictment practice and the information practice the real burden of investigating cases, of drafting charges, and of preparing cases for trial, rests upon the public prosecutor. He furnishes the motive power for criminal law enforcement. Generally speaking, he decides what cases to push and what cases to drop; he decides what cases to call to the grand jury's attention, where the grand jury method is in vogue, and what cases to prosecute where he proceeds by information. He tries the cases; and, if persons are convicted, he has the primary responsibility of seeing that sentences are carried out. The prosecutor ordinarily cannot perform all these functions personally. He has to have assistance of various sorts. In larger communities the prosecutor's office includes several assistant attorneys, a number of investigators, and a large staff of clerks.

Another important function of the public prosecutor is to advise other officials in regard to legal problems which confront them. Frequently, doubts arise whether a particular official has power to do a certain act or whether one method of procedure is better or worse than another. These doubts usually hinge on matters of law, and officials are entitled to obtain the prosecutor's opinions for their guidance. In this way the prosecutor serves as counselor for officials, essentially as the ordinary attorney serves as counselor for the individual client.

The public prosecutor is also commonly expected and required to draft public documents and technical legal instru-
ments for the local officials in his district. If a deed or lease of county property is to be executed, or if a purchase of a site for a county courthouse is to be made the prosecutor will serve as the legal draftsman for the local authorities.

Finally, the prosecutor brings lawsuits on behalf of various government units. In this capacity he may be called on to bring proceedings to collect property taxes or to condemn land for use as a highway. Similarly, he may bring action to enjoin or abate a public nuisance. In short, in any case where the public has proprietary interests which need to be protected, the local prosecutor is ordinarily the functionary who is obliged to act. He serves in such cases as the representative of the public. He initiates action and carries the action through all its steps to a conclusion.

The prosecutor is an executive official. His acts are governed by legal standards as other executive acts are. Nothing need be added to what was said in section 3-06 on this general subject, except to observe that the prosecutor is not a minor executive, but one well up in the executive hierarchy and one invested with a considerable degree of discretion.

Throughout this section I have treated the local public prosecutor as the prototype for all public attorneys. This emphasis on the local prosecutor is justified by the great practical importance of his functions. It is justified from your point of view by the fact that you will often be reading about what the public prosecutor does or can do. However, it would leave an incorrect impression if we passed over the functions of other public attorneys without any notice whatever. In the states, the local prosecutor is governed to some extent, the prosecutor's discretion in the handling of cases, especially criminal cases, is controlled by the judge of the court in which a criminal proceeding is pending. However, this judicial control is rather remote; in actual fact the prosecutor has almost complete freedom to push or to drop the ordinary case.

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5 If a nuisance, e.g., smoke or noise, is injurious to an individual landowner he may bring a civil action to enjoin or abate. If the nuisance is injurious to the public, the action to enjoin or abate is brought by the prosecutor.

6 To some extent, the prosecutor's discretion in the handling of cases, especially criminal cases, is controlled by the judge of the court in which a criminal proceeding is pending. However, this judicial control is rather remote; in actual fact the prosecutor has almost complete freedom to push or to drop the ordinary case.
extent by the orders of an attorney general. The latter is the principal law officer of the state; as such he gives opinions, drafts papers, and brings important actions on behalf of the state. His functions in these respects are parallel on a higher level, to the various functions which the public prosecutor performs locally. In the federal system, the district attorney is subject to a very real control by the Attorney General of the United States. The latter is the principal law officer of the federal government. He is a member of the President’s cabinet. His office, called the Department of Justice, is charged with the care of most of the legal interests of the United States; it exercises a great variety of advisory, supervisory, investigative (e.g., F.B.I.), and administrative functions. I do not believe that it is necessary for our present purpose to deal specifically with all the functions of these central law offices of the state and federal governments.

Sec. 3-11. Criminal trial—jury and judge. You now have before you descriptions of the principal agencies involved in the enforcement of criminal law: executive officials, the courts, and the public prosecutor. It is time to give you a sketch of the criminal trial.

The criminal trial more than any other legal proceeding has the features of drama. Ordinarily the act charged against the defendant involves human interest, and the trial itself is a great contest in which the defendant battles for his life or liberty against the power of the state. In this contest, which is co-operative as well as dramatic, the prosecutor, the defendant, the defense attorney, the witnesses, the jury and the judge all participate and perform their appointed roles. The proceedings prior to trial and the trial, too, may be viewed as a series of acts or scenes. Filing the charge is an act; like-

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7 And less directly by the orders of the governor.
8 Indirectly, the district attorney is subject also to the orders of the President who is the immediate superior of the Attorney General.
wise the arrest of the accused; and the entry of a plea. The impaneling of a jury is a scene. The presentation of the evidence is a series of scenes in which each question put to a witness and each separate answer made is a distinguishable act. And, the concluding arguments of counsel, the judge’s instructions to the jury, and the jury’s verdict are acts which bring the legal performance to a conclusion.

The jury and the judge play the dominant roles in the trial. The jury, properly called the petit jury, consists of twelve persons. Its function is to hear the evidence and decide whether or not the accused is guilty as charged. In other words, its function is to determine the facts. The jury is selected by various methods in different legal systems, but one essential feature is characteristic of the jury in all Anglo-American countries: it is a body of laymen drawn from the general population. The jury is intended to introduce the elements of common sense and common fairness into justice, thus preventing the operation of the legal system from becoming over-technical; and is intended to check arbitrary acts of officials who might otherwise detain individuals without sufficient cause or deny them their lawful rights.

The judge may be likened to a player-producer. He acts in the play and has the general management of it. All the acts which the prosecutor, the defendant, the defense attorney, and the witnesses do, are standardized and governed by legal regulations. The judge supervises their conduct to see that they follow the regulations. The judge decides whether each piece of evidential material is admissible, as it is offered by one side or the other. He rules on the propriety of questions asked by counsel on the two sides. And, after the evidence has all been presented and counsel have argued the case to the jury, the judge instructs the jury on the law applicable thereto.\(^1\) He says to the jury in

\(^1\) This is the order of procedure at common law. In some states, however, statutes have changed the order of procedure; the judge instructs the jury prior to the argument of counsel.
effect: If you find such and such facts to be true as contended by the prosecutor, then you will find the defendant guilty; on the other hand, if you find such and such other facts to be true as contended by the defendant, then you will find him not guilty. Of course, the actual instructions go into more detail, but their essential purport is sufficiently indicated by this skeleton form.

The trial judge not only supervises all steps in the trial and instructs the jury, but he issues all the specific orders which need to be given during the course of the trial. For example, if the trial needs to be postponed, the judge gives the order for a continuance (postponement); if a witness fails to appear or refuses to answer questions, the judge issues the necessary order imposing penalties; if the evidence of the prosecution is insufficient to support a conviction, the judge directs the jury to return a verdict for the defendant; if the jury returns a verdict of “not guilty,” the judge orders the defendant discharged; and if the jury returns a verdict of “guilty,” the judge sentences the defendant according to law.\(^2\) In short, a criminal trial has some of the elements of a game in which two champions try to overcome one another. This is a feature which goes all the way back to the days of trial by battle. The judge controls the contest. He acts as a sort of referee as between the two primary contestants, the attorney for the prosecution on the one hand and the attorney for the defense on the other. His job is to see that the contest is carried on according to the rules.

Sec. 3–12. Problems. 1. In framing his instructions to the jury, how far is the judge concerned with questions of fact? How far with questions of law? Who decides the questions of fact? The questions of law? Consider here the matter in sections 3–08 and 3–11.

\(^2\) According to the practice in some states, the jury fixes the penalty in regard to some or all types of crime.
2. A statute provides:

"Any person having knowledge of the commission of any offense punishable with death, or by imprisonment in the state prison, who shall take any money, or any gratuity or reward, or any engagement therefor, upon an agreement or understanding, expressed or implied, to compound or conceal such offense, or not to prosecute therefor, or not to give evidence thereof, shall be guilty of a misdemeanor."

Why should the agreements here specified be prohibited and punished?

Suppose A is clerk in a bank; he embezzles $1000. His defalcation is discovered and his father offers to repay the $1000. Can the bank properly accept this offer?

3. In the Sixth Amendment to the Federal Constitution is a provision that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."¹

What is the practical basis for such a guarantee? Viewed from the standpoint of enforcement of standards, how does this guarantee operate?

4. The 5th Canon of Professional Ethics adopted by the American Bar Association declares:

"It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."

¹ This provision applies only to criminal trials in the federal courts. However, there are similar provisions in the constitutions or statutes of most of our states; and the lack of counsel in a state prosecution may constitute a violation of the "due process" clause of the Federal Constitution. Powell v. Alabama, 287 U. S. 45 (1932); Betts v. Brady, Warden, 316 U. S. 455 (1942); Foster v. Illinois, 332 U. S. 134 (1947).
According to this canon how far can a lawyer go in defense of his client?

Statutes of limitation commonly bar the prosecution of crimes (except murder and a few others) after a certain period of time has elapsed (e.g., three years). Should a lawyer plead such a bar on behalf of a client whom he knows to be guilty?

5. In section 1–10, problem 6, we discussed the case of the Lambeth Poisonings, involving one Roose, the Bishop of Rochester’s cook. The English Parliament passed an act declaring that Roose and any other poisoner be adjudged a traitor and be executed by being boiled to death. Roose was accordingly boiled at Smithfield a few days after the act was passed.

As applied to Roose such an act would be unconstitutional in the United States, both because it is an ex post facto law and because the legislative branch cannot thus usurp judicial functions. What other constitutional guarantees would this enactment violate?

Sec. 3–13. Bringing civil action. The civil action occupies a prominent place among methods of law enforcement. A, who is harmed by the act of X, or threatened with harm, calls upon the courts for aid in maintaining his rights. The outstanding feature of this method of law enforcement is that it is initiated by an aggrieved party, A. One whose rights are violated or threatened with violation calls upon the state’s tribunal for a remedy or protection. However, A is not obliged to maintain his rights; he is empowered to take action to protect himself. He can, if he chooses, allow the actual or threatened injury to go unredressed. The legal system relies upon A’s self-interest as a motive for action.

An ex post facto law is one which makes an act criminal after the act has been committed.
The legal system does not guarantee complete and perfect protection to him; it comes to A's assistance when he calls for help. From the point of view of A, the legal system performs a service function. From the point of view of the state, A, by setting the wheels of justice in motion, serves as an agent of enforcement.

On the principle of party presentation, stated in the preceding paragraph, the legal system leaves to the aggrieved A full responsibility for taking each step in the legal procedure for effectuating his claims. He must discover the witnesses and other evidence necessary to support his case and produce them in court. He must call upon the agents of the law to compel witnesses to appear, if they are unwilling; and he must require persons to produce papers which are needed. Only rarely does the judge or any other official do any act on his own motion, by way of enforcing A's claims. A must present his own claims and take each step in pursuing them to a conclusion. But, while we speak of party presentation as characteristic of our legal system, A, who is an ordinary layman, is not able to carry on his suit without assistance. Usually he must have the aid of an expert, a lawyer. The actual presentation of the case is made by the lawyer at the instance of A. The lawyer brings the action and leads his client through the procedural mazes which baffle the ordinary citizen and even bewilder the conscientious law student at the start.

Sec. 3-14. Trial of civil action. The private action at law is triable by jury. In fact the action cannot be tried without jury unless both parties waive jury trial, inasmuch as jury trial is guaranteed by the federal, as well as the state, constitutions. The role of the jury in a civil action is similar to its role in criminal cases. The jury hears the evidence and finds its verdict in a similar way. The jury's activities are subject
to similar judicial control. The judge rules on the admissibility of evidence and makes all the necessary orders during the trial. He instructs the jury essentially as he does in a criminal case. The judge also gives the final judgment. And, if there is an appeal, he makes the requisite orders regarding the appeal and the preparation of the record for appeal.

All the acts of jury and judge are covered by legal standards. These fix the functions of the jury and the powers and functions of the judge. They determine what evidence may be used by the parties and how it is to be admitted. They control the manner in which the judge is to instruct the jury. They determine when and how a judge is to enter a judgment or decree; when he is to take a case from the jury, direct a verdict, or set aside a verdict for error or for other reasons. These standards you will become familiar with in your courses in procedure.

No one can truly assert that the jury is an efficient agency for the trial of civil cases. It is ordinarily composed of persons whose knowledge and experience are quite inadequate to the exigencies of cases involving complex business deals and difficult problems of scientific fact. Nevertheless jury trial in civil cases will probably be with us for a considerable while to come. The civil jury had a prominent place in the processes of establishing our civil liberties, especially freedom of speech; and for this reason is secured by our constitutions. It seems quite unlikely that sufficient political support can be mustered in the foreseeable future to bring about the constitutional amendments which would be required to abolish jury trial in civil actions.¹

However, jury trial can be waived as I have indicated above. If this is done, the case is tried by the judge alone; he decides both matters of fact and matters of law. The

¹ Most of the legal systems of the world have either never employed the jury in civil cases or else they have abandoned its use long ago. Only in the Anglo-American systems of law has the civil jury retained its vogue.
practice of waiving jury trial is a relatively recent development in trial procedure. This practice has reached a point in many parts of the country where most civil cases are now tried without jury.

The American legal systems have evolved from the system which prevailed in England prior to the Revolution. In the English system of prerevolutionary days certain types of civil cases were not tried by jury but by the judge alone. The principal cases which I have in mind went by the name of “suits in equity.” 2 This is not the place to develop the early history of equity in England or its later history in the United States. Suffice it to say that equity cases did not fall within the jurisdiction of the English law courts, where jury trial prevailed, but belonged in the jurisdiction of the Court of Chancery, where cases were tried without jury by a judge known as the Lord Chancellor. The distinction between cases for law courts and cases for equity courts, and the distinction between the modes of trial therein, have been maintained down to the present day both in England and the United States. So that even now equity cases are tried by the judge alone as they have always been tried in the English practice. Equity cases constitute an important section of civil cases. You will hear a great deal more about equity cases, equity actions, and equity procedure in your various courses, and I shall have a few more words to say about them in the next section.

Sec. 3-15. Redress in civil action. In our legal system money damages are the normal form of redress. The judgment of the court in a civil action condemns the defendant

2 In the English ecclesiastical, admiralty and probate courts of pre-revolutionary days cases were also tried without jury. This method of trial still prevails in the admiralty courts on both sides of the Atlantic. In the United States we have no ecclesiastical courts. In the probate courts of the United States jury trial is often provided for by statute, but in some states probate cases are still tried without jury.
to pay a certain amount by way of compensation. If the defendant has done a personal injury to another, if he has trespassed upon another’s land, if he has carried away or misappropriated another’s goods, he must pay damages. In parallel fashion if he has failed or refused to perform his contract obligations, he must pay damages. The damages given are intended to make the injured party whole in an economic sense; they are intended to restore him to the same position, as regards total assets, as he would have occupied if the wrong had not occurred or if the contract had been performed.

But the private action is not ended with the final judgment. As any lawyer knows, there is a difference between getting a judgment and collecting it. So it is important to look beyond the judgment to the means of realizing on it. To collect the damages which have been adjudged to him the judgment creditor must have *execution* levied on the goods or other property of the judgment debtor. This means that the creditor, or an enforcement officer, must find property on which to levy execution. The execution involves the seizure and sale of the debtor’s property to obtain money to satisfy the judgment. If no property is found the creditor realizes nothing. The seizure and sale are carried out by a constable or other official on the court’s order at the behest of the judgment creditor. Accordingly the normal legal remedy in a civil action can be summed up in two phases: judgment for money damages and levy of execution on property of the judgment debtor.

In a few situations our legal system undertakes to give the complaining party *specific redress* rather than money damages. This means that it undertakes to give him what he actually wants, not merely money in place of it. Three instances of specific redress, frequently called specific relief, will suffice for illustration:
First is the redress obtained in the action of *ejectment*. The plaintiff who has been ousted from the possession of land asks to be restored to possession. If the court gives judgment for the plaintiff, it orders the sheriff to put the defendant out of possession and to put the plaintiff into possession. This is an obvious instance of giving the plaintiff what he asks for.

Second, a proceeding for an injunction may be brought in certain cases. *Injunctions* fall within the jurisdiction of an equity court. They constitute one of the classes of equitable actions which I mentioned in the next preceding section. Consider for instance a case where a man maintains a factory on his land which discommodes his neighbors by the production of smoke or excessive noise. On such facts a neighbor who is injured may apply to the equity judge for an injunction. After the judge hears the case and finds that the plaintiff is entitled to this remedy, the judge issues a restraining order to the defendant. The order prohibits him from continuing to produce smoke or noise to the discomfort of his neighbor. What is also important for our present purpose is that this order is enforced by threat of imprisonment for contempt if the defendant does not desist. Of course, it is only rarely that a defendant will persist in the face of such an order. The judge is authorized to proceed summarily in case of a violation of his order, as any defendant knows. He will therefore abate his own nuisance as the court commands him to do, and the complaining party obtains the relief that he wants.

Third, a court of equity may issue a positive order, not merely a restraining order, commanding a defendant to do a particular act. Typical situations in which positive orders, called *mandatory* injunctions, are issued are (1) the case in which a defendant is adjudged to be bound to convey land according to a land contract, and (2) the case where he is ordered to remove an offending structure which encroaches upon the land of another. In both these cases the court orders
the defendant himself to do the act which should be done. In one case the order commands him to make the conveyance as per contract, and in the other it requires him to remove the structure in question. These mandatory orders, like the injunctions first spoken of, are enforced by threat of imprisonment for contempt; they secure to the plaintiff the relief to which he is entitled.

Sec. 3–r6. Judicial control of persons, estates, etc. In addition to their jurisdiction over criminal prosecutions and civil actions, courts are commonly invested with extensive authority (1) to care for persons who need care, (2) to change and determine the status of persons, and (3) to manage and dispose of estates of various kinds. This authority, you will observe, does not ordinarily involve litigation of any kind; it does not necessarily involve the settlement of any controversy of law or of facts. It falls outside of what we normally consider the judicial role. It calls for the doing of supervisory and administrative acts.

As instances of jurisdiction to care for persons I might mention the general protection which courts extend to infants (minors) and to incompetent persons (the insane, etc.). This kind of jurisdiction is usually vested in, and exercised by, probate courts. They appoint a personal guardian for the infant who is an orphan or whose parents are unfit or incompetent to care for him; and they exercise supervisory control over the acts of the guardian. They remove the child from the custody of unfit parents. They place the neglected child or juvenile delinquent in an institution or in the custodial care of a proper person. They supervise the care, training, and education of children who are under guardianship, in custodial care, or in institutions. Similarly these courts appoint personal guardians for incompetent persons and exercise

1 See sec. 3–09 in regard to the character of probate courts.
supervision over the guardians and over the institutions and individuals who have such persons in custody.

Courts also exercise authority to change or determine the status of persons. For example, a judicial proceeding is requisite in order to declare a person to be incompetent or insane, and in order to commit him to custodial care. The adoption of a child has to be approved and accomplished through a judicial proceeding. Divorce and annulment are also judicial acts whose essential operation is to change personal status.  

Instances of judicial management and disposition of estates are very common. I shall refer to a few of the more important. First, I might mention the appointment by a probate court of a guardian to manage the estate of an infant or an incompetent person. Such a guardian has to be distinguished from the guardian of the person previously mentioned. This guardian has the control and management of property. However, one and the same individual may be appointed both guardian of the person and guardian of the estate of an infant or an incompetent. Second, the judicial administration of decedents' estates is worth noting. This is also an instance of the judicial management of property. Decedents' estates are actually managed and distributed by administrators or executors. But the latter have to be appointed by the probate court; they derive their legal authority from it; and they must get the court's approval for every important act which they do in the processes of collecting assets, converting them into money, paying debts, and distributing shares to the parties entitled. Third, courts of equity supervise the administration of trusts. The trustees are the primary actors but

2 This jurisdiction is always invested in a court of general jurisdiction, not in a probate court. As regards this distinction, see sec. 3–09.

3 Except in one state, courts of equity are no longer separate courts. Equity powers are exercised by the trial courts of general jurisdiction. See sec. 3–09 above.
their acts are subject to judicial supervision. These courts also appoint receivers to take over the possession and management of the estates of insolvent individuals and corporations. And finally, the United States district courts handle the estates of bankrupts. The courts, through trustees who collect claims due the bankrupt, take possession of the bankrupt's assets, and distribute his estate ratably to his creditors. In all the instances here mentioned courts appoint agents to manage and administer estates. Usually the agents are also subject to removal for cause by the appointing court. These agents are required to make reports of their actions from time to time to the courts which appoint them; and their management is subject to judicial control and supervision at all times.

Sec. 3-17. Problems. 1. Ricketts v. Dorrel. The defendant wrongfully took 738 rails and 164 stakes belonging to the plaintiff and built a rail fence dividing the lands of the plaintiff and the defendant. The plaintiff brought an action of replevin to recover the possession of the rails and stakes. The court held that the plaintiff had brought the wrong kind of action and dismissed his suit. The court said: "The law affords him ample remedy if he rightfully chooses it; but it is no part of the duty of this court to instruct him as to what that remedy is."

Consider the last statement made by the court. Where does it fit into our discussion of the civil action?

2. Under statutes of the United States aliens may become naturalized citizens of the United States through a proceeding in a state or federal court. The alien is eligible to apply for naturalization if he has filed a declaration of intention and lived in the United States continuously for five years. The admission to citizenship involves an application for

1 55 Ind. 470 at 474 (1876).
naturalization by the candidate, a hearing by the court on this application, and a decree admitting him to citizenship.

Where would you place this judicial jurisdiction to naturalize aliens, among the types of jurisdiction mentioned in the preceding sections?

3. Suppose H sues W for divorce and the court grants the divorce as prayed. How does the relief granted differ from the types of redress mentioned in section 3–15?

4. In the last thirty years, statutes have been passed by most of our states and by the federal government providing for what are called "declaratory judgments." * A declaratory judgment is a binding declaration of legal relations as between parties, made where such relations are in controversy; the declaration is made on the basis of contentions of adversary parties and counsel as the ordinary judgment is made. The declaratory judgment fixes the existence of relations arising out of a legal instrument or transaction, but does not embrace any relief beyond a binding determination of legal relations. The ordinary legal action springs from the fact that the party defendant has already committed a legal wrong for which the court is asked to provide a remedy, or that the defendant is threatening the immediate commission of a wrong which the court is asked to prevent. The declaratory judgment also falls in the field of preventive relief. However, it is intended to prevent damage by removing the uncertainty of parties regarding their rights, usually in cases where both parties are acting in good faith and without the purpose to commit wrong. There are many situations in which a legal declaration of rights can thus prevent damage—as where there is a bona fide dispute as to the existence of a marriage, as to the legitimacy or sanity of an individual, as to the title of property, or as to the construction of legal documents, such as contracts, deeds, leases or wills. In the

* (I.R.) See generally on this topic, Borchard, Declaratory Judgments (2d ed., 1941).
absence of provisions for declaratory relief, persons must act at their peril in such cases; persons must act upon their own interpretation of their supposed rights and take the consequences. It is to remove uncertainty in these respects that the declaratory judgment has been adopted as a device of preventive justice in the civil law countries of Europe, in England, and in the United States.

In arguing in favor of statutes to provide for declaratory judgments, Sunderland says:

"In early times the basis of jurisdiction is the existence and the constant assertion of physical power over the parties to the action, but as civilization advances the mere existence of such power tends to make its exercise less and less essential.

"If this is true, it must be because there is something in civilization itself which diminishes the necessity for a resort to actual force in sustaining the judgments of courts. And it is quite clear that civilization does supply an element which is theoretically capable of entirely supplanting the exercise of force in the assertion of jurisdiction. This is respect for law. If the parties to the action desire to obey the law, a mere determination by the court of their reciprocal rights and duties is enough. No sheriff with his writ of injunction or execution need shake the mailed fist of the State in the faces of the litigants. The judgment of the court merely directs the will of the parties, and the performance of duty becomes the automatic consequence of the declaration of right.

"It is not to be assumed that the peaceful acquiescence of the highly civilized man in the legal findings of the court implies any loss of power in the court itself. Quite the contrary. The greater the ease with which the court's findings impose themselves on litigants the more the real power of the court is demonstrated. But the force behind the finding of the court has become a latent instead of an active force. This transition is possible, however, only when the existence of the force is so well recognized and so clearly understood that no one would think it worth while to put it to the test. The entire cessation of actual coercive measures on the part
of the court would therefore mark, not the disappearance, but the perfection of the rule of force.

"The modern observer, noting this correlation between social progress and the decline in the need for outward display of force in the administration of justice, may well ask himself why we have not done better than we appear to have done. If the existence of force is enough, without its exercise, to sustain the court in its findings, why do we not show a realization of that fact in our remedial machinery? If the power of the state stands irresistibly behind our judicial decisions, why take so much pains to clothe them with the outward show of authority? Why display the sheriff and his writ with so much ostentation? We do not arm our traffic policemen with guns and cutlasses. Why insist that the court must always rattle the sabre?

"To make a specific application of this general criticism, let it be asked why our judicial system does not provide a means for merely determining and declaring rights. If our civilization is not a sham, and the state is understood to be equal to the task of enforcing the decrees of its courts; a mere declaration may serve every purpose of an order, and the order will become unnecessary. A declaration by the court that A is entitled to the immediate possession of a chattel in B's possession, should be equally effective in A's behalf as a judgment that A do have and recover of B the possession of the chattel. A judicial declaration that a certain city ordinance is invalid ought to serve equally well as an injunction against its enforcement. Furthermore, the remedial possibilities in such declaratory judgments are much greater than in judgments for relief, and they open up an entirely new field for judicial usefulness as will hereinafter be pointed out."²

As regards the matter of redress or enforcement, how does an action for declaratory relief differ from the ordinary civil action? See sec. 3-15.

In what important respects is the declaratory judgment like the ordinary judgment in a civil action?

Sec. 3-18. Appellate courts—jurisdiction. In section 3-08 I referred to the controversies of fact and law which it is the primary function of courts to determine. In section 3-09 I divided the jurisdiction of courts into two kinds: trial and appellate. Trial jurisdiction has been considered in the preceding sections, as well as certain administrative functions which courts perform. In the present section I shall speak as briefly as I am able about appellate courts and their jurisdiction.*

The appellate court reviews the record of the work which the trial court has done. It does not hear the evidence in the case again.\(^1\) It examines the lower court's proceedings to determine whether they have been conducted according to legal standards. If they have been so conducted, the appellate court affirms the trial court's findings, judgment, or decree. If material error has been committed, the appellate court reverses the trial court's determination. It sends the case back

* (I.R.) Manifestly I cannot deal with so large a subject in a brief space and make every statement complete and accurate to the last detail; I hope the informed reader will bear in mind that I am merely trying to give a general picture of our appellate courts—a picture which will aid the beginning law student in his study of reported cases.

For more detailed treatments of the organization and procedure of appellate courts, the reader is referred to Pound, Organization of Courts (National Conference of Judicial Councils) (1940); Pound, Appellate Procedure in Civil Cases (also a National Conference publication) (1941); American Law Institute, Code of Criminal Procedure (1931)—the sections on appeal with full annotations; and also items cited in sec. 3-26, note *, and sec. 3-28, note *.

\(^1\) Appeal, as we are using the term, always involves the review of the record of a trial. Appeal presupposes that the case reviewed has been fully heard, both as to the law and the facts, by a court below. And review, or appeal, accordingly means the judicial examination of the record of what a lower court has done.

However appeal is sometimes used in a different sense and one which can lead to confusion. For example, it is sometimes provided that an appeal can be taken from a petty court to a court of general jurisdiction where the case which was tried in the petty court is to be tried again. This provision for a trial de novo is called an appeal. As the case is heard fully, both on the law and the proof, on the second trial as well as on the first, the second trial is obviously not an appeal in the sense in which I have used that word; it is a second trial, just as I have called it, not a review.
for a new trial or directs the lower court to give judgment for one side or the other; or, in the practice of some jurisdictions, the appellate court itself enters judgment for one side or the other.

The common errors which occur in jury trials are errors in rulings on the pleadings, errors in admission and rejection of evidence, errors in instructing the jury on the law, and errors in rulings on motions of the parties, e.g., motions for new trial and motions for directed verdict. The common errors in trials by the judge are errors in excluding evidence and errors in the judge’s findings of fact and conclusions of law.

However, not all errors in the proceedings are fatal. Some errors may be committed which the appellate court regards as harmless or at least as too trivial to require the radical remedy of reversal. Other errors are committed but corrected by the trial court before the trial is over. And it must always be remembered that a party cannot ordinarily take advantage in the appellate court of an error in the proceedings below, unless he has entered a proper objection when the error was committed. He cannot quietly sit by, see an error committed in the proceedings below, and raise an objection for the first time in the court above. If he does not make a timely objection he waives the error. Furthermore, the party must call the error to the appellate court’s attention in a proper manner and rely upon it for reversal.** The principle of party presentation, i.e., the principle that parties must represent their own interests, applies in appellate proceedings as well as in trials. So that it is never safe to assume that the mere fact that error has occurred means that the proceedings of a trial court will be reversed.

In each of our states there is at least one appellate court whose function is to review the proceedings of trial courts;

** (I.R.) Ordinarily these propositions hold but there are some errors, as every lawyer knows, which can be raised for the first time on appeal.
sometimes there are several appellate courts, as I shall point out presently. The most important of such appellate courts is a supreme tribunal or court of last resort. This supreme tribunal is usually called the supreme court, but in some states it is known as the court of appeals or the court of errors and appeals. In the federal system the supreme tribunal is the Supreme Court of the United States. Every supreme tribunal consists of several judges who sit together in the hearing and determination of appeals. The number of judges ranges in the different states from three to nine. In the Supreme Court of the United States there are nine justices.

Some of the state judicial systems have only one appellate court, e.g., Michigan. This arrangement is ideal if it can be made to work. Under this system every party litigant has the benefit of a trial and then of the scrutiny of the trial record by an appellate court. But a single appellate tribunal often has difficulty in keeping abreast of all the cases in which review is sought. The court may fall far in arrears with its business so that justice is seriously delayed. Or the court may have to resort to "one man" opinions; this means that each case is really considered carefully by only one appellate judge. He goes over the record; he decides whether the case has been properly tried; he writes the supreme court's opinion. The scrutiny of the case by the other judges becomes more or less perfunctory and formal. This, of course, defeats the very purpose of having appellate tribunals composed of several judges. Litigants do not get the benefit of the collective opinion of an appellate bench, to which they are entitled.

One way to meet the problem of handling the heavy load of appellate work has been to introduce intermediate appellate courts. This expedient has been adopted in the federal system and in New York, Illinois, and other states. It is

2 While almost all of the business of the Supreme Court of the United States and of the supreme appellate tribunals in the states is appellate in nature, each of these courts handles a certain amount of business in the first instance. This kind of business is referred to as original jurisdiction. See notes to sec. 3-09.
intended to take some of the load of appellate work from the supreme tribunal by making the determination of the intermediate appellate court final in a large proportion of cases. In the federal system the intermediate appellate court, called the court of appeals, seems to serve this function rather well. The United States is divided into ten circuits in each of which there is a separate court of appeals. This court has jurisdiction of most appeals from the district courts within its circuit; and in most matters which come before it the determination of the court of appeals is final. It would certainly not be convenient to have all appeals heard by a single court sitting in Washington.

However, there is serious doubt among procedural experts whether the intermediate appellate court is the best device for meeting the excessive load of appellate work in the state courts. The existence of an intermediate appellate court always raises a multitude of questions regarding jurisdiction. Which cases go to the supreme tribunal? Which cases are to be decided in the intermediate tribunal? In which cases is the determination of the intermediate court final? The determination of such questions is unnecessary if there is only one appellate court. And, in those cases which do go to the supreme tribunal via the intermediate court, the intermediate hearing simply presents an added appeal. It means that the case is heard twice by appellate courts. And this double hearing substantially increases the expense and delay of judicial business.

An alternative for the intermediate appellate court, strongly supported by experts on procedure, is to maintain a single appellate court, but to have it sit in several divisions, each division or branch to hear appeals. It is clear that, in a populous state like New York, one appellate court sitting as a unit, could not give due consideration to all the appellate

\footnote{A few cases are appealable directly from the district to the Supreme Court.}
work of the state. Some division of the task seems to be necessary. If the appellate court is sufficiently large and is split up into divisions, it can handle as many cases as can be handled by one supreme appellate court and several intermediate appellate courts; but duplicative appeals can be avoided as well as unnecessary jurisdictional questions. The court can sit as a whole (in banc) in cases which it deems of sufficient public importance and in cases wherein the judges of a division find themselves divided in opinion. This divisional method is essentially that employed in England. The supreme courts of ten of our states are authorized to sit in divisions, but so far this authority has not been exercised to any great extent.

In most cases the party who seeks a review is entitled to the same as a matter of right; he can carry his case to the appellate court if he chooses. This fact vastly increases the load of appellate work; it means that many unnecessary and unimportant cases have to be considered along with those which are of real consequence. Congress has met this difficulty in regard to the Supreme Court of the United States by making the review of most cases discretionary with the Supreme Court. The party who asks for review must satisfy the court that his case presents points of sufficient merit or doubt to warrant review. If so, the court allows him to bring his case before it for full hearing; if not, it denies the opportunity for a review. The result is that only a relatively small proportion of cases which are tried in the federal courts ever reach the Supreme Court. The great bulk of them is finally disposed of in the courts of appeals.

Sec. 3–19. Advisory opinions. From very early times, the judges of the high courts in England gave extrajudicial advisory opinions on questions of law to other governmental agencies (the King, the Privy Council, the House of Lords,
This practice was well established in England at the time of the American Revolution. But the framers of the Federal Constitution did not follow the English model; they expressly rejected a proposal to confer on Congress and the executive the authority to require advisory opinions of the Supreme Court. The powers of the judiciary were separated from legislative and executive powers. And the Supreme Court has consistently held that judicial power embraces only the adjudication of actual cases and controversies; it has held that the rendering of advisory opinions does not fall within the scope of judicial power.*

This view of the scope of judicial power has usually been adopted by the supreme courts in the various states. However, the constitutions of a few states (Massachusetts, Maine, New Hampshire, Rhode Island, Colorado, Florida and South Dakota) impose upon the highest court of the state the obligation to render advisory opinions upon the request of the legislature or either house thereof, or of the governor. And two states (Alabama and Delaware) have sanctioned the advisory opinion by statute. But most states definitely would not uphold legislation of this type without explicit constitutional authority.**

Where the advisory opinion is allowed, the procedure for obtaining it is as follows: the executive, by a written request, or either house of the legislature, by resolution, propounds to the supreme court a number of questions relating to a proposed measure or action. Answers are given by the judges

* (I.R.) Hayburn's Case, 2 Dall. 409 (1792); and Muskrat v. United States, 219 U. S. 346 (1911).


** Matter of the Senate, 10 Minn. 78 (1865); Reply of the Judges, 33 Conn. 586 (1867); Opinions of the Justices, 64 N. C. 661 (1870); State v. Baughman, 38 Ohio St. 455 (1882); Re Board of Public Lands, 37 Neb. 425 (1893); Matter of State Industrial Commission, 224 N. Y. 13 (1918).
of the supreme court, collectively or individually. While it is usually provided that the supreme court may require the aid of the attorney general or other counsel in reaching its conclusions, no satisfactory way of securing this aid has been devised and actually the aid of counsel is rarely asked or obtained. Furthermore, the court has no actual litigants before it so that it is not deciding a controversy. For these reasons, the court which gives an advisory opinion does not regard itself, or any litigant in a later case, as bound by such opinion. On the other hand, it is not to be expected that any court will lightly depart in subsequent litigation from an opinion earlier expressed in an advisory capacity.

The principal argument opposed to advisory opinions is the impracticability of devising ways for presenting and submitting questions to the court for advisory opinion. As I have already indicated, courts have never succeeded in obtaining the assistance of adversary counsel for their guidance in deciding questions presented. Not only is the argument of counsel necessary in the sense that the court may overlook important considerations unless it has this aid, but also the court has to give its opinion in the abstract, without reference to any concrete facts. The validity of legislation is often conditioned by the factual situation to which it will apply. As Frankfurter says, "Constitutionality is not a fixed quantity. In crucial cases it resolves itself into a judgment upon facts. Every tendency to deal with constitutional questions abstractly, to formulate them in terms of barren legal questions, leads to dialectics, to sterile conclusions unrelated to actualities." ¹ And this holds true of any abstract question, alike whether a constitutional question or a question of the meaning of a statutory enactment or executive action.

¹ See Frankfurter, "Advisory Opinions," in I ENCYCLOPAEDIA OF SOCIAL SCIENCES 475 at 478.
A strong argument in favor of advisory opinions is that they make possible the prompt resolution of doubts about the validity and meaning of legislative and executive acts. If an act is to be later declared invalid, it is much better that the act should not be passed or done at all. Even more important is the fact that a substantial period of time normally elapses between the date when a statute is enacted or executive action is taken and the date when the supreme court passes upon the validity or interpretation of the enactment or executive act. During this interval, costly and perilous uncertainty regarding legal rights and relations prevails. For example, the National Industrial Recovery Act was passed in the early stages of the New Deal. The validity of the Act was doubted from the beginning, and many of its provisions were very obscure. The Act affected most of the important business enterprises in the United States, and most of these enterprises attempted to comply with its provisions, deeming this the only safe course. Nevertheless, after almost two years, the whole Act was declared unconstitutional by the Supreme Court of the United States. 2 This kind of situation shows the practical need for having questions about the validity and interpretation of acts decided in advance of their operation and enforcement. The protagonists of the advisory opinion claim that it meets just this need, that it avoids waste in doing invalid acts and delay in passing upon acts of doubtful validity or doubtful meaning.

Queries: (1) There is a serious question whether the advisory opinion meets the need last suggested. On the basis of what is herein stated, what do you think about this point? (2) In what respect is the general purpose of the advisory opinion like the purpose of the declaratory judgment? (3) Why is it easier to bring the declaratory judgment within traditional notions of judicial power than to bring the advisory opinion within such notions?

Sec. 3-20. Acts of administrative agencies.* The constitutional separation of powers among three branches of government could have been taken to mean that governmental power was divided exhaustively among the three branches, so that no governmental power could be exercised and no governmental act done, except by the legislative, executive and judicial agencies provided for by the Constitution. But this has not been the construction adopted by those charged with the interpretation of the Constitution. The practical exigencies of government have required the creation of a fourth kind of agency, not strictly identifiable with any of the three traditional branches. These agencies are often called administrative. They are typified by the Interstate Commerce Commission, the Federal Communications Commission, the Federal Trade Commission, and various independent boards and offices, in the federal system; and are exemplified by workmen's compensation commissions, public utility commissions, and a great variety of boards and supervisory agents, such as insurance commissioners, banking commissioners, and others, in the state systems.

It cannot be said that these administrative agencies are all of one type, or that the powers they exercise, or the acts they do, are all alike. For this reason, I can give only a rough picture of the administrative agencies which function in our federal and state legal systems. These agencies are all created by or pursuant to statutes; in this respect they are like the subordinate executive agencies created by Congress and the similar executive agencies created by state legislatures.1 And usually, they are invested with certain duties and powers which might fairly be called executive in character, such as

*(I.R.) For bibliography on this subject, see Stone, Province and Function of Law 593 notes (1946) and Pound, Outlines of Lectures on Jurisprudence 92 (5th ed., 1943); and note also the lectures by Stason, cited in this section, note 2.

1 Regarding the rule-making, or legislative powers, which most of these administrative agencies have, see secs. 4-15 to 4-17, inclusive.
are involved in the supervision and enforcement of the laws with reference to banking, or the laws with reference to railroads, or utilities, or the laws relating to employer-employee relations. As regards functions, powers and duties, they are to be differentiated from the executive merely by the fact that they enjoy a more or less complete autonomy; in particular they are independent of the supervisory authority of the chief executive. They are given a special field of operation, such as one of the fields just mentioned, and enforce and effectuate the laws in that field. If they did not enjoy this independence and control of a special field, they would remain mere arms of the general executive branch, and we would not need to distinguish them from executive agencies which definitely fall within the executive branch.

Many of these administrative agencies are empowered to handle certain types of controversies between parties, controversies which are, in essentials, like private lawsuits. In this respect, these agencies serve functions similar to courts. They are authorized to decide both questions of law and questions of fact. For this reason, they are sometimes referred to as quasi-judicial agencies, and their powers are called quasi-judicial powers. But inasmuch as these bodies are authorized to follow simpler procedures than courts use, and inasmuch as they determine fact questions without jury, they cannot be regarded as ordinary courts. For example, a workmen’s compensation commission is given authority to pass on the claim of an employee against his employer for injuries arising in the course of employment. The employee must proceed before the workmen’s compensation commission. The commission decides how and when he was injured; and decides, according to a fixed schedule, what his compensation shall be. Formerly, this type of case would have been handled in a court proceeding by the employee against the employer. It would have been a matter for a court and jury to determine. This modern proceeding before an admin-
Administrative body has superseded the old legal action. This substitution of another trial agency in place of a court would not have been possible if grants of judicial power had been interpreted to mean that all controversies between parties must be heard and determined by the judicial agencies and methods provided for in the constitutions. On the contrary, administrative bodies are commonly allowed, in fields where public welfare so demands, to perform functions like those of courts, though these agencies are not regarded as judicial bodies in the full constitutional sense.

Not only could the constitutional separation of powers have been taken to mean that all the legislative, executive and judicial powers of government must always be invested in the three respective branches mentioned in the constitutions, but it might also have been held that the three kinds of power must always be kept separate from one another. It might have been held that the three kinds of power cannot be combined in a single hand. This view has often been urged; but again the interpreters of our constitutions have had to yield to the practical exigencies of government and to recognize the possibility of combining, in a single administrative agency, power to make regulations, power to enforce them, and power to adjudicate controversies regarding their meaning. In fact, this combination of powers is one of the outstanding features of the modern administrative agency. Instead of separating the regulative powers of government into three hands, the tendency in recent decades has been to separate powers of control in regard to different fields and subjects of human action. Thus, in the federal system, control over railroads is assigned to the Interstate Commerce Commission, control over radio transmission to the Federal Communications Commission, and control of certain employer-employee relations to the National Labor Relations

2 As well as one of the chief grounds of objection to the typical administrative agency. See items cited in next footnote.
Board; and in the state systems, control of the insurance business is invested in an insurance commissioner, control of public utilities in public service commissions, etc. Control of such a field is invested in a single body or official, and this body or official is given authority to legislate, enforce, and adjudicate within this field of special competence. In other words, within this field, the separation of powers as a scheme of checks and balances is not followed out; powers of control are not separated, but are combined in one hand. The administrative body or official is at once lawmaker, executive and judge. Its special field of operation is marked out and separated from others on a principle which is essentially the economic theory of specialization or division of labor. The idea is that a body which specializes in the control of railroads or public utilities, can do a better job of creating rules for their control, and a better job of supervising their activities and enforcing the applicable rules, and a better job of deciding controversies in regard to their activities and rules, than can an agency which has to make all kinds of rules, or to enforce all kinds of rules, or to settle all types of controversies. The job of control will be better done not only because of the knowledge and experience which comes with specialization, but also because the combination of powers of control avoids the delays and possible conflicts of views which may result where the job of control is divided three ways.

Our courts had no little difficulty about recognizing the constitutional validity of these hybrid agencies, exercising powers part legislative, part executive, and part judicial. They helped themselves over the difficulty at first by calling the powers of these agencies quasi-legislative, quasi-executive and quasi-judicial, as if the addition of the “quasi” conferred a different odor on the roses in question. As a matter of fact, the real basis for the creation and recognition of these agencies with mixed powers was the need for specialization
in governmental functions. And nowadays this basis is frankly acknowledged. Congress and the legislatures still have to decide when the public welfare demands that a governmental function be invested in an administrative body rather than in an executive officer or court. Indeed, Congress and the state legislatures are showing a definite inclination to put specific checks on the administrative agencies which they create in order to prevent abuses that can result from the combination in one agency of the functions of rule maker, rule enforcer, and judge. However, such checks are matters for legislative determination. There is no longer any doubt about the constitutional status of administrative agencies. Congress and the legislatures can invest their creatures, established to control special subjects, with almost any powers or combination of powers that they deem necessary in the public interest.

Sec. 3-21. Nonregulative acts of governmental agencies. It is sometimes tacitly assumed that government does just one thing: it performs a regulative function. In fact, this assumption is made in the conventional statement of the separation of powers doctrine. In classifying governmental powers into legislative, executive, and judicial, that doctrine subdivides only the regulative powers of government. Certainly the primary function of the state, as I have already pointed out, is to regulate the behavior of individuals; and certainly this regulative function of the state is that in which we, as lawyers, are most interested. Even the regulation of the behavior of officials must be regarded as secondary to the primary function of regulating the behavior of the individual.

But state agencies perform many acts which are non-regulative in character, and which fall quite outside the

3 See STASON, ADMINISTRATIVE DISCRETION AND ITS CONTROL (Cooley Lectures delivered in 1950); Federal Administrative Procedure Act of 1946, 5 U. S. C., secs. 1001-1011; and the Uniform Administrative Procedure Act (an equivalent state act), Wisconsin Laws, 1943, chapter 375.

1 Sec. 3-01.
threefold classification of governmental powers into legislative, executive, and judicial. Besides its regulative function, the state performs fiscal functions; it raises and spends money. It performs many public services, such as the maintenance of schools and highways and the keeping of records of various sorts. And it administers its own affairs as any private business concern would do. One sees the operation of these nonregulative activities of government most plainly in connection with the legislative branch. While the legislature takes its name from the fact that it enacts laws, legislative bodies in our American legal systems are not confined to lawmaking. The Congress of the United States, for example, is vested with sweeping powers of taxation. It authorizes contracts on behalf of the government; it procures and controls government property; it expends funds for the general welfare; it controls and issues money; it supervises and investigates the conduct of officials; it declares war and peace.

Similar acts of nonlegislative character are done by the legislatures of the states. These acts, of course, are confined to the fiscal and business affairs of the respective states. The executive agencies of the federal and state governments are, in their turn, required to carry out the legislative mandates affecting these fiscal and administrative activities of government, so that their activities also fall beyond the field in which conduct of individuals is regulated. And the judicial agencies of these governments are, in an analogous way, often concerned with controversies between agencies of government and other disputes which do not immediately relate to individuals. In short, we need to remember that its regulative activity is not the only function government performs. The conventional classification of governmental powers in regulatory terms is, therefore, one-sided and not exhaustive. It suits our present purpose well enough, but sometimes we find it necessary to look at all the functions of government in
order to understand the operation of regulative and effectuative measures.  

EFFECTUATION OF STANDARDS FOR OFFICIALS  

Sec. 3-22. Need for effectuation—control devices. In the last subtopic, I have mentioned the kinds of acts which officials do—chiefly acts which they do by way of effectuating standards applicable to the individual—and have called attention to the standards which are applicable to these official acts. I shall now pass on to the ways in which these standards for official acts are in their turn effectuated. Officials themselves are human beings and, like those whom they control, need not only standards to guide their actions but proper motives and habits to make them perform according to standards.

The problem of making effective the standards applicable to official acts is essentially like the problem of effectuating standards for the individual's behavior; it is a problem of insuring proper motivation and habits. However, it is not quite as easy to devise methods to control officials, and especially top officials, as it is to devise methods to control the individual. This is the point of a celebrated question asked by Juvenal regarding Plato's proposal of a state in which the "guardians" would exercise all governmental authority: "Quis custodiet ipsos custodes?" (Who shall keep guard over the guardians themselves?) In general terms, the answer to this question of control is easy. Officials will be controlled by the acts of their superiors, by their education.

2 After all, the activities of government of every kind and character are woven together in an inextricable manner so that no part can be properly evaluated apart from the whole. This is a point which has already been stressed. See secs. 2-36 and 2-39. It is a point which I shall have occasion to dwell on again later. See secs. 7-17 to 7-27, inclusive.  

1 The discussion in the present subtopic parallels the discussion of methods of effectuating standards for the individual, secs. 2-29 to 2-42, inclusive.  

2 SATIRES, VI, 347.
and training, by promise of reward for good behavior, by threat of penalty for bad, and so on, just as any actor is controlled. But when we undertake to work out specific programs for the control of particular types of officials, acting in the varied situations where they must act, the problems of devising sanctions to control officials become most difficult and complex.

The methods devised and used in the American legal system can be reduced to four:

1. The use of independent officials as checks upon one another.
2. The selection of officials on the basis of proper habits and training.
3. The assurance of sound conditions of tenure.
4. The supervision and disciplinary control of officials by superiors.

In the next section, the first of these methods will be considered; in the sections immediately following, the other methods will be treated as they apply specifically to control of inferior executives, the chief executive, the trial jury, the trial judge, and the appellate judge.

Sec. 3–23. Checks and balances—separation and integration of powers. As I have already mentioned, a prominent feature of all the American constitutions, beginning with the federal, is the separation of governmental powers and acts into three kinds: legislative, executive, and judicial. This separation was not made by the framers of the Federal

1 Although the doctrine of separation of powers is embodied in all the state constitutions, I shall speak here only of the Federal Constitution because it was the original instrument in which the separation was definitely adopted, and because it will serve as an adequate illustration of the nature and effects of the doctrine. It should be noted, however, that the Federal Constitution does not mention the separation doctrine explicitly, as some of the state constitutions do. It simply makes a separation of powers in distinct and express terms; in Article I it provides for legislative power; in Article II, it allocates executive power and defines its scope; and in Article III, it defines the scope of judicial power.
Constitution merely as a matter of convenient classification; it was made as a matter of policy. The founding fathers were deeply impressed by the argument of Montesquieu in his *Spirit of the Laws* that such a separation is essential to the security and protection of the individual.* Behind the separation of powers of government in this manner was a policy of checks and balances. The notion was that by creating three separate branches of government, each would serve as a check upon the acts and activities of the others. No one branch would be able to exceed or misuse its powers, inasmuch as it would be restrained by the powers and acts of the other two. In other words, the founders of our government expressed in the doctrine of separation of powers their intention to make the three branches of government independent for a special purpose—the purpose of using each branch as a means of insuring proper behavior, i.e., behavior according to standard, by the others.\(^2\)

The function of Congress as a check on the executive is seen in the fact that the great bulk of legal standards which the President is to enforce and effectuate are created by Congress. Most of his powers depend upon statute.\(^3\) Moreover, the President cannot act without the aid of subordinate officials, and these officials occupy offices created by Congress.

\(^*\)(I.R.) The theory of checks and balances did not originate with Montesquieu; Locke expressed the theory in somewhat different form. And the notion of using one organ of government as a check upon another was advanced by Polybius, a Greek writer, before the Christian era. Also, the colonial governments were already organized on lines which resembled the division of powers made by the Federal Constitution.

\(^2\)It must also be remembered that the separation of powers among three branches of government is not the only instance in which the principle of checks and balances appears in the framework of American government. The division of legislative power between a House and a Senate is a separation derived from the British Parliament. The division of powers between the federal and the state governments makes the general government and the state governments checks upon one another. Similar observations apply to constitutional divisions between state and local government, such as the Home Rule Amendments, which have been adopted in many of our states.

\(^3\)A few important powers are conferred on the President by the Constitution; but most of his powers depend on statutes.
and supported by Congressional appropriations. And, while the appointment of higher officials is normally made by the President, any such appointment must be approved by the Senate. In all these respects we see, then, that Congress has a very real restraining authority over what the executive branch does. On the judicial branch, similar legislative checks obtain. All the federal courts except the Supreme Court depend on acts of Congress for their existence. All the powers of the courts in the federal system, except a few constitutionally defined powers of the Supreme Court, are fixed and defined by the Congressional will. Judicial appointments can be made only with the approval of the Senate, or in such manner as Congress shall determine. Finally, Congress checks both executive and judicial behavior through its power to remove federal officials from office by impeachment. The House of Representatives is empowered to start removal proceedings by filing charges of misbehavior, and the Senate is invested with power to hear and determine such charges and enter judgment of removal.

The President's power to veto legislation, his discretion in initiating action of various sorts, and his control over officials who enforce law, serve to make him a check on the behavior of the legislative branch, especially as he owes his election to the people and not to Congress. The President has some checking power as regards the judiciary in his power of appointing judges. More important perhaps is the fact that the President is the ultimate agency to enforce decrees of the courts, and in this sense serves as a check on their action. For ordinary purposes, the court's own marshal can accomplish whatever is required, but if military assistance becomes

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5 Also his power to pardon serves as a check on judicial action in the criminal field.
necessary, the courts must call upon the Chief Executive who has control of the military forces.\(^6\)

The judicial branch serves as a check on Congress chiefly through what has come to be known as the power of judicial review. This is the power to pass on the constitutionality of legislation. This power stands in the way of efforts by Congress to exceed its legislative powers.\(^7\) And the judiciary exercises an analogous check on the executive branch. The courts pass on the question whether executive action exceeds constitutional authority; or, where executive action purports to be taken under authority of statute, they decide whether such action is in harmony with the statutory authority conferred by Congress.

There can be no doubt about the importance or soundness of this system of checks in the American governmental scheme. But there has been a tendency at times to exaggerate the extent of the cleavage between the branches of our government and to forget the reason for their separation. The branches of government were intended to co-operate with, as well as to check, one another. The three branches of government are partners in the processes of regulation. The one branch is to establish regulative provisions, the second branch to see that they are enforced, and the third branch to settle controversies regarding the meaning and application of regu-

\(^6\) This is the point of the remark, attributed to President Jackson, "Well, John Marshall has made his decision, now let him enforce it." The decision referred to was that of Chief Justice Marshall in Worcester v. Georgia, 6 Pet. 515 (1832). The State of Georgia was ready to defy the authority of the Supreme Court in this case. It seems probable that President Jackson never made the remark quoted. WARREN, SUPREME COURT IN UNITED STATES HISTORY, II, 219 (1922). Nevertheless, the effectuation of the Supreme Court's decrees against states or large groups does depend on executive action.

Also, the judges of the federal courts may depend on the executive for protection against personal attack. See In re Neagle, 135 U. S. 1 (1890), a dramatic case in which a disgruntled litigant assaulted Justice Field of the Supreme Court while the latter was acting as circuit judge in California. The attacker was killed by Neagle, a United States marshal, who had been assigned by the Attorney General to protect Justice Field.

\(^7\) As to judicial review of the validity of legislation and the effects of such review, see also secs. 4-08 to 4-13, inclusive, and 7-36 to 7-38.
lations. The three branches are partially separated, but also interdependent. The separation has to be interpreted in the light of its purpose—to prevent the abuse of power by any of the three branches of government involved in the processes of regulation. Each is intended to check, but not paralyze the others' action. The activities of all are integrated by a common regulative purpose, and the division between them is not intended to destroy their unified operation. As Woodrow Wilson once said, "Government ... is a body of men, with highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose. Their cooperation is indispensable, their warfare, fatal."  

Sec. 3–24. Control of inferior executives. We have now considered the checking influences which distinct and separate branches of government may exert upon one another's behavior. We move on to other processes of control, and con-

8 The system of checks demands that two branches join in governmental acts. If the action of each were quite independent of the other, there would be no checking. Thus, two houses of Congress check one another and at the same time cooperate in legislation, taxation, impeachments, etc. The President and Senate participate in appointments and in treaty making. See Luce, Legislative Problems 104–139 (1935). The Congress is checked by the courts because legislative acts have to be applied by them in litigated cases. Indeed, all the instances of checking mentioned in the text are at the same time instances of co-operative action.

9 Constitutional Government in the United States 56 (1908). The most important instances of checks, extending to the point of paralyzing effective governmental action, have been the cases of judicial assertion of power of review of any and all kinds of executive and administrative action of the federal and state governments. This meant, for example, that every hearing on utility rates had to be retried in a federal court, and the processes of rate making were slowed to a point where they were almost completely stalled. This was the practical situation as regards many forms of governmental activity in the 1920's. Since that time the Congress has limited the powers of judicial review in various ways, and since about 1938 the federal courts have adopted a strong presumption in favor of the correctness of executive and administrative action. This combination of statutory limitations and a hands-off policy of the courts has completely altered the picture in this important area. See for example Railroad Commission v. Rowan and Nichols Oil Co., 310 U. S. 573 (1940); Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591 (1944); and Yakus v. United States, 321 U. S. 414 (1944).
sider the efficacy of methods of selection, of conditions of
tenure, and of supervision and disciplinary measures as
applied to various types of officials. I shall begin with inferior
executive officials.

First, the behavior of inferior executive officials is deter­
mined by the way in which they are selected. Undoubtedly,
the best way to insure proper official behavior is to pick
persons with sound qualifications. Three methods of selection
are commonly used. All are theoretically intended to secure
men who by habit and training are most likely to perform
the acts which their respective jobs call for. One method of
selection is *appointment*. The power to appoint is usually
vested in a single person, such as the President, or the gov­
ernor of a state, or the head of a department or bureau. The
appointing official, if competent and honest, can satisfy very
well the need for a choice based on an estimation of qualifi­
cations and training. This method emphasizes the personal
judgment of the appointing official regarding the personal
qualities of candidates; it is especially suited for use in choos­
ing higher officials who will be called upon to determine
policy questions to some extent, and whose qualifications for
this purpose can hardly be measured by any fixed standard.

Another method, and one which has quite wide vogue in
this country, is *popular election*. This method of choosing
fit candidates for such offices as sheriff, prosecutor, etc., goes
back to the full flush of Jacksonian democracy. As a method
of choosing officials to enforce the law, it has little to recom­
mend it. Popular election has its place in government; we
should by all means elect those who make our laws; we
should all have a voice in shaping the policies of government.
But, when it comes to the application and enforcement of
those policies, when it comes to the administration of law,
we need impartiality, not popular impulse; we need the man
who knows his business and who applies the law as it is,
honestly and fearlessly. Popular election does not get such
men; in fact, it works the other way. The major fault of popular choice is that you and I and other citizens cannot obtain the information necessary to pass on a candidate's fitness for sheriff, register of deeds, or prosecutor. We have no way of getting the facts regarding his ability, his training, his habits, his disposition or his fairness. And probably one is too optimistic in supposing that the mass of voters attempt to choose the best man. Many voters forget the question of merit entirely. They vote for a candidate because of friendship, or they cast a straight party ballot, or they vote against an incumbent official because he has done an act adverse to them or their friends, regardless of whether the act was right and proper or not. In short, election of officials is an indiscriminate affair. It has little to do with fitness for office. It reflects chiefly the ability of the particular candidate to make a direct personal appeal to voters, or his readiness to make promises to particular persons, or to political or economic groups, in exchange for their support.¹

A third method has come to be used more and more in recent decades. It gives promise of supplanting the other methods wherever this is constitutionally possible. This method we may call the civil service method. It relies primarily on the written examination to test the qualifications of candidates. The examination is generally open to all who fulfill certain formal conditions of training and experience. The examination is usually given by a board or by officials acting under the supervision of a board. In addition to the examination, there is usually a certain amount of weight attached to personal experience and to a face-to-face interview in which the personal qualities of each candidate are rated. Furthermore, the board does not actually choose a

¹ The faults of popular election, here mentioned, are most noticeable in choosing officials for large urban communities. In rural communities and small towns, where electors usually know the candidates and their backgrounds, popular election can work with a reasonable degree of satisfaction.
particular man for the job in question, but sends the names of the highest qualifiers, e.g., three persons, to the head of the agency for which a person is to be chosen. The head of the agency is left free to appoint from the candidates so suggested.

The conditions of official tenure are no less important than the methods of selection. In order to secure the most efficient and impartial service from officials, it is essential to guarantee to them indefinite tenure of office, or, as it is more commonly called, tenure during good behavior. At this point, government is confronted by an apparent dilemma: either to give all officials security and independence, which may involve a continuation of weak and incompetent persons in office for life; or to reserve a power to terminate official tenure at any time, which, of course, enables government to get rid of its unfit officials. If the first course is chosen, unfit men may be kept long in office. If the second course is chosen, all officials are deprived of that feeling of security and independence which is the very foundation of unselfish devotion to duty. On the whole, the balance of arguments is in favor of secure tenure, especially if this tenure is coupled with sound methods of selection and removal. If officials are chosen on the basis of merit, not too much unfit timber should find its way into the official structure. At least, the number of unfit persons should, on the average, be lower than the number who will fill offices when all candidates are chosen on a partisan and temporary basis; and even civil service need not stand in the way of removal from office for such causes as fraud, disobedience, or neglect of duty.

Compensation also needs to be reasonable in amount. Inadequate compensation has three harmful tendencies. It introduces a temptation to dishonesty and corruption; it results over the years in the resignation of the more energetic officials; and it diminishes the enthusiasm for service of those
who remain in office. Compensation should also include a provision for that deferred type of payment which we commonly call a pension; such pension is essential to give security and thus independence to the officeholder. The combination of secure tenure, reasonable pay, and adequate pension, is calculated to secure for government services and abilities which would command substantially higher returns if devoted to private business.

Behavior according to approved standards can also be insured by supervision and threat of disciplinary measures by executive superiors. Most officials are subject to supervision by superiors who can issue direct orders for action, require reports on action taken, and scrutinize or criticize the work of their inferiors. Usually, this kind of supervision is coupled with authority to remove for misconduct or neglect of duty. Where civil service is in force, removal from office can be accomplished only after a hearing by an impartial agency and only for stated causes. These restraints on removal are essential to guarantee the secure tenure and independence at which the civil service system is aimed.

Besides the disciplinary measures just mentioned, the public prosecutor can, in many instances, proceed criminally against inferior executive officials for abuse or misuse of powers, or for neglect of duty. He can also employ "extraordinary legal remedies," such as quo warranto to question the exercise of official power, prohibition to prevent the exercise of power not possessed, and mandamus to compel the exercise of official power; and he can often use equitable remedies by way of injunction for purposes not unlike the functions of these extraordinary legal remedies.

The individual also enjoys adequate civil remedies against inferior executives whose misbehavior causes, or threatens, injury to him. From the public viewpoint, these remedies serve as sanctions to enforce behavior according to approved
standards. For example, if a sheriff makes an unjustified arrest, he is liable for false imprisonment; if he makes an unauthorized seizure of an individual's property, he may be required to pay the full value of the property by way of compensation. If an official fails to do an act which he is commanded to do for the benefit of an individual, the latter may ordinarily hold him liable for damages, e.g., where an official negligently fails to serve process in an action by A against B and damage results to A. And official duties may also, in some instances, be enforced by equitable or extraordinary legal remedies at the individual's behest.

Examples need not be multiplied. You will realize by this time that the obligatory and prohibitive standards directed to minor executives, their duties to act or not to act, are backed up by formidable sanctions and control devices. Nevertheless, you will find only too often a considerable difference between the standard for official behavior as it appears in the books and the behavior of officials as it works out in actual practice. Just as there are private persons who ignore applicable standards or consciously violate them, so there are public officials who fail to act in cases where they should act, or who do not carry out duties in the manner prescribed by standards. There is a great difference between an alert policeman and an indifferent one. This kind of difference counts heavily all the way up the scale to the chief executive.

Finally, there is a large and important part of official behavior which is not covered by obligatory or prohibitive standards. The official is given discretion or power to act or both. In these cases, action is left to the official actor's judgment. His acts are intended to be free and uncontrolled. Beyond furnishing him with patterns for effective action, to

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2 On this point, compare what is said in sec. 2–29 et seq., regarding the discrepancy between standards for the individual's act and their effectuation.
use if he chooses to act, the lawmaker does not concern himself greatly about effectuation or enforcement. Even the traffic officer has some discretion in the performance of his duties. The element of discretion increases as one proceeds upward in the hierarchy, as I have already said. Standards of behavior become more general; they do not prescribe behavior so definitely and so specifically. Sanctions for departure from standards are less immediate and direct. Thus, the public prosecutor as compared with the ordinary policeman has a very wide discretion. He has a great deal of leeway in deciding what cases to prosecute and what cases to disregard. He may take into consideration the strength of the evidence, the character of the person accused, and the hope for his reform if he be given another chance. This kind of discretion is a very good thing in the hands of a sound official, but it is hard to draw the line between proper use of discretion and the neglect of duty. An incompetent or dishonest prosecutor can go pretty far before the sanctions of the law will strike him.

Sec. 3–25. Control of the chief executive. The chief executive is always chosen by popular election. While no one can deny that some very weak and some dishonest men have been elected to the highest executive offices in this country, I doubt if any serious student of our democratic

3 Sec. 3–06.
4 For example, in the days of prohibition the breakdown of enforcement was in large part due to the refusal of prosecutors to institute prosecutions for violations of the liquor laws. One could not blame the prosecutor in an urban community too severely for this neglect of duty. Quite apart from possible corrupt motives for his neglect, the prosecutor knew that it was most difficult to secure convictions by juries drawn from a population which was largely opposed to prohibition and that his ardor in favor of enforcement would not be appreciated by the wet voters whom he would have to face in a campaign for re-election. Hence, the prosecutor was naturally inclined to make a big show of prosecuting violators, but actually to do no more than was necessary to keep the drys from becoming aroused and organizing a campaign for his defeat.
institutions would substitute any other method of choosing our chief executives for choice by popular election. Some changes in the methods of nominating candidates and in the machinery of election might be suggested, but on the whole I believe that popular election of the President and governors meets with approval.\(^1\) Popular election works reasonably well in regard to chief executives because of the prominence of the officers involved. The successful candidate must almost always be a man who is well known and who has maintained himself in the public eye for a substantial period of time. He usually runs on a more or less definite platform. The average voter realizes that the chief executive has a hand in determining important public policies. For these reasons the voter is apt to scrutinize the chief executive’s qualifications more carefully than he does the qualifications of candidates for inferior offices, especially in states where the number of elective offices is very large and the voter must indicate choices for every office from lieutenant governor and secretary of state to dogcatcher.

The tenure of office of the chief executive is ordinarily fixed at a relatively short period of years—four years in the case of President of the United States and of most state governors, though in a few states the governor holds office for only two years. In a number of the states the governor is explicitly made ineligible for re-election. Short terms and denial of re-election were both dictated by the purpose to prevent the perpetuation of men in office—a reaction against the former British practice of hereditary succession to, and life tenure of, many executive offices. It was intended to make the control of policy by the electors direct and imme-

\(^1\) I have not made mention here of any of the details of nomination or election, such as party conventions, nominating primaries, or the federal electoral college. These subjects are very important, to be sure, but I regard them as more properly topics for courses in government, which I assume that most of you have had, than as topics for discussion in the present course.
diate. However, the short tenure of governors has its drawbacks, too. In Michigan, for example, where the governor holds office for two years, the chief executive has an insufficient time in which to formulate and push through a program. He is hardly settled in office before he must again run the gauntlet of popular approval or disapproval.

The President of the United States needs and receives a substantial compensation, $100,000, plus large allowances for expenses. The pay of governors is also ample in some of our states. In other states, an unwise financial policy has been pursued by the legislature of keeping the governor's salary at an insufficient level, or else the salary is fixed by the constitution so that changes cannot be made to meet rising costs. The result of this kind of false economy is that the man who is elected governor must either be a rich man and spend freely of his own funds, or he must make political commitments to persons who furnish the funds to finance his election campaigns. Either result is contrary to the public interest.

However, the length and security of tenure and the adequacy of pay, count for less in relation to the office of chief executive than in relation to most other offices. The candidate for chief executive is largely actuated by the desire for honors and influence. And, in the case of the candidate for governor, the job is often looked upon as a stepping-stone to such offices as United States senator, ambassador, cabinet member, etc. So that in general, the quality of our chief executives has been relatively high, despite some of the disadvantageous tendencies mentioned in the foregoing paragraphs.

There are no very effective ways of enforcing the standards of behavior applicable to the official, who is himself the highest law-enforcer. To start with, his range of discretion is very wide, and the standards which apply to his activities are usually broad and ill-defined. Then there are no ways of
compelling the chief executive to perform his positive duties, such as his duty to employ the military forces to suppress disorder, his duty to set in motion machinery to enforce laws, or his duty to appoint officials to fill vacancies. His prohibited acts, which violate the rights of others, may be challenged before the courts in litigated cases; improper acts may be held to be forbidden or ineffective. And the chief executive’s underlings may be prevented from carrying out his orders by threat of suit on behalf of persons injured, e.g., if a sheriff undertakes to carry out an unlawful order of the governor. Yet there are no judicial remedies of any consequence which are operative against the chief executive directly. He may, of course, be impeached and removed from office if his conduct be flagrant enough. But impeachment is remote and cumbersome; it is rarely attempted and not often successful. Also, the chief executive may be defeated for re-election, if the voters disapprove of his behavior. But this, too, often fails as a method for visiting on an incumbent the proper consequences of misbehavior. It is only too easy for the demagogue to explain away the bad features of his deeds to an electorate which cannot be too well informed on the facts. In short, the obligations of the chief executive are without effective legal sanctions. The proper behavior of the chief executive is guaranteed principally by the quality of the man himself and by the impact upon him of the opinion of his leading associates and of the general public.

Sec. 3-26. Control of the trial judge.* The chief actor in the adjudicative process is the trial judge. He controls the jury; he has wide discretion in many matters; he often

has to pass on matters of vital importance to individuals. For all these reasons we hope for, and expect from him, the utmost degree of fairness and objectivity in making his determinations. The control of his behavior, like the control of inferior executives, takes us back to fundamental questions of selection, tenure, compensation, supervision and discipline. In order to get and keep good judges, men who will perform their functions according to prescribed standards, important problems of training, habits and motivation need to be solved.

In the federal system, judges are appointed by the President with the approval of the Senate. On the face of it, this method of selection might seem to promise satisfaction. But, unfortunately, the appointment of inferior federal judges has come to be heavily involved in local partisan politics. The President has, to a large extent, abdicated his power of selection, and leaves the real choice to members of the Senate or to the politicians who stand behind them.¹

In most of our states, trial judges are chosen by popular election.² This method of choosing judges is open to all the

¹ "This has come about because political interest in district and circuit judgeships is local rather than national, because the President does not have time to investigate the reputation and standing of candidates and is forced to seek information and advice from local leaders, because senators and other influential persons of the state in which a vacancy occurs will naturally be consulted by the Senate when it passes upon an appointment, and finally because the President himself is in the midst of politics, and is forced to cede local patronage for political support. But whatever the causes, there is no doubt of the facts. Appointments of inferior judges and promotions to the circuit courts of appeal are dictated today by the senators from states where the vacancies exist, at least if they are influential and of the President's own party; if the senators are members of the opposition party, then naturally the President turns for 'suggestions' to the local chiefs of his own party. Every vacancy results in a wild scramble and pulling of political wires which is only less hurtful to judicial independence and disinterestedness than is a popular primary or election. I ask the reader candidly whether we dare view this situation with indifference, whether we dare look on without concern while this last citadel of justice according to law is engulfed by the rising tide of politics." Shartel, "Federal Judges—Appointment, Supervision and Removal—Some Possibilities Under the Constitution," 28 Mich. L. Rev. 485 at 488 (1930).

² According to Haynes, judges are popularly elected in all but thirteen of the states. In Connecticut, "Most judges are appointed by the Governor with
objections that can be made to its use in the choice of inferior executives. In addition to the fact that the average voter is quite unable to pass upon qualifications for judicial office, the popular election and the mudslinging which goes with it scare away many of our best potential judges. A campaign for popular favor disgusts men of fair and independent type, the very men who would make good judges. Such men do not need to curry favor with anyone in private law practice. They refuse to subject themselves to the political obligations which popular elections involve. The consequence is that the choice of judges is limited, generally speaking, to the lesser lights of the bar. In saying this I do not mean to say that we do not obtain some good judges by popular election. We all know elected judges who have served ably and well. But I do mean to say that the tendency of the system is wrong, and that we have probably obtained more good men than we were entitled to expect.

In recent decades there has been a strong and persistent movement among civic leaders and members of the bar in the several states to introduce methods of selecting judges on a merit basis. There seems to be fairly complete agreement that judges should be appointed, and that their appointment is.
ment should be hedged about by safeguards against the making of political appointments. The methods proposed usually combine appointment with checks to insure a scrutiny of qualifications and to eliminate political wirepulling. Most of the proposals have taken one of three forms. One proposal would vest the power of appointment in the chief justice of the particular judicial system, a proposal which has, so far, not been adopted anywhere in this country. Another proposal would vest power to nominate in a nonpartisan commission, which is obliged to investigate the qualifications of candidates and suggest a list of names to the governor for appointment; the governor's choice would be limited to the persons whose names are thus submitted to him. This method of selection has been adopted in Missouri as a mode of choosing trial judges in the St. Louis and Kansas City areas, as well as all judges of the supreme and intermediate appellate courts. A third proposal of this sort would provide for appointment by the governor with the approval of a nonpartisan commission; it would place the initial selection in the governor, and give a sort of veto to the nonpartisan body. This method has been adopted in California as a mode of choosing appellate, but not trial, judges. Obviously, the make-up of the commission which proposes or approves judges under these various schemes is most important. It is

5 In the states, gubernatorial appointment with the approval of the state senate (or equivalent body) seems not to have worked badly; and in the recent New Jersey constitution, this is the method of judicial selection which was adopted. Const. 1947 Art. VI, Sec. 6.

6 Judicial selection of judges has been proposed by a number of writers. Appointment of inferior federal judges by the Chief Justice with the approval of the Supreme Court, is the method which I have urged in an article, "Federal Judges—Appointment, Supervision and Removal—Some Possibilities Under the Constitution." 28 Mich. L. Rev. 485 (1930).

In England, judicial appointments are made by the Lord Chancellor, who is the highest judicial officer of the realm and who might, therefore, be compared to the Chief Justice of the Supreme Court of the United States. However, The Lord Chancellor does not hold his office as such permanently, but only so long as the ministry of which he is a member holds office.

7 Const. Amend. 1940 Art. VI, Sec. 1.

8 Const. Art. VI, Sec. 4a.
desirable to give various interests representation on the commission; it is desirable to have on the commission some men who have had judicial experience, some who are practicing lawyers, and some who are representative of the lay public. If the members of the commission be chosen to represent various informed interests, and if they be given fairly long and staggered terms, I believe that politics in judicial appointments can be reduced to a minimum, and that the chances of getting a uniformly high-grade judiciary would be much improved.

Tenure during good behavior is guaranteed to judges of the federal courts by the Constitution; and judges of the superior courts of Massachusetts, New Hampshire and Rhode Island enjoy the like tenure. Under the new constitution of New Jersey, the judge holds office on first appointment for a term of seven years, and on reappointment remains in office during good behavior. Trial judges in the other states hold office for limited terms of years. In most of these states, the term is relatively short—four to six years; but in a few of them, the trial judge’s term of office is relatively long, e.g., in New York fourteen, and in Pennsylvania, ten years. Any limitation of tenure to a period of years, especially to a short period, is inimical to judicial independence. But actually, the harmful effects of repeated

9 Such a nonpartisan commission was represented by a constitutional amendment proposed a few years ago by the State Bar of Michigan. It would have provided for appointment of supreme court judges by the governor on nomination of a judiciary commission of nine persons, to be chosen as follows:

“The judiciary commission shall consist of a justice of the supreme court elected by the justices of that court, a circuit judge elected by the judges of the circuit courts, a probate judge elected by the judges of the probate courts, three electors of this state not licensed to practice law therein appointed by the governor, and three members of the bar of this state appointed by the commissioners of the state bar of Michigan.”

10 See Haynes, Selection and Tenure of Judges (National Conference of Judicial Councils) 10, 30–50 (1944). The superior quality of justice, which is usually dispensed in our federal courts, must be ascribed to the secure tenure and adequate pay of the judges and to the prestige which their office involves. Certainly one cannot attribute it to sound methods of selection (see above, this section) nor to effective methods of discipline (see below, this section).
exposure to popular caprice have been considerably reduced in many places by the activities of bar associations in supporting incumbents for re-election, and by the gradual development in many localities of a tradition of re-electing the sitting judge. If the end of each term always meant for the judicial incumbent a real battle for re-election, I believe that we would have a much less competent judiciary than we have in most of our state courts. Only by making popular elections more or less a form has this mode of choice been able to produce passable results.

The pay of trial judges varies greatly. The United States district judge has a salary of $15,000. In 1948, the salaries of some trial judges of general jurisdiction in the states of Kansas, Oklahoma and Utah were as low as $4,000. In New York, judges in the more populous departments now receive $28,000; in the less populous, $18,000. In Pennsylvania, the judges of superior courts receive $21,000. In Michigan, the salaries vary between $7,000 and $16,500 in different counties. In the great majority of cases, trial judges are paid salaries of $6,000 to $7,000. In these days when the most ordinary labor is paid one dollar and fifty cents or more per hour and skilled workmen receive two to three dollars per hour, there can hardly be a doubt in anyone's mind that $6,000 is inadequate as pay for the kind of work which the judge does and the kind of responsibility which rests on his shoulders. When inadequacy of pay is added to the drawback of short terms and the possibility of defeat for re-election, it is hardly to be supposed that the best lawyer will choose to remain long in judicial office. If such a man does seek a judgeship, he does so for the sake of the experience and the profes-

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11 If the reader wishes to see complete and specific figures regarding the salaries of state judges, I refer him to 31 JOUR. AM. JUD. SOC. 150 (1948).

Adequate pensions are hardly less important than adequate pay. See discussion of this point in sec. 3–24 above; and on the subject of judicial pensions, see generally my article "Pensions for Judges," 27 Mich. L. Rev. 134 (1928); for recent figures on pensions, see 31 JOUR. AM. JUD. SOC. 147 (1948).
sional prestige which he will enjoy after he has held such an office.

So far, I have spoken of problems of selection, tenure and compensation of trial judges. I cannot say that we have been quite successful, on the whole, in dealing with these problems. Nor can I give a more favorable report about our handling of problems of discipline and supervision.

The first and most important of existing checks on the behavior of the trial judge is threat of reversal for error. The Supreme Court will upset his judgment in a civil case, or his sentence in a criminal case, if the trial judge commits a substantial error of law or fails to comply with the standards which control him in any essential respect. The threat of reversal is effective as far as it goes; no judge wants to have his acts publicly exposed as erroneous. The difficulty is that this remedy does not cover enough. It does not cover personal misconduct, unless it is obvious enough to get into the record and unless it is clearly prejudicial to a complaining party. Misconduct, such as drunkenness in or out of court, inattention on the bench or arbitrary refusal to listen to argument, manifestation of bias in front of the jury, and abuse of lawyers, cannot ordinarily be reached through threat of reversal.

A second possible check on the trial judge is threat of criminal liability for his acts. This threat applies to judges as well as to other persons; but it is not practically very important, since judicial misconduct, if it occurs, is not likely to be criminal in character. And civil liability of the judge as such, to individual parties is not recognized at all.

"Judges have always been accorded complete immunity for their judicial acts, even when their conduct is dictated by 'malicious' or improper motives. The reason is not a desire

\[12\] Furthermore, orders of the Supreme Court are enforcible against the trial judge by threat of personal punishment for contempt; so that we can say that they are backed by effective sanctions.
to protect the misbehaving official, but rather the necessity of preserving an independent judiciary, free from the undue influence of the threat, or even the possibility, of subsequent damage suits.” 13

The third check on the trial judge, operative where judges are elective, is the threat of defeat for re-election. The fear of such defeat may indeed check some kinds of misbehavior. The judge who has to be elected from time to time is inclined to be more polite than he might otherwise be to influential parties and attorneys. Only, defeat for re-election is indiscriminate; it cuts down the courageous and honest judge who has to make an unpopular decision as often as the judge who misbehaves in a way to displease the public. It is like a drastic medicine which kills disease but kills the patient, too. Its net effect is to destroy independent judicial behavior of all sorts.

Finally, there is the threat of removal from office by impeachment. 14 While the judge is legally subject to removal for personal misbehavior, this remedy is hardly ever used. The houses of the legislature are too busy with other things to deal with impeachments. Especially in states where judges are popularly elected, the disposition of the legislature is always to “pass the buck” to the electors. Impeachment proceedings are not even attempted, as a rule, except in the most flagrant cases of misconduct. Fortunately, judicial misbehavior is relatively rare, but I feel that it is nonetheless essential to have effective methods of removing judges when cases calling for removal do occur. In recent years in Detroit, for example, two judges have been repeatedly charged in the newspapers with drunkenness and other scandalous mis-

13 ProsseR, Torts 1075 (1941).
14 In many states, judges are also removable by joint resolution of the houses of the legislature, called “address.” If the reader is interested in a detailed discussion of methods of removal, I refer him to my article, “Removal and Retirement of Judges,” 20 Jour. Am. Jud. Soc. 133 (1936). This method is patterned after the British practice. It is applicable, either expressly or according to general understanding, to such cases as disability and incompetence, and not to cases of misconduct. It is even less frequently used than impeachment.
behavior. If these men are innocent it is not fair that such accusations go unheard; if they are guilty, it is not right that they remain in office. Yet nothing has been done about the charges against them; and there is no way now existing to eliminate an offending judge other than impeachment.

What is needed is a judicial method of removing judges for misconduct. The supreme court, or an administrative council composed of judges, should be vested with power to remove any misbehaving trial judge or judge of an inferior appellate court, after notice and hearing. This method of removal is used in other countries, and is provided for in a few states in this country. Jurisdiction to remove judges for cause is not unlike jurisdiction to disbar attorneys. It should be exercised in a manner similar to disbarment proceedings.

Just as much needed as effective methods of removal is provision for judicial supervision of the personal conduct of the trial judge. One of the most common objections to judicial tenure during good behavior is that the judge who enjoys this tenure tends to become arbitrary and high-handed. Certain federal judges are pointed to as examples. As I have said in another place:

"Perhaps this objection is sometimes made by attorneys who are only aggrieved by the fact that they are not allowed to run wild in the federal courts as they are too often allowed to do in state courts where judges are afraid of political consequences. But one would not be warranted in assuming that this particular criticism is quite without basis in fact. The trial judge acts alone. He has a very wide discretion in many matters. He sits in hotly contested cases where essen-

15 Alabama, Louisiana, Nebraska, New Jersey, New York, Oregon and Texas, provide for judicial removal of some or all judges for misbehavior. Provisions for such removal were introduced in New Jersey by the Constitution of 1947; they apply to judges of superior and county courts. Const. Art. VI, Sec. 6 (4). In 1947, New York, which had long provided for removal of justices of the peace and other petty judges, after trial by an appellate division of the supreme court (Const. Art. VI, Sec. 17), also made provision for removing judges of superior courts by judicial proceedings. Art. VI, Sec. 9-A.
tial facts are disputed and feeling runs high. He is on the firing line, so to speak, and subject to the greatest stress and strain. And in this connection it is worthy of note that the trial judge is the one most often charged with arbitrariness, high-handed conduct, and abuse of discretion. An occasional reversal of a case does not have that immediate and essential effect to restrain him in his everyday conduct. Even though his lapses may not be frequent, they should not go unchecked. The high-handed conduct of a single judge not only works serious injustice to individuals but through his conduct the entire bench suffers a serious impairment of its reputation and of public trust. It seems, therefore, desirable that there should be devised some supervision over the daily conduct and discretionary acts of the trial judge.”

In an earlier article, proposing a method of supervision for the federal bench, I discussed the form which such supervision should take:

“The officials best suited to exercise this supervision are the Chief Justice and the presiding circuit judges. The Chief Justice should give attention to the conduct of all federal judges; the presiding circuit judges should oversee the conduct of district judges. These supervisory authorities should undertake to restrain arbitrary and high-handed demeanor, abuses of discretion, and other minor judicial improprieties. They should suggest, criticize and admonish. Most of the common causes of complaint against federal judges should soon vanish if the Chief Justice and the presiding circuit judges were to act in the manner suggested, and especially if the power to supervise were reinforced by effective methods of removal in case of persistent misconduct. Each judge would have the feeling on all occasions that his conduct might come under the eye of the Chief Justice or the presiding circuit judge. He would constantly feel the need, as we ordinarily express it, ‘to watch his step.’”

If, as is certainly true, most of our trial judges do behave themselves as they should, this is because they have sound personal habits and the training of lawyers, and are controlled by social and extralegal sanctions, such as the opinion of fellow members of the bar and of other persons with whom they come in contact. It is not because of well-worked-out methods of disciplinary control. In fact, existing disciplinary methods of checking what I have called personal misconduct, are almost completely lacking or ineffective.

Sec. 3-27. Control of trial jury.* The jury is part and parcel of our adjudicative machinery. Although its members are laymen and private citizens, the jury constitutes collectively an official agency. The function of the jury, as it is ordinarily stated, is to find the facts. There are various standards which govern the jury's activities and procedures, such as the rule which forbids the jury to talk about the case to outside persons during the course of the trial, rules regarding burden of proof, etc. In the aggregate, the rules are all intended to insure a fair consideration and determination of the facts by the jury on the basis of the proofs which are presented to it. The effectuation of these standards for jury behavior presents many distinctive problems, which I believe it is desirable to discuss separately from problems regarding control of other official agencies involved in the adjudicative processes.


1 See sec. 3-11 above regarding the constitutional requirement of jury trial in criminal cases; and sec. 3-14 regarding the requirement of juries in civil cases.
Methods of selection are basic in the control of the jury as in the control of other official actors. Many methods have been employed since the early days of the English common law jury. Today, jury selection is governed by statutes in all jurisdictions, and these statutes vary greatly in substance and detail. It would only be confusing to try to describe all the methods of selection which have been, or which are now, in use. I shall give you only a description of common methods used, and of the usual agencies involved in the processes of jury selection.

In the older practice, a jury was often drawn by the sheriff pursuant to a specific order of the judge, to serve in the trial of a specific case. Today it is still possible in some instances to draw juries for the trial of specific cases; but usually the statutes provide for the preparation of a comprehensive list of eligible jurors in advance of need, and require that juries for most cases be drawn from this list. In our larger cities, this eligible list may embrace several thousand names, and in smaller localities, the number of names usually runs into the hundreds. The list is prepared in some jurisdictions by the sheriff, in some by a jury commissioner, and in many places today by a jury commission, consisting of two or more persons. From this eligible list, the clerk of the court, or some other specified official, draws by lot a smaller list, or panel, to serve on juries during a particular term of court. The reason for the large list, as well as the choice by lot, is to avoid the possibility of packing juries with persons of known views. The list and the juries to be drawn from it are supposed to represent a “cross section” of the community.

Persons drawn for jury service must meet certain statutory qualifications. They are usually required to possess: 1. physical capacity (e.g., be able to hear); 2. mental capacity (e.g., be of “sound mind and discretion”); 3. of good moral char-
acter; 4. a definite political status (e.g., citizenship or right to vote); 5. residence in the district of jury service; 6. a definite economic status (e.g., be a property owner or taxpayer), though this qualification is by no means universal. Persons who do not have these qualifications are normally to be excluded from the jury list by the sheriff or other official agency which makes up the list of persons eligible for jury service; though, of course, the judge will eliminate disqualified persons himself if any such get by the initial sifting procedures.

The make-up of jury lists and panels is further reduced by various statutory exemptions. For example, public officers and employees and persons engaged in certain professions, such as doctors, lawyers and teachers, are commonly exempt from jury service. An exempt person may serve or not at his election; the exemption belongs to him personally, and must be claimed by him; in this respect it differs from a disqualification.

Persons may also be excused from jury service if they satisfy the court in which they are called to serve that they have a valid reason for not serving at the particular time, such as an illness in the family which requires their presence at home.

Finally, constitutional provisions and statutes uniformly contain provisions intended to insure that the jury which is to try the particular case will be made up of persons who are able to hear and determine that case without bias. The application of these provisions involves selective activities of the judge and the parties concerned in the case to be tried. Accordingly, when a group of veniremen (persons called for jury service) is drawn for the trial of a case, the judge and counsel for the parties examine the proposed jurors to determine whether each one is impartial and able to perform his duties as juror properly. Each is asked whether he is
opposed to the law applicable to the particular case, e.g., in a case in which the capital penalty may be involved, whether he is opposed to capital punishment. He is asked whether he has already formed and expressed an opinion concerning the facts of the case. He is asked whether he is biased for or against any of the parties in the case. He is asked whether he is interested (financially) in the outcome of the case. If it appears from the examination that the prospective juror is not impartial, he is challenged by interested counsel “for cause,” or may be excused by the court on its own motion. In addition to the dismissal of persons for cause, statutes very commonly provide that parties are entitled to a certain number of peremptory challenges. Such challenges are to be used to get rid of persons whom the party in question (or his counsel) regards as likely to be hostile or unfavorable to his side. The general aim is the same as the aim of challenges for “cause.” The difference is that no actual showing of bias must be made to appear; the peremptory challenge can be exercised without any explanation or statement of a reason for challenging the juror.

Theoretically, this combination of selective devices, starting with the preparation of a comprehensive jury list by an official agency, and followed by the drawing of a panel by lot, by exempting and excusing persons, and by striking off other persons for reasons of bias in the particular case, and finally by peremptory challenges, is supposed to result in a jury which is at one and the same time a cross section of the community, unbiased in its views, and satisfactory to all persons who are involved in the case to be tried. Actually, however, the average jury can hardly be said to represent a fair cross section of the community. Most of the ablest and busiest persons are able to avoid jury service by claiming exemptions or making excuses, and usually it is definitely to the interest of one party or the other to challenge the
more intelligent jurors. The consequence is that only too often juries, especially in cities, are constituted of persons whose experience and capacity are below the average of the community. But I doubt if the remedy for this situation is to be found in the abandonment of jury trial—though as I have already pointed out, trial without jury is growing in popularity in some fields—rather the practical remedy for inferior juries is to be sought in better and more discriminating methods of selection, in reducing the number of exemptions and excuses, and in improving the pay and other conditions of jury service.

Inasmuch as the jury is made up of laymen, it cannot be expected to know the rules which are applicable to its official activities, the rules which apply to its weighing of evidence and its determination of facts. The judge always instructs the jury on request and, in fact, is required to instruct the jury as to its duties and procedures in determining the facts. But there are two kinds of verdicts which the jury may be required to give: a special verdict and a general verdict. A special verdict is a simple determination of facts which are disputed between the parties. Usually it takes the form of specific answers to specific questions of fact, e.g., "Did the defendant make such and such a promise?" and "Did the defendant perform this promise?" Such a verdict decides

2 At its best, jury trial is not a very satisfactory device for settling civil litigation; it is cumbersome, costly in time and money, and unpredictable as regards results (see sec. 3-14). Waiver of jury trial, with consequent trial by the judge, is occurring with ever-growing frequency. In criminal cases I doubt if anyone, familiar with the jury's historic role in the development and protection of our liberties, would want to do away with the jury. Anyhow, abolition of jury trial would require constitutional amendment, and this could not be easily accomplished (see section 3-11).

3 It is a common opinion today that the service of women as jurors has raised the quality of juries, since many well-qualified women have the time to serve. If this opinion be accepted as correct, it is unfortunate that the statutes in some states allow women to claim, as such, an exemption from jury service.

Regarding possibilities of improving methods of selecting juries, see the items cited in note * above.
only fact questions and leaves to the judge the task of applying the law to the facts found. The functions of finding facts and of applying law are, in effect, completely separated. The general verdict is of quite a different sort; it represents the more common practice in this country. It is applicable to all criminal cases and is employed in most civil cases. In rendering a general verdict, the jury performs two functions; it determines the disputed facts and applies the law to them. For instance, in a case where D is charged with the theft of X's goods, and defends on the grounds that he took the goods believing they were his own, and that he was insane at the time of the act, the jury does not specifically report in its verdict whether D took the goods of X, and if so, whether he thought they were his own, or if he was insane at the time he took them; instead the jury declares simply that D was guilty or not guilty of the crime charged. Such a verdict obviously requires that the jury not only decide what happened, i. e., the facts, but also that it employ the rules of law applicable to what happened. This in turn makes it necessary that the jury be instructed about the rules of law applicable to the facts in issue. The court must tell the jury what the law requires it to do in connection with all the possible fact conclusions which it may justifiably reach on the evidence presented to it. This often calls for very elaborate instructions; and the jury is left with the task of applying them to the actual facts.

From what has already been said you will realize that the judge exercises a substantial control over the jury. Indeed, he controls the jury's performance of its functions in several important ways. First, he determines what evidence is to be admitted for the jury's consideration. He passes on the admissibility of this evidence, bit by bit, as it is presented. Second, he instructs the jury regarding its own functions and procedures, and regarding the law of the case where a general
verdict is to be found. Third, the trial judge in the common law practice was accustomed to comment on the weight of the evidence; he gave the jury the benefit of his opinion and advice in relation to the facts of the case. This practice is still followed in the federal courts, and in a substantial number of state courts. However, in the majority of states this practice is no longer permitted; the judge is prohibited from indicating his opinion on the evidence in any way. Fourth, he is empowered to scrutinize the evidence which has been presented, and if he finds that the evidence on one side is altogether insufficient to support a verdict, he must direct the jury to find a verdict for the other side. As a recent writer says:

“In present-day practice a directed verdict is a device for taking a case from the jury when there is no issue of fact for the jury to decide. The jury brings in a verdict, but it is clearly recognized that the act of the jury is merely a matter of form. This practice must be carefully distinguished from (1) instruction on the law and (2) advice on the facts.”

Fifth, the judge may set aside the jury’s verdict if he concludes that it is contrary to the great weight of evidence, or is supported by insufficient evidence. Thus, if a jury has found D guilty of a crime, the judge may set this verdict aside if he finds that the verdict is based on insufficient evidence to justify a finding of guilt beyond a reasonable doubt.

4 See Capital Traction Co. v. Hof, 174 U. S. 1 (1899) in regard to the judicial role in jury trial in the federal courts.
5 Blume, “Origin and Development of the Directed Verdict,” 48 MICH. L. REV. 555 (1950). It is almost impossible to give an accurate characterization of the directed verdict in a sentence or two. And this observation holds in somewhat less degree of the other devices herein mentioned. My purpose here is to point out methods of controlling jury action, not to furnish complete summations of the law. If the reader wishes further information regarding the directed verdict, he can profitably consult the article above cited.
6 The double jeopardy clauses of our constitutions (which forbid an accused to be twice put in jeopardy for the same offense) are ordinarily construed to
In short, the judge supervises and checks the jury’s fact-finding process in various ways just mentioned. The standards which require the jury to perform its functions in a certain manner are effectuated in a very real sense by this judicial control. However, it must not be supposed that the control of the judge over the jury’s verdict is complete. The jury can ignore the judge’s instructions with impunity. There was a time when juries in criminal cases were punishable for contempt in ignoring the court’s instructions, and when juries in civil cases were liable to injured parties for returning improper verdicts. But for almost three centuries now it has been established in all Anglo-American jurisdictions that a jury cannot be penalized, criminally or civilly, for rendering a wrong or perverse verdict. And inasmuch as the jury has a wide range of discretion anyway, in drawing its conclusions of fact from the evidence, it must be apparent that the jury has considerable freedom of action. The standards which control the jury, like all other standards which we have discussed, are only partial in their coverage and are by no means completely enforceable. The judge’s control merely represents elements of guidance and enforcement of standards within the limited range where enforcement is feasible.

Sec. 3–28. Control of appellate judge.* The appellate judge, like all other persons involved in the adjudicative

forbid all attacks on a jury’s verdict of acquittal. Such a verdict cannot be overturned by appeal or otherwise; it matters not if the most obvious errors have been committed, or if conclusive proof of guilt be later found; the jury’s verdict of acquittal is final as to the prosecution of the defendant on the particular charge. However, a state can construe its double jeopardy clause differently and can accordingly provide for appeal by the prosecution without violating the due process clause of the Fourteenth Amendment; and two states have so provided. Palko v. Connecticut, 302 U. S. 319 (1937); and see American Law Institute Code of Criminal Procedure, sec. 428 and annotations at 1203 et seq.


* (I.R.) On the subject matter of this section, see generally the items cited in sec. 3–26, note *. In addition the reader should consult a study which has
process, is governed by standards. And the effectuation of standards in his case raises many of the same problems as the effectuation of the standards applicable to the trial judge; methods of selection are usually the same and methods of removal are also the same.¹

But there are two important differences between the work of the appellate, and the work of the trial, judge. The trial judge normally sits alone. Every appellate court is made up of several men; often as many as nine sit and work together. The conduct and determinations of each appellate judge are, to a considerable extent, restrained and supervised by his fellow members on the court. Furthermore, the appellate judge works in a more quiet atmosphere than the trial judge; he works chiefly on legal problems far removed from the emotional strains of battle over facts. Both these differences mean that there is less need for checks on personal misbehavior of the appellate judge, such as outbursts of temper, etc.

And the control of the supreme court judge differs from the control of the trial judge and the intermediate appellate judge in another way. As in the case of the chief executive, the supreme court is not controlled or affected by any very direct or immediate legal sanctions.² The court has no superior. The proper behavior of supreme court justices is guaranteed chiefly by the quality of the persons who man the court. These men are almost invariably lawyers of long

¹ See sec. 3–26.

² Only the threat of impeachment and defeat for re-election are worth mentioning. Both are remote, and the latter is indiscriminate. Nevertheless there does not appear to exist any pressing need for additional ways of checking or removing supreme court judges. Thoroughly bad individuals are not apt to reach the supreme court; and, if a judge in that high office misbehaves, his conduct is likely to evoke action where the misdeeds of an inferior judge might not.
training and experience; their ideals and purposes are derived from this legal background. If such men are swayed at all by outside influences, they are moved chiefly by a regard for public opinion and especially for the opinion of their brethren at the bar. As a matter of fact, both appointment and popular election work better in relation to supreme court judges than they do in relation to judges of inferior courts. Thus, I think it is clear throughout the years that most appointees to the Supreme Court of the United States have been outstanding men; and even the elective process which is employed in most of our states has worked reasonably well in the selection of supreme court judges. The prestige of such judgeships means that many good lawyers are ready to accept appointment or election; political bosses who use their power over the choice of other officials almost openly to serve their own ends, do hesitate to install venal men or men of questionable reputation on the supreme bench. Furthermore, judges of our supreme courts are chosen, if they are elected, for terms which are usually longer than the terms of trial justices; their pay is also better, and the tradition of re-electing them is more common; so that these judges enjoy a greater degree of independence than trial judges do. I do not think that our methods of choosing and controlling the judges of our supreme courts are by any means ideal; and yet it is only fair to say that the average of men

3 Some persons may be inclined to challenge this statement. They will point to the appointment of many New Dealers to the Supreme Court by President Roosevelt. I shall have to answer that whether one likes the social philosophy of these appointees or not, practically all of them were men of outstanding ability. So long as the President has the power to appoint, and so long as the Supreme Court makes the important policy determinations that it does, we shall have to expect that the President will choose appointees whose social views are in general accord with his own.

4 For example, in Pennsylvania, justices of the supreme court are chosen for twenty-one years; judges of the principal trial courts, for ten years; and in Michigan, supreme court justices are chosen for eight years, judges of the circuit courts for six.
on our supreme courts is far above the average of government personnel, in regard to both ability and integrity.

Sec. 3–29. Problems. 1. Tumey v. Ohio. Chief Justice Taft delivered the opinion of the court:

"The question in this case is whether certain statutes of Ohio, in providing for the trial by the mayor of a village of one accused of violating the Prohibition Act of the State, deprive the accused of due process of law and violate the Fourteenth Amendment to the Federal Constitution, because of the pecuniary and other interest which those statutes give a mayor in the result of the trial. . . .

"All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. Wheeling v. Black, 25 W. Va. 266, 270. But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

"The Mayor of the Village of North College Hill, Ohio, had a direct, personal, pecuniary interest in convicting the defendant who came before him for trial, in the twelve dollars of costs imposed in his behalf, which he would not have received if the defendant had been acquitted. . . . But the pecuniary interest of the Mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here. The statutes were drawn to stimulate small municipalities in the country part of counties in which there are large cities, to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county. The inducement is offered by dividing between the State and the village the large fines provided by the law for its violations. The trial is to be had before a mayor without a jury, without oppor-

tunity for retrial and with a review confined to questions of law presented by a bill of exceptions, with no opportunity by the reviewing court to set aside the judgment on the weighing of evidence, unless it should appear to be so manifestly against the evidence as to indicate mistake, bias or willful disregard of duty by the trial court. The statute specifically authorizes the village to employ detectives, deputy marshals and other assistants to detect crime of this kind all over the county, and to bring offenders before the Mayor's court, and it offers to the village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation. The Mayor is the chief executive of the village. . . . He is charged with the business of looking after the finances of the village. It appears from the evidence in this case, and would be plain if the evidence did not show it, that the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public money and expending it, in the pecuniarily successful conduct of such a court."

Accordingly, the Court held that the defendant, tried for offenses against the Ohio prohibition law in the circumstances above indicated, had been denied due process of law; and the judgment of the Supreme Court of Ohio, upholding his conviction, was reversed.

The decision of this case is expressed in terms of the lack of due process. How would you restate the court's conclusions in terms of motivation of judicial behavior and of the effectuation of standards applicable to such behavior?

2. Consider the following discussion of methods of retiring disabled and superannuated judges: 2

"Another device for eliminating disabled or superannuated judges is compulsory retirement at a fixed age. This particular device is chosen in order to escape the difficulty of passing on individual cases and of making invidious distinctions between individuals affected. Often the individual who ought

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to be retired does not realize that he has ceased to be able to perform his functions. It is not easy for others to tell him that he has lost his fitness for his job. A compulsory retirement makes the process of elimination easy and quite impersonal. But while the administrative difficulty is thus avoided, the legislative problem is not. Is it feasible to fix a uniform age for compulsory retirement? If so, what shall be the age thus fixed by constitution or statute? The fact is that not all men become incapacitated at the same age. Some men are old at 50, while occasionally a man retains his faculties and full vigor until 90 or over. Whatever age of retirement is set, some waste of competent man power will result; the judicial system will lose the experience and ability of some men who still have all their faculties though they have passed the fixed age. Against this waste must be balanced the advantage of eliminating dead timber. That it is not easy to fix a uniform age for retirement is attested by the not uncommon opinion of competent persons that such an age is not possible to fix and by the marked diversity of opinion among other persons as to what the proper age should be. But admitting the difficulties it does not seem to the writer that fixing an age for judicial retirement is different in kind from fixing an age for any other significant act or event. The age for majority is typical; not all persons arrive at the age of discretion at the same time. Nevertheless we must and do fix such an age on the basis of a general estimate. And no one has ever felt that the fact that some good professors or army officers or business executives will be put on the shelf by an automatic superannuation provision constituted a conclusive reason against such a requirement. If provision is made for part-time service by retired judges, the waste of man power need not be great; almost all states have overcrowded dockets. The retired judge can always sit if he is willing, and be assigned to the types of matters for which he is best fitted."

Can one regard methods of retirement as devices for controlling judicial behavior? Compare methods of retirement with methods of selection, in this respect.
Hancock v. Elam.\textsuperscript{3} Nicholson, C. J., delivered the opinion of the Court:

"This suit was brought by Hancock to recover of Mary L. Elam $228 for work and labor, in repairing a mill. The jury found a verdict for defendant, and plaintiff has appealed. . . .

"In this case, after the jury had been out from eleven o'clock until dinner time, which we suppose was about one o'clock, upon returning into Court and announcing that they could not agree, and that they did not disagree as to the evidence, or the charge of the Court, the Sheriff was peremptorily ordered 'to lock them up until they should agree,' and that, without allowing them to have their dinners before being locked up. The jurors might very well understand from this order, that they were required either to agree or to submit to indefinite confinement and starvation. They were ordered to be locked up until they should agree. They did agree in the course of several hours, but whether their disagreement was harmonized, under free, patient investigation and deliberation, or under the apprehension of prolonged confinement and starvation, we have no means of determining. We can see, however, that under the influence of such an arbitrary order, jurors may have yielded their convictions, in order to avoid the threatened consequence of continued disagreement. . . .

"The verdict is, therefore, set aside, and the judgment reversed."

How would you state the prohibitive standard applicable to the judge's act in this case? How is this standard enforced?

4.\textit{Thiel v. Southern Pacific Co.}\textsuperscript{4}

Plaintiff brought action in a California court against the defendant railroad for injuries caused by the latter's negligence. The case was removed to a federal court on the ground of diversity of citizenship. At the start of the trial, plaintiff moved to strike the jury panel because the jury

\textsuperscript{3} 62 Tenn. 33 (1874).
\textsuperscript{4} 328 U. S. 217 (1946).
commissioner and clerk of the court had excluded all daily wage earners from the jury. These officials testified that the exclusion of wage earners was motivated by knowledge that the federal district judges had consistently excused such persons from jury service because of pecuniary hardship (i.e., the pay for jury service was only $4.00 per day). The district court denied plaintiff's motion. The jury found a verdict for defendant, and on appeal the circuit court of appeals affirmed a judgment for defendant. The Supreme Court granted certiorari. Held—the exclusion of daily wage earners in drawing the jury panel was improper, and the judgment was reversed.

Murphy, J., speaking for the Supreme Court said in part:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross section of the community. Smith v. Texas, 311 U. S. 128, 130; Glasser v. United States, 315 U.S. 60, 85. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. . . .

"The undisputed evidence in this case demonstrates a failure to abide by the proper rules and principles of jury selection. Both the clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury lists all persons who work for a daily wage. They generally used the city directory as the source
of names of prospective jurors. In the words of the clerk, 'If I see in the directory the name of John Jones and it says he is a longshoreman, I do not put his name in, because I have found by experience that that man will not serve as a juror, and I will not get people who will qualify. The minute that a juror is called into court on a venire and says he is working for $10 a day and cannot afford to work for $4, the Judge has never made one of those men serve, and so in order to avoid putting names of people in who I know won't become jurors in the court, won't qualify as jurors in this court, I do leave them out. . . . Where I thought the designation indicated that they were day laborers, I mean they were people who were compensated solely when they were working by the day, I leave them out.' The jury commissioner corroborated this testimony, adding that he purposely excluded 'all the iron craft, bricklayers, carpenters and machinists' because in the past 'those men came into court and offered that (financial hardship) as an excuse, and the judge usually let them go.' The evidence indicated, however, that laborers who were paid weekly or monthly wages were placed on the jury lists, as well as the wives of daily wage earners.

"It was further admitted that business men and their wives constituted at least 50% of the jury lists, although both the clerk and the commissioner denied that they consciously chose according to wealth or occupation. Thus the admitted discrimination was limited to those who worked for a daily wage, many of whom might suffer financial loss by serving on juries at the rate of $4 a day and would be excused for that reason.

"This exclusion of all those who earn a daily wage cannot be justified by federal or state law. Certainly nothing in the federal statutes warrants such an exclusion. And the California statutes are equally devoid of justification for the practice. . . .

"It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship. But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. Here there was no effort, no intention, to determine in advance which individual
members of the daily wage-earning class would suffer an undue hardship by serving on a jury at the rate of $4 a day.\(^5\) All were systematically and automatically excluded."

Frankfurter, J., and Reed, J., dissented. Jackson, J., took no part in the decision of the case.

How is this decision related to the methods of controlling a trial jury above discussed? Does the decision really meet the problem presented by the $4.00 per diem allowance for jury service?\(^6\)

**USE OF STANDARDS FOR OFFICIALS**

**Sec. 3-30. Use by executive officials.** We have now mentioned the standards applicable to various official acts, and have examined the ways in which these standards are effectuated. It is necessary to consider also the intentional uses of these standards, the ways in which they are used to guide action. How are these official standards used, and by whom? How does O, the official actor, use them? What use do courts make of them? How are they used by the individual and his legal counselor? And in what ways are they used by the student of the law?\(^1\)

The standards with which we are now concerned are addressed primarily to the official actor, O. He is in the position

\(^5\) The compensation of jurors is now fixed at $7.00 per day in the federal courts, "except that any juror required to attend more than thirty days in hearing one case may be paid in the discretion and upon the certification of the trial judge a per diem fee not exceeding $10 for each day in excess of thirty days he is required to hear such case." U. S. C. A. tit. 28, § 1871.

\(^6\) Regarding the decision in this case, see note in 59 Harv. L. Rev. 1167 (1946), and article by Fraenkel, "The Supreme Court and Civil Rights: 1946 Term," 47 Col. L. Rev. 953 at 959 (1947).

It is interesting to compare the effects of systematic racial discrimination in the drawing of juries. Smith v. Texas, 311 U. S. 128 (1940) and Akins v. Texas, 325 U. S. 398 (1945); and the effects of the selection of so-called special or "blue ribbon" juries for criminal trials in state courts. Fay v. New York, 332 U. S. 261 (1947), noted in 46 Mich. L. Rev. 262 (1947) and discussed in the article by Fraenkel above cited.

\(^1\) The discussion in the present subtopic parallels the discussion of ways of using standards for the individual, secs. 2-43 to 2-48, inclusive.
of hearer, and is intended to shape his acts by reference to
the standards. In this sense they are standards for O’s use;
they cover, in more or less detail, important acts which he
may do or think of doing. But these standards are not quite
independent; in very large part they connect O’s act with
A’s. Very frequently, the official begins by using a standard
applicable to the individual’s act in the manner described
in the last chapter.\(^2\) Thus O, a policeman who is patrolling
the street, applies such a standard for individual action when
he notes that A, the driver of a car, is speeding. On the
basis of this observation regarding A’s conduct, O will employ
a standard applicable to his own official act, a standard which
tells him what to do on such an occasion.\(^3\) As you see, O is
called upon to apply two sets of standards, those applicable
to A and those applicable to himself; he considers whether
A is subject to arrest, and, if so, how he shall make the
arrest. In both respects O makes use of legally prescribed
standards; he checks the elements of an act (A’s or his own)
against the specifications of a standard. O’s method of apply-
ing standards is not essentially different from the method
employed by A when A uses standards in planning his acts
or in sizing up their effects.\(^4\)

The chief executive or any superior official may make
similar uses of standards applicable to individual and official
acts. A police chief, for example, may have to test a series
of acts, including his own, by the applicable standards. Thus,
he may first have to decide whether there is sufficient evidence
to indicate that A was speeding or that he was driving while
drunk; then, whether O who arrested A behaved according
to the standards applicable to an arrest; and finally the chief
may have to decide what the presented facts require him to

\(^2\) Sec. 2-45.

\(^3\) Here, O’s use of a standard to guide his own action parallels the indi-
vidual’s use of a standard to guide his acts. Sec. 2-44.

\(^4\) Sec. 2-44.
do and the manner in which he is to do it. If he believes that A cannot be shown to have violated any standard or that O acted improperly in arresting A, the chief may be bound to order A’s discharge. If he thinks that A is probably guilty and that his subordinate has acted properly, the standard applicable to his own act requires that he have A detained and produced before a magistrate on the morrow. The performance of his proper functions may require such a superior executive to use not only the standards applicable to A’s acts, but also the standards governing the acts of his inferiors and those which govern his own.

Sec. 3-31. Use by the courts. The trial judge is often called upon to apply the proper standards to the acts of individuals. The method which he uses in applying such standards has already been described. He applies standards to the acts of officials and official agencies in essentially the same manner. And his own acts are also governed by standards. These he must look to and use in laying out his own courses of action. They determine his powers and functions; they define the acts which he must do in supervising and conducting a trial. They specify methods he must use in bringing the case to issue, and in admitting evidence to the jury; they determine the manner in which he is to instruct the jury, and enter judgment or sentence; they determine when he is to direct a verdict, set a verdict aside, and so on.

The supreme court, in its turn, may be called upon to use standards applicable to the acts of A, to the acts of O, to the acts of the jury, and to the acts of the trial judge; the court may have to decide whether any or all these acts have been performed according to applicable standards. In examining these prior acts of individuals and official agencies, and in taking action based thereon, the supreme court is also

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1 See sec. 2-45.
2 Here the judge’s use of a standard, i.e., to guide his own action, parallels the individual’s use of a standard to guide his acts (sec. 2-44).
guided by standards; it applies them in its own acts. So that
the supreme court's use of standards may represent a sequence
of applications comparable to the series of acts described in
"The House That Jack Built."

Sec. 3-32. Use by A and his counselor—reliance on O's
habits. All standards are addressed primarily to a limited
group of persons, but all standards are important also, in a
secondary sense, to other persons than the addressees, because
these others are affected one way or another by what the
addressees do. In this sense, A may be concerned with the
standards applicable to acts which O has done.¹ His rights
may depend on O's acts, and he may have to know whether
O has acted effectively. He may be injured by an act that
O has done, and need to decide whether O has behaved in
a manner which will warrant his recourse to the courts for
an injunction, or other remedy. These secondary uses of
standards addressed to O hardly require further elaboration,
in view of what has already been said about multiple uses
of standards, and inasmuch as the methods of applying such
standards to O's acts are essentially the same as various other
applications of standards already discussed.

But A's concern with acts of O, like his concern with acts
of B, is not limited to past acts of O, to acts that O has
already done. On the contrary, A often needs to predict the
future behavior of O.² He has to rely on what O is going
to do. For the purpose of prediction, A rests his calculations
on observations of the past behavior of O. Sometimes A may
use the prescribed standards for official behavior as a basis
for predicting what O will do; A expects O to perform his
duties and exercise his powers as prescribed by legal stand-

¹ Compare the discussion of A's application of standards to acts which
B has done (sec. 2-46).
² The discussion in this section of the bases for predicting O's behavior
parallels the discussion in sec. 2-46 of the bases for predicting B's behavior.
STANDARDS FOR OFFICIAL ACTS

ards; A predicates this expectation on the general law-abiding habits of officials. But the standard itself merely tells A what O is supposed to do; it does not form a basis for predicting whether he will act according to its terms. O’s known habits are the basis for that kind of calculation.

If legal standards covered every act which O might do, and if these standards were completely effectuated, A might in all cases rely on legal standards as a basis for prediction. But much of official conduct falls beyond coercive legal standards. A large part of O’s conduct is privileged, or discretionary. What will O do in areas where he is free to act or not to act? So far as A’s planning depends on what he can expect O to do, A has just two things to rely on—O’s habits and his declared intentions. For example, if A is a busy doctor and is called as a witness in a suit between X and Y, he hopes to be put on the stand at once and without delay. Can he count on this courtesy? Or must he expect to cool his heels for a half day while he waits for his turn to be called to the stand? The answer lies in the discretion of Judge Jones, presiding at the trial. A may rely on the known practice of Judge Jones to interrupt the course of a trial and put the busy witness on the stand out of turn. Or he may rely on the personal assurance of Judge Jones that this will be done. Moreover, officials do not always act according to standards. And what is just as important, their activities do not always eventuate as they are supposed to do. On the one side, there is the discrepancy between prescribed standards and the forms which behavior actually takes. On the other, there are various practical factors which may defeat the operation of legal remedies.* Thus, in the case of a

3 See sec. 3–04 regarding the unregulated areas of official action; and compare secs. 2–05, 2–07, 2–11 and 2–46 regarding the unregulated areas of individual action.

* (I.R.) These two propositions constitute for me the gist of the “realist” position. The relevant items regarding the realist point of view are very numerous; I shall suggest only a few, in order of date of publication. These
banker who is about to loan money to B, the capacity of B to repay it may loom larger than B's legal obligation. The banker may be more interested in the fact that the legal means of collection may fail for various reasons, that official aid may be very costly, or may be futile in the sense that a judgment may be uncollectible. Or again, A, whose car has been damaged in a collision through the fault of B, must consider not only whether a jury ought to give him a full recovery for his loss, but also the question whether there is some chance that the legal processes through which he will obtain compensation may go awry at some point. B may have ways to evade or defeat A's claim. B's witnesses may contradict A's, and the jury may believe B's witnesses. Or the jury may be prejudiced against A, and may reject his claim in spite of all the evidence in his favor. And finally, if A is one of the "bad men" about whom Holmes speaks, he counts upon the discrepancies between legal standards and official acts for his own advantage. Let us say he contemplates opening a gambling establishment. He knows well enough that he will be acting contrary to legal standards. He bases his calculations of profit on his ability to evade official sanctions and to corrupt certain officials and to make gains large enough to offset the costs of fines and losses. In all the cases I have mentioned, A has to look first of all to actual patterns of official behavior. He uses them as bases for calcu-

represent different attitudes toward the realist viewpoint. A full citation of articles maintaining the realist point of view is appended to Llewellyn's second article cited below (at pages 1257-1259).


4 See sec. 2-32, problem 3.
lating possible acts of O. He is justified in resting his calculations on legal standards only so far as these can be identified with the lines that official behavior will probably take.

A’s legal counselor has a large part in A’s forecasts of official action, and in planning the practical results of A’s own action. Both the counselor’s knowledge of law and his experience with legal affairs are brought to bear in these respects. The successful counselor learns early in his practice to weigh his chances of achieving actual results. He learns how important it is to think out and provide for the various contingencies which may arise under a contract, deed, mortgage or will that he is drafting. He learns that promises are not always kept; that doubtful promises are usually construed by each party according to his self-interest; that vague or inadequately drafted instruments may entail the necessity for court action to determine meaning. He learns to appreciate the difference between the standards in the books and the results which can be achieved through official aid. He learns—and advises A accordingly—that there is a vast difference between having a lawsuit and having the means of proving it; that even when evidence is available, the processes of proof are uncertain and fraught with hazards, such as the disappearance or impeachment of a key witness; that it is usually better to settle a lawsuit at a substantial discount than to incur the cost, suffer the delays, and run the risks of litigation; that there is no point in pursuing an expensive lawsuit to a conclusion against a defendant who is uncollectible; that the bias of juries counts heavily in certain cases. In short, he has to learn how to plan his client’s lawsuit

6 The importance of this aspect of the lawyer’s role was first clearly stated by Justice Holmes. He said that the real meaning of legal rules inheres in their probable application by judges and other agents of the state, that the lawyer must be able to foretell what these officials are going to do, that the lawyer’s primary function is that of prophecy. See “The Path of the Law,” 10 HARV. L. REV. 457 (1897).
and draft his client's documents, and guide his client's acts in the light not only of knowledge of legal standards but also of experience with human contact, especially official conduct.

Sec. 3–33. Use by student of official standards and habit patterns—academic and practical training. In the foregoing section and others,¹ I have tried to give you a picture of various kinds of work which the legal counselor is called upon to do. These materials suggest at the same time important lines of preparation and training which the legal counselor needs to have. They suggest uses of official standards which the student of the law must learn to make, and uses of official habit patterns which he must become familiar with. In the present section, I want to deal with these necessary skills and the times and methods of acquiring them, in other words with the what, when, and how of these parts of S's legal education.

S, the student of the law, must first of all learn to use legal standards, to analyze fact situations, and to fit them to legal standards. The importance of this side of his training has been stressed in our discussion of uses which he makes of standards applicable to the individual.² We saw how S follows and criticizes the applications of standards which others have made in actual cases, and how he makes manifold hypothetical applications of standards, and thus acquires experience in their use. Standards applicable to officials are used by S in the same ways. He can make similar examinations of others' applications of standards to official acts, and make similar hypothetical applications of official standards.³ In

¹ See secs. 2–44, 2–46, 2–47.
² See sec. 2–47.
³ And if we are thinking of S's experience in applying standards to official acts we must also count here the numerous standards and methods to be mentioned in subsequent chapters: in Chapter 4, standards and methods which govern the legislator's act; in Chapter 5, those which control the inter-
fact, there are no marked differences between the uses he makes of the two kinds of standards. Everything I have said about uses of standards for the individual is relevant here; and everything I shall say here about uses of official standards applies equally to the use of both kinds of standards. I aim chiefly to expand and drive home some of the points already suggested regarding the place in legal education of exercise in the use of standards.

As our law schools are set up and operate, the law student’s work is preponderantly theoretical. This is another way of saying that he is a nonparticipant in the legal scene. He studies the operation of the legal system from the outside. His detachment from the legal scene carries certain advantages and also involves certain limitations. Both advantages and limitations are reflected in the uses which he makes of legal standards.

One advantage of S’s detached position is that it allows him to wrestle with a very wide variety of problems of applying standards. The variety far exceeds the bounds of the direct experiences which S might have with actual cases. The law reports make available a large supply of materials for re-examination. And these materials are found in a form to show how a court has worked out a problem of application. They are well adapted for study and the development of the capacity to think in legal terms. In these respects, the reported cases constitute a fund for instruction hardly equalled in any other art or science. When we add to S’s opportunity to work with reported cases, his chance for discussing, analyzing, and dealing with hypothetical situations,
we find that S has an almost unlimited scope for exercise in the use of standards.

Another advantage of S’s detached treatment of cases is the fact that it makes possible an objective attitude towards the standards themselves and their applications. S can view a legal problem impartially from every side. He does not have to apply standards in cases which affect his interests or sympathies in any way. For this reason, he can be free of the natural bias of those who are touched by the actual operation of the legal system. A, who drives a car and collides with another car, cannot be expected to view the event with the same detachment as S; A is naturally swayed by the impulse to justify what he has done or failed to do. Even his counselor’s thinking tends to take on the color of A’s interest. Nor is S required to apply individual or official standards to a concrete occurrence, which may affect the lives of real human beings—as judge and jury must do. To be sure, judge and jury are normally more objective than the parties themselves, or their witnesses, because judge and jury have no personal stake in the decision of the controversy before them, and because they are chosen by methods which are designed to eliminate the element of bias as far as possible. Nevertheless, judge and jury see the parties and hear their “real life” stories; judge and jury cannot be entirely unaffected by factors of human sympathy or prejudice. S is one step further removed from the actual facts. He does not have to make a decision which will have practical effects. He can, if he will, view each case from all angles. He can, if he tries, acquire habits of objective judgment. Such habits will serve him well even when, later on, he assumes the position of counselor and representative of a particular point of view. He will need to anticipate the points which his opponents can make as well as those which he ought to make himself.

But the law student is getting ready for the time when he will make actual uses of legal standards in the practice
of the law. His exercise in analyzing cases and applying standards is only preparatory for his functions as counselor and advocate; it has to be supplemented by exercise in doing the practical work of a lawyer. Ultimately he has to acquire experience as adviser, as draftsman of instruments, as pleader, and perhaps as judge and as draftsman of legislation. The student needs to learn how to use the law library, i. e., how to find the standards which he is to apply. He needs to learn how to prepare briefs, i. e., how to use previous applications of standards in decided cases in order to support his own lines of argument. He needs to learn to draft important instruments, and to try cases.

The whole approach to these practical jobs is different from the approach which one takes to the study of decided or hypothetical cases. In the study of cases, one tries to multiply all the legal possibilities and to resolve them as far as one can. One tries to develop a grasp of legal standards by making all possible applications of them, normal and abnormal. One tries to develop a sense for distinctions by working them out into the greatest refinements. By contrast, in doing a practical job the actor aims primarily to insure desired results. He wants to accomplish something constructive, not merely analyze situations in legal terms. Above all he is minded to do a safe job. He does not see how close he can come to legal shoals, but adopts a safe course. He draws a pleading, so far as he can, which does not raise legal questions. He draws an instrument, such as a long-term lease or a contract, in which all probable points of dispute between his client and the other party are covered and provided for. He is not interested in peculiar situations and difficulties as such. Rather, he aims to avoid difficult legal problems if he can. He uses his experience with legal standards and legal methods as means of avoiding legal problems.

There is no question in anyone’s mind about S’s need for practical training for law practice. The only questions are
when and how this kind of training is to be given. Some older practitioners think extensive practical training should be given in the law schools; and are inclined to criticize the schools for sending their graduates out incompletely prepared for practice. On the other hand the law schools acknowledge only a minimum obligation to give the student practical training. They recognize an obligation to give him some experience in the use of the law library, some experience in the drawing of pleadings and argument of disputed points of law, and some experience in the drafting of important instruments. But almost all law teachers are convinced—and their views determine the policies of the schools—that the place to learn to practice law is in actual law practice, that the law school cannot go far in training the student to practice law, that the law school has neither the time nor the facilities for giving such training efficiently. Three years is felt to be little enough time in which to introduce the law student to the various fields in which he has to make use of legal standards and legal methods. If there were any slack time, over and above what is needed for a sound academic training (plus a minimum initiation in practical methods), I believe, and I think most experienced law teachers believe, that the law student should be detached from the law school by just that much sooner, and sent out into practice where he can learn most speedily and efficiently how to write briefs, to advise clients, to draft instruments, and to try cases.

Legal education is sometimes compared unfavorably with medical, in regard to this matter of practical training. It is pointed out that the medical student is given not only academic training in medical science but a substantial amount of practical training in medical work—contact with patients and experience in use of medical and surgical procedures. Even the general practitioner of medicine has to have at least one year of interneship beyond the normal period of
four years in medical school, in which he learns to use the medical science with which he has become familiar. And the specialist has to put in several additional years beyond that. The suggestion is then made or implied that the processes of legal education have nothing to correspond to the practical training of the physician. But the difference in this regard between legal and medical education is merely apparent. Probably the actual academic part of the training for the two professions does not differ greatly in quantity. Most of law school training is of the academic type for a period of three years, and I think it is safe to estimate that no less than three years of the five or more which the young physician must spend in school and in the hospital are really academic in character. Probably the young lawyer needs as long a subsequent period of practical work as the young physician in order to get a grasp of his professional tasks. This is recognized in a few jurisdictions by specific provision for an apprenticeship in law practice before the young lawyer is admitted to the bar. Likewise, in most European countries service of an extended apprenticeship is a prerequisite to admission to the profession. This kind of service corresponds in all essentials to a medical internship. But in most states in this country no such requirement of practical preparation exists; this does not signify any essential difference, however, between the two professions in regard to academic and practical training. It only means that the young lawyer gets his license to practice before he is fully prepared; he has to obtain the bulk of his practical training after he is admitted to the bar.

4 Until almost the end of the 19th century the predominant form of legal training in the U. S. was of the apprentice type. Relatively few of the men who went to the bar were trained in school. The law student prepared himself in a law office under the supervision of a practitioner. This form of training resulted in an undue emphasis of the practical, and a serious neglect of theoretical and systematic preparation. Blackstone and a few other texts were read by the student, but the bulk of the training of the young lawyer was derived from observing and aiding the work of his practitioner-teacher.
In recent years the law student's preoccupation with legal standards and their application has been vigorously criticized from another angle, by a group of so-called "realists."* These writers say that legal standards are abstract and give a totally misleading impression of the activities, and the relations, of individuals and officials. They say the traditional approach involves a neglect of realities, that descriptions of behavior are more significant than standards of behavior, that what is needed by S is an appreciation of the way individuals and officials behave in actual life. They stress the habit factors which were mentioned in the last and other sections. As regards the law student, they declare that he needs to be taught to perform the prophetic functions which Holmes ascribes to the lawyer. He needs to be made to realize that legal standards are not descriptions of reality, but merely ideal pictures. Lawyers and judges come to the realization of this fact through their experience with the actual operation of the law. And the law student should have the difference between the ideal and the actual hammered into him so that later on he will properly evaluate his own observations along this line, and so that he will be spared the disillusionment entailed by having impossible ideals destroyed by his future experiences in practice.

* (I.R.) See bibliography on the realists in sec. 3–32, note *.

5 Toward the end of the last, and the beginning of the present, century our American legal scholarship and teaching were justifiably criticized, too, for dealing with their subject matter in a social vacuum. Writers and teachers took law as it was and hardly asked about its social functions. Lawyers, writers, and students (and I was a student myself when this was the case) concentrated on the technical niceties of existing law. That was the day of what Pound has called "mechanical jurisprudence." Lawyers lived in a "heaven of juristic conceptions." The social background of the law and its relations to real people were hardly mentioned in those days. Holmes, Pound, and Wigmore were the spearheads of a general attack on this traditional approach which neglected social functions and the ends of law. Most of what these pioneers stood for and taught, has now become well accepted; it constitutes the most important part of our present-day notions regarding legal policies. I mention this change in approach in passing only because it also affected the direction of legal education. I shall leave consideration of policies to our last chapter: Legal Policies and Policy Making.
No doubt these writers have helped to correct a one-sided stress on legal standards and their manipulation. No doubt the lawyer does need to know business practices, the ways of life, and the habits of all kinds of people. When I was a law student this sort of thing was hardly mentioned. The modern law teacher tries to complete his classroom presentation with all the material he can muster, regarding the actual operation of the legal system and regarding the habits of individuals and officials so far as they are relevant to the operation of the legal system. He points out the discrepancies which do often exist between legal standards and their effectuation. He tries to fill out his classroom discussion with necessary references to the practices of business and actual modes of living. You will note, indeed, that I have given you a great deal of material of this realistic type in this and the next preceding chapter; and you will find that the same approach and presentation of material is adopted in most of your regular law courses.

However, I have two reservations to offer regarding the theme of the "realists." Without these reservations, I think some of their expressions of opinion might leave you with misleading impressions. In the first place, I think some of the more ardent "realists" are guilty of overstressing the need to study actual behavior of officials and individuals. Their emphasis on the prophetic function of the lawyer is just as one-sided as the abstract viewpoint which it was aimed to correct. There is no call here to fly from one extreme to the other; no call to exchange one one-sided viewpoint for another. There is no occasion to conclude that legal standards are of secondary importance, as some of the extreme "realists" seem to do, simply because the operation of standards is not one hundred per cent perfect.** Certainly, we as

** (I.R.) Among items in which such a one-sided emphasis is laid on habit patterns and attitudes and on the lawyer's function of prediction, see items
lawyers need to understand the role of standards. We need to know how they are made, how they are applied, how they are interpreted, how far they are realized in practice. Even when we describe human behavior or prophesy what the behavior of individuals or officials is going to be, we cannot afford to ignore the patterns set up to guide behavior. The primary purpose of our legal system is to furnish guidance for behavior. And guidance for behavior involves the use of standards, models of action established beforehand, or, if you will, prescribed plans of action. We see their character most plainly in connection with effective acts. It is absurd to suppose that plans or patterns are unimportant because they are not always perfectly carried out. Important as it is to call attention to deficiencies in execution and effectuation, the core of legal training will always be the legal standards and their application.

In the second place, I have some question about the extent to which a knowledge of people and their ways can be taught in law school. In prelegal courses, such as psychology, social psychology, sociology, economics, and political science, and in law courses, such as jurisprudence and sociology of law, most of what is scientific in the field of human behavior can be given to the student. These sciences represent the sum total of what our thinkers and writers have been able to achieve by way of systematic descriptions and observations of human attitudes, habits, and practices. But these sciences


Among items in which a balanced stress on standards and habit factors is adopted, see items by Holmes, Pound, Dickinson, and Fuller, cited in sec. 3-32, note * and Llewellyn, "The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method," *49 Yale L. J.* 1355 (1940). Ten years earlier I think Llewellyn would have had to be counted among the writers who overstressed the realist viewpoint; at that time he referred to legal rules as mere "paper rules"; the "real rules" were for him the official patterns of behavior, "A Realistic Jurisprudence—The Next Step," *30 Col. L. Rev.* 431 (1930).
of behavior hardly touch the practical bases for predicting official and individual behavior. That is a type of knowledge which is not easily described, set down in books, or taught. It is the kind of knowledge which comes through personal experience, experience which each lawyer must have for himself. How can a school, for example, develop in its students a sense for detecting a lying witness, or a capacity for negotiating the settlement of a damage case, or an ability to figure out when the court will put a defendant on probation? There is no reason why the teacher should not contribute anything he can along these lines, but I do not think it can be very much. Most of the kind of information, which the practitioner needs and gets, regarding individuals, witnesses, and judges, is not generally available; it can only be acquired by S after he is a practitioner, not while he is in law school. The most that the law teacher can do about such information is to call S’s attention to the importance of it, when, as, and if he can come by it. Accordingly, I have a feeling that most of the talk about the deficiencies of law schools in failing to teach practical material of this kind is far removed from pedagogical realities, quite as far removed from realities as was the old-fashioned doctrine which some extreme protagonists of realism so vociferously talk about and criticize.

Sec. 3–34. Problems. 1. Ex parte Hardcastle.¹ Morrow, J., delivered the opinion of the court:

“This is a habeas corpus proceeding in which the relator is held under an order of the city health officer of San Antonio, by virtue of quarantine regulations established in accord with chapter 85 of the Acts of the Fourth Called Session of the Thirty-fifth Legislature, under a statement of the order of arrest that, according to the information of the health officer, relator is affected with gonorrhea. . . .

¹84 Tex. App. 463, 208 S. W. 531 (1919).
“The Legislature, under the police power, has authority to authorize the establishment of quarantine regulations for the protection of the public against contagion from those persons whose condition is such as to spread disease, and, incident thereto, to authorize the arrest and detention of such persons: and such, we understand, is the purpose of the statute in question. Under its terms, the proper health officer may issue a warrant by virtue of which a lawful arrest may be made without preliminary thereto affording the person affected a hearing; but if, after arrest, such person challenges the right of the authorities to continue the detention, the fundamental law accords him the right to have the legality of his detention inquired into by a proper court in a habeas corpus proceeding. . . . The health authorities causing the arrest of relator derive their power to do so from the alleged existence of the fact that the relator is affected with the disease mentioned, and that her detention is required in the public interest to prevent contagion. If those facts do not exist, the officer has no jurisdiction to continue the restraint and the court in the habeas corpus proceeding has authority to inquire whether the facts essential to jurisdiction exist. Ex parte Degener, 30 Tex. App. 566, 17 S. W. 1111 . . .

“We conclude that, under the act of the Legislature in question, the relator had the right to a hearing on writ of habeas corpus, and therein to prove the nonexistence of the facts necessary to authorize her continued detention and thereby obtain release. Facts essential to determine whether she should or should not be held not being available in this court, it is ordered that the writ of habeas corpus prayed for be granted, and that it be referred for hearing to Hon. R. B. Minor, Judge of the Fifty-Seventh Judicial District of Texas.”

What important standards for official acts are here involved? Who is called on to apply them?

2. Judge Jerome Frank says in a recent article:

“Litigation is the ultimate reference for the lawyer. By and large, in the last analysis, legal rights and duties, so-called, are nothing more or less than actual or potential
successes or failures in lawsuits. A lawyer who has inadequate acquaintance with litigious processes is, relatively, an impotent lawyer. Indeed, the lawyer is differentiated from other men by the sole fact that he, more expertly than others, is supposed to know the way of courts. (When I speak of courts, I include administrative agencies, which constitute a special sort of court.)

“When you come to practice and, acting for your client, Mr. Shadrach, draw his will, or pass on a bond issue, or organize a corporation, or negotiate the settlement of a controversy, or draft a legislative bill, you will—or you should be—concerned with how the courts will act. If you are competent, you will, as best you can, try to answer this question: ‘What will happen if those specific documents or transactions hereafter become a part of the drama of a trial?’ For the legal rights and duties of your client, Mr. Shadrach, under any given document, or in connection with any given transaction, may mean simply what some court, somewhere, some day in the future, will decide at the end of a trial in a future concrete lawsuit relating to Shadrach’s specific rights under that specific document or in connection with that specific transaction. In the last push, when your client gets into litigation, he has a legal right if he wins the lawsuit, a legal duty if he loses it.

“You will note that I have emphasized trials and trial courts. In that respect, I differ from most law teachers. With a very few notable exceptions, the kind of so-called ‘law’ taught by most professors in schools consists of deductions from upper-court opinions. The schools, generally speaking, are upper-court law schools. But upper courts, courts of the sort in which I sit, are relatively unimportant for most clients. Why? Because the overwhelming majority of lawsuits are never appealed, and, in most of the small minority which are appealed, the appellate courts accept the facts as ‘found’ by the trial court.

“This brings me to the transcendent importance of the facts of cases. A legal rule, principle or standard, says merely this: ‘If the facts are thus and so, these are the legal consequences.’ In a lawsuit, any particular rule, then, should be applied only if the facts invoking that rule’s application are
found to exist. If you, as a lawyer, assert that a given rule should govern your client's case, you will therefore fail, you will lose your suit, unless either the opposing lawyer concedes that those are the facts (which he seldom does), or you persuade the trial court (a jury or a trial judge sitting without a jury) that those are the facts.

"Now the actual facts in a suit do not walk into the courtroom. For they are past events, events which occurred before the suit began. The trial judge or jury, in most cases (i.e., those in which the facts are disputed) can usually learn about those past facts in but one way—through the courtroom narratives of witnesses. The witnesses, being human, may make mistakes in their original observation of the facts, in their memories of what they thus observed, or at the trial in their reports of their memories. Some witnesses deliberately lie. Many others are biased, and, because of bias, unconsciously distort their stories. The trial judge or juries, who are themselves merely fallible human witnesses of the witnesses, must guess which, if any, of the witnesses accurately testify about the actual past facts.

"A guess it must be, since there exist no mechanical instruments for weighing evidence or for determining the honesty and accuracy of the respective witnesses. We have not yet perfected a foolproof lie detector; we certainly now have no detector of the unconscious distortions of prejudiced but honest witnesses; and almost surely, we will never have a contrivance for correcting a witness' original mistaken observation of the facts.

"The facts, then, for decisional purposes are no more than what trial judges or juries guess—what they think the facts are (or, more accurately, what they publicly say or imply they think the facts are). The 'facts' consist, therefore, of the fallible subjective reactions of the trial judge or jury to the fallible reactions of the witness. Consequently, subjectivity, in two ways, inheres in trial-court fact finding—in the subjective reactions of the witnesses, and in the subjective reactions to the witnesses of the jury or trial judge. Specific decisions frequently turn on such subjective reactions, culminating in such fallible findings of the facts. In court-houses, the legal rules are never self-operative, are always at the
mercy of those findings and often of that subjectivity. I can perhaps most easily indicate the practical significance of that subjectivity by quoting what I have said elsewhere with respect to the trial judge: 'What we call the “facts” of a case constitute, often, the most important ingredient of the trial judge’s decision. But when the testimony is in conflict,—as it is in thousands of cases—the “facts” of a lawsuit consist of the judge’s belief as to what those facts are. That belief results from the impact on the judge of the words, gestures, postures and grimaces of the witnesses. His reaction—inherently and inescapably subjective—is a composite of the way in which his personal predilections and prejudices are stimulated by the sights and sounds emanating from the witnesses. Now these personal attitudes of the judge reflect the subtlest influences of his experience and of the manner in which he has moulded them into what we describe, loosely, as his “personality.” Where he was born and educated, his parents, the persons he has met, his teachers and companions, the woman he married, the books and articles he has read—these and multitudinous other factors, undiscoverable for the most part by any outsider, affect his notion of the “facts.” All kinds of obscure, unarticulated community moral attitudes thus play their part in his fact determination.' As I recently said, on behalf of our court: ‘Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, “bias” and “partiality” be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices. Without acquired “slants,” preconceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem, he would go mad. Interests, points of view, pref-
erences, are the essence of living. Only death yields dispassionateness, for such dispassionateness signifies utter indifference. “To live . . . is to have an ethics or scheme of values, and to have a scheme of values is to have a point of view, and to have a point of view is to have a prejudice or bias . . . ” An “open mind,” in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist’s descriptions of the feeble-minded. More directly to the point, every human society has a multitude of established attitudes, unquestioned postulates. . . . Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.’ For obvious reasons, the point becomes markedly sharper when cases are tried by juries.

“Never forget that courts do business at retail, not wholesale. All decisions are specific decisions in specific suits. In advising a client of his rights and duties, a lawyer is attempting to predict, to guess, what decision will be rendered in a specific bit of litigation. Often that requires him, before any suit is begun or even threatened, to guess whether, should litigation arise, there will be a dispute about the facts, and, if so, whether conflicting testimony will be introduced at the trial, and what trial judge or jury will try the case, and what will be the reaction of that as yet unknown trial judge or jury to that as yet unknown testimony.

“Prediction of specific decisions is hazardous, then, not primarily because of uncertainty about the legal rules but usually because of the obstacles to guessing what the trial courts will guess to be the facts. Due presumably to the difficulty of such guessing, Learned Hand, our greatest American judge, declared, after a long period on the trial bench, ‘I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.’ Sir William Eggleston, the present Australian Ambassador, an experienced trial lawyer, wrote this year, ‘With regard to the trial of pure questions of fact, I am of opinion that the results are . . . much a matter of chance.’
"Because, fixing their attention on upper courts, they neglect that crucial aspect of court-house government, many leading law teachers do their maximum worst in gravely miseducating their students. Repeatedly they assert that clear and precise legal rules usually prevent litigation, and imply that the difficulty of predicting decisions stems largely from uncertainty in or about the rules. That amounts to saying that if all the legal rules were settled and precise, or if parties to controversies always could agree on the pertinent rules, there would be little or no litigation. That is pure, unadulterated tosh. In most suits, no disagreement arises about the rules, and the disputes relate solely to the facts. Decisions in such suits, says many a professor, quoting Cardozo, leave 'jurisprudence . . . untouched.' That is true, provided you so conceive of 'jurisprudence' that it stays aloof from the affairs of ordinary men. But such a decision often means death or imprisonment or poverty or a ruined life to some mere mortal who, in his benighted ignorance, has more regard for his own welfare than for the aesthetic delights of pure 'jurisprudence.'

"Uncertainty about some of the legal rules exists; one comes upon it in the 'marginal' (or 'unprovided' or 'new' cases). Cardozo correctly said that such uncertainty ought not to be exaggerated. However, the point he missed, because he was an upper-court lawyer or an upper-court judge during most of his career, is this: The major cause of legal uncertainty, which is vast in extent, inheres in the unknowability of the 'facts' of cases. For I repeat that few cases are appealed and that, even when a case is appealed, the upper court usually accepts the facts as found by the trial court. Appellate courts deal principally with the legal rules. For that reason, upper courts are relatively unimportant. Trial courts—trial judges and juries—are the pivotal factor in the judicial process. . . ."  

What difficulty about the application of standards does Judge Frank stress? Is this point brought out in your law studies?

What proportion of contracts made between citizens A and B give rise to litigation, i.e., disputes in court regarding law or facts? What does this suggest?

Sec. 3-35. Summary and concluding observations. The main theme of this chapter has been the control of official acts by legal standards. We have been concerned with methods of controlling official acts which are, in turn, mainly significant as means or methods of controlling individuals.

First, we dealt with the standards which are established to control officials, and the ways in which official acts are significant. The discussion here included an analysis of executive acts, a discussion of the functions of courts and court procedures, and a brief description of the activities of administrative agencies and certain nonregulative acts of governmental agencies.

Second, we discussed the ways of effectuating standards for officials. Here, methods of motivating official behavior along desirable lines, methods of selecting officials, and methods of checking official acts were treated.

Finally, we considered the important uses which are made by various persons of the standards prescribed for official acts: how these standards are used by executive officials, by the courts, by the individual and his counselor, and by the student of law.

The stress throughout both this chapter and the preceding, has been on legal methods—methods of controlling people and methods of using and applying standards. This stress is justified by the fact that the principal thing which one gets in law school is a knowledge of legal methods—methods of analyzing fact situations and methods of applying legal standards to a case. No one can acquire a knowledge of all the law; no one can remember for long even a major part of the law which one covers in law school. Every practitioner
and every teacher has learned, analyzed and digested—and then forgotten—a great quantity of law. One often hears the practitioner say that he could not take a bar examination, or that he never knew so much law as when he graduated from law school. What he has carried away and kept are methods of analyzing fact situations, methods of applying legal standards to a case, and a feeling for the ways in which legal principles can be and will be developed and applied. Just as one who has learned to swim never loses his sense for the way to keep himself afloat and propel himself through the water, a legal trainee never loses his sense for, and ability to use, the legal methods into which he has been initiated.