CHAPTER 7

Legal Policies and Policy Making *

Sec. 7-01. Scope of chapter: policies and how made. In the foregoing discussion, standards have been viewed primarily as means of achieving ends, as instruments through which the lawgiver tries to effectuate policies which he envisages.1 We have not yet come to grips with the question of what the ends of law are. We have assumed in our discussion that legal standards are created to serve human ends. But what are those ends? What are the purposes which find expression in legal standards? Why does the legal system furnish guidance of various sorts? Why prohibit behavior of some kinds? Why command other kinds of behavior? Why permit certain activities? And, why does the law undertake to make many predefined acts effective? Until now, we have given only passing notice to such questions.2 Thus far, we

1 In thus treating law and its standards as instrumentalities devised to serve human ends, I have merely followed the modern trend of thinking here and elsewhere. Ever since the epoch-making work of Von Ihering, Law As a Means to an End, legal writers have been stressing the instrumental character of law. In this country, the great protagonist and popularizer of this viewpoint has been Roscoe Pound. As he says, “Making or finding law, call it what you will, presupposes a mental picture of what one is doing and why he is doing it.” An Introduction to the Philosophy of Law 59 (1913).

2 More or less definite references to legal policies will be found in the following places: secs. 2-11, 2-29, 4-04, 4-05, 4-07, 5-12, 5-13 (problem 3), 5-20 (problem 1), 5-23, 5-27, 6-06, 6-11 (problem 2), 6-18 and 6-19.
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have only carried the discussion of legal problems up to the point where we have found that questions involving legal policies were involved, and have stopped there. In the present chapter, I propose to take up these questions as such; I want to consider what our principal legal policies are, and show how these policies are fixed and formulated.

Sec. 7-02. Legal policies and policy makers. The creation of a legal standard is an intentional, a planned, act. The lawmaker who does his job properly works out a full plan; he works out the provisions of his standard with a clear appreciation of the ends he wants to accomplish by it. His planning encompasses both the provisions of the standard itself and the ends for which the standard is framed. These ends serve as self-imposed guides for the framing of the standard.*

By a legal policy, I mean an end or objective of such a legislative plan. In framing a constitutional provision, the draftsman has certain ends in view; these are legal policies. In enacting a statute, the legislature likewise entertains purposes which are to be attained through the creation of a standard or standards; these are also legal policies. And the judicial lawmaker who establishes a standard by his decision visualizes certain objectives behind it; these objectives are legal policies, too. A legal policy, then, as I am using the term, is essentially a legislative policy; it is the objective.

1 For examples of statutes in which the legislative ends are definitely stressed, see secs. 4-07 and 4-19; and compare the general discussion in sec. 4-04 of the point here made.

*(I.R.) It is worth noting that the means-ends analysis can be developed in more detail; it can be applied in the following series: Legal remedy as means of securing legal right (end); legal right as means of recognizing legal interest (end); and remedy, right, and interest as means through which a legal policy is recognized. In the present chapter, I have chosen to use the means-ends analysis in the last sense. This is the sense which is useful in the present chapter. The choice of a terminology or a mode of analysis is largely dictated by the purpose in hand, though convenience dictates that one not depart too far from common usage.
of a lawmaker. So that when I speak of legal policies in the rest of this chapter, I shall be taking the legislative point of view and focusing attention on the purposes for which the lawmakers of our American legal system create standards.

The creation of a policy is a verbal act. It is a declaration of intention. Often it is a part of the same verbal act as the standard to which it relates. The framer of a legislative provision establishes standards and tells what he wants to accomplish by them, all in one breath. And the judicial lawmaker lays down a rule of law and in the same opinion declares what the purpose of the rule is. This method of coupling standards and policies has become the common practice with Congress, as I have already pointed out; it enacts various provisions regulating individual and official conduct, and joins with them an expressed declaration of policy.² Only too often, however, the policy maker’s purpose is stated on a separate occasion, or is perhaps not thought out at all, or is merely assumed and taken for granted.³ In all these cases, the interpreter of law has to discover the lawmaker’s policy. In some cases, this means that he must conjure up something which, like the “little man,” was “not there.” The interpreter becomes, in effect, the policy maker of the legislation he is interpreting.

So policies and their declarations are always connected with human actors. Individual human beings may act on behalf of organized groups, as the lawmaker and other officials do when they entertain and express policies on behalf of the state.⁴ But only individuals do acts and lay out plans. I stress

² See examples in secs. 4-04 and 4-19.
³ See further regarding the incompleteness of legislative declarations, sec. 4-22.
⁴ It is common usage to speak of the ends of law, the policies of government, and the interests of society as if law, government and society were persons who entertained ends, pursued policies, and asserted interests. This mode of speaking does no harm if one appreciates that it is metaphorical and elliptical. In fact, I shall not hesitate to follow this common usage myself throughout the rest of this chapter. But it must always be remembered that these modes of speech refer in the last analysis to ends, policies and interests recognized and adopted by officials. Cf. sec. 3-03.
this personal role of policy makers and other officials in order to forestall the type of thinking which loses sight of human acts in the midst of dry abstractions. Of course, I do not mean to limit our discussion to particular policies of particular lawmakers on particular occasions.** I do not mean that you and I can get along without generalized types of policies, or general ends of law as expressed in official actions on many occasions. We must make use of these general ideas; in fact, most of the policies with which we shall have to deal in the remainder of this chapter are general in the sense just mentioned. But the fact that they are general and commonly accepted, does not deprive them of their character as ends recognized by actual officials.

Sec. 7-03. Policies as guides for other officials. One of the lawmaker's primary aims is to give guidance to other officials. Correlatively, these officials look to him for guidance. The lawmaker ordinarily makes his instructions as detailed as possible. He tells other officials, in the form of specific stand-

** (I.R.) More specifically, my reason for recognizing the role of the policy maker in formulating and recognizing legal policies lies in the fact that it is so common to speak of legal policies, ends of law, legal interests, social interests, etc., in the elliptical manner mentioned in the preceding footnote. This usage neglects the personal side of legal policies and policy making. It leaves policies hanging in the air, and can, on this account, be seriously misleading. To speak of the ends of law is quite as if one spoke of the aims of poetry, or the purposes of philosophy. Poetry and philosophy do not, as such, recognize ends. In this connection, ends must mean, respectively, the general aims which are cherished by poets and the general purposes which are professed by philosophers. By the same token, what we mean when we speak of the ends of law are the purposes which are entertained by persons who create law, or who interpret and apply it. If this is not clearly realized, it is easy to fall into the fallacy of personifying the law itself. Much of the difficulty which I have found over the years in trying to explain the ends of law to law students seems to me to stem from the fact that law is regarded as if it were somehow endowed with a phantom personality which can pursue objectives of its own, and as if it had an independent existence apart from the acts of lawmakers, judges, and other officials. But if we look upon law merely as a set of standards established by human acts, and if we see the ends of law as objectives entertained by human lawmakers and intended to guide the acts of human officials, we shall not have too much difficulty in grasping the meaning of the ends of law or the policies of the legal system.
ards, what they must do and not do, what they may do, and what they can do effectively. But he may employ very broad and indefinite standards, including the type of broad statement in which we are at present interested, to wit, the declaration of policy. In other words, the lawmaker's explanation of his aims has guidance value, too, though this guidance may be rather remote and vague. If the lawmaker's plan of guidance by specific directions is adequate, and normally it is, then his vague and general declarations of policy play very little part. But sometimes specific directions turn out to be ambiguous or conflicting, or are found to be altogether lacking. In that case, the official who is looking for guidance must seek for directions outside the specific standards provided; he may find it in an explicit declaration of legislative policy, or a general policy of the common law, such as the policy of preserving the public peace, or a general policy of our constitutions, such as the policy of allowing the individual the maximum of freedom in deciding what contracts he will make. When other guides fail, legally recognized policies serve as secondary standards and furnish at least a minimum of guidance for official action.

Similar resort to general policies for guidance may be had by officials when the lawmaker intentionally fails to provide specific standards to go by. Of this type, as you will recall, are the instances where the legislature delegates subsidiary lawmaking authority to administrative agencies.\(^1\) This kind of delegation does not leave the agency with an unlimited lawmaking discretion. Usually the agency is tied down by an explicit declaration of policy in the act which invests it with governmental authority; and besides this, the agency is to be guided by policies such as public convenience, the protection of life, protection of property, etc., which find general recognition in constitutional clauses, statutory provi-

\(^1\) See secs. 4-15 to 4-17; and compare sec. 4-23.
sions, and judicial decisions. Of this same general type and purport are the cases of acts which are left to the free discretion of judges. For example, if a judge must pass on the question whether a particular type of contract operates as an unreasonable restraint of trade—a vague enough standard—he looks for and obtains some guidance in common declarations of policy, legislative and judicial. He finds some support in policies regarding free contract, freedom of business, protection of the public against monopoly, etc. Such policies serve as a secondary, but nonetheless helpful, guidepost to direct his conclusions. Again, if a judge has to decide whether a particular offender is to be put on probation or sent to prison, he does not find himself entirely without leads as to the proper choice to make. He is aided by declared policies of statute and decision, regarding reformation of offenders, the protection of the public against injury, etc. Alike in all these cases where specific standards are intentionally not provided, policy declarations of various sorts serve the official actor as general guides.

Sec. 7-04. Legal policies—classification—subtopics. Policies, like the private objectives of the individual, might be listed almost without number. They vary widely from one legal system to another. For classification and further discussion, I have selected the principal policies recognized by the American legal systems.*

* (I.R.) Also like motives (e.g., hunger and sex, self-regarding and other-regarding motives, self-preservation and socially directed motives), policies can be classified in a variety of ways. For example, policies can be related to the persons who announce them (officials and theorists); they may be policies which are adopted in fact and those which ought to be adopted; they may be related to things, tangible and intangible, to physical environment and to culture; they may be related to various kinds of personal subject matter, as individuals, groups and communities.

It is obviously not feasible to consider and mention all the policies that have ever been adopted. A selection must be made. It is also not feasible to analyze and classify the selected material except in limited ways. In fact, the selection of items for analysis and the classification of material selected,
All these policies have an actual and an ideal side. They are actual in the sense that they are, in fact, adopted by some or all the American legal systems. They are ideal in the sense that they are goals which may or may not be achieved; and ideal in the further sense that they are viewed as desirable or proper goals by those who adopt them.

Along with each policy presented, I shall refer to standards in which it is recognized, and to various governmental measures through which it is effectuated.¹

The policies will be subdivided and described under three heads, to each of which a subtopic will be devoted:

- Policies regarding the individual.
- Policies regarding the community.
- Policies regarding organized groups.

These three subtopics will be followed by a fourth and concluding head, entitled Determinants of Policies, in which you will see how policies are formulated and what shapes their development.

**Policies Regarding the Individual**

*Sec. 7–05. Stress on the individual claim.* The United States was born in the heyday of individualist thinking. The emphasis of political and economic writers of the time was on the claim of the individual, on his demand for liberty, equality and security. These writers were much impressed by the drawbacks of governmental interference with individual initiative, and by the dangers of governmental abuses of power. They regarded the individual as the best judge of his own interests, and felt that governmental restraints always go back to what the classifier thinks is important. In this regard, the following treatment expresses my personal views of what is significant in this field.

¹ Consult section 3–01, note 1, regarding the senses in which the terms "government" and "state" are used in these lectures.
on his acts and choices should be held to a minimum. It is not surprising, therefore, that the practical policy makers of that day embodied these general views in the federal and state constitutions which they framed. It is not surprising that they gave emphatic recognition to the individual will, and adopted a hands-off policy for government which would allow the individual to work out his own salvation.

But this original concern with the individual's claims is more than a matter of historical interest; it continued without break or challenge almost until the end of the nineteenth century. It found expression in innumerable subsequent declarations of constitutions, statutes, and decisions. Even today the vast bulk of our private law is focused on the claims of the individual; we talk of his acts, his rights, his powers, his privileges, and his remedies, almost without end. So that the legal policies in which individual claims are recognized are still matters of prime, practical import to us as law students. They constitute a natural and convenient starting point for our discussion of legal policies.

The claims made by individuals and recognized by law I shall call "individual interests," following the terminology which is now commonly accepted. These are claims asserted by individual men, and also recognized as the subject matter of protection by the policy makers of our legal system. They may be said to have two aspects: an individual aspect and an official aspect. The individual aspect is found in the making of a claim for protection on the individual's part. The official aspect is found in the grant of that protection by policy makers. These two aspects of the policy of protecting an individual claim are linked together when we speak of the legal recognition of an individual interest or the legal protection of the individual.*

*(I.R.) The treatments of this subject by Pound and Stone seem to me to suffer from the fact that they do not develop this official aspect clearly. They do indicate that legal interests are claims asserted by people; they fail to
A convenient inventory of these recognized interests of the individual has been prepared by Pound. He lists three major groups of individual interests: 1. interests of personality; 2. interests in domestic relations; 3. interests of substance. I adopt the essential features of Pound's inventory in the three sections which follow.

Sec. 7–06. Interests of personality. This group of recognized interests underlies a major segment of the law of torts as well as important parts of the criminal law. The group embraces such interests as the claims of the individual to live without molestation by others, to move about without restraint, to act freely, to believe and say what he chooses, and so on. These interests find recognition in constitutional provisions, which guarantee the protection of the life, the liberty, and the equality of the individual. They also find recognition in statutes and decisions, defining standards for individual action, and fixing the rights, powers, privileges and immunities of individuals in regard to other individuals and to officials.

The policy of protecting the individual's personality is subdivided by Pound further into:

a. Protection of the integrity of his physical person—against aggression or injury by others, such as assaults, batteries, and negligent harms.

b. Protection of the freedom of his will—against restraints on his freedom of movement and freedom of action; and against compulsion and fraud in the like respects.

Indicate with equal clarity that legal interests, legal ends and legal policies are interests, ends and policies recognized and adopted by people, i.e., by officials. See Pound, Outline of Jurisprudence (5th ed.) 96–97 (1943); Pound, Social Control Through Law 68–69 (1942); Stone, The Province and Function of Law 487 et seq. (1946).

1 Outline of Jurisprudence, (5th ed.) 97–102 (1943). However, I have modified some items and have omitted others in order to simplify the presentation. See also Stone, The Province and Function of Law, chapter 21 (1946).
c. Protection of his personal reputation—against defamatory acts, i.e., libel and slander.*

d. Protection of his freedom of belief and opinion—against governmental interference and interference by others; the protection in this regard extends to religious tenets, political beliefs, and economic views; it covers freedom of speech and of the press and of assembly, as well as freedom of belief. All these freedoms are clearly recognized by provisions of the constitutions, by statutes, and especially by the decisions of the Supreme Court.

Sec. 7-07. Interests in domestic relations. The individual's interests in domestic relations cover his family relationships. They are, in a very real sense, an extension of his personality to include claims regarding his relations to others. Many of these claims are recognized in legal policies. For example, the claims of husband and wife to one another's society; the claims of husband and wife that third parties shall not interfere in their relations to one another; the claims of the parent to the control of the child, and to its society and services;¹ the claims of the child to the society and support of the parent.² It is not necessary to elaborate these claims or the policies behind their recognition; they are well known and find expression and recognition in a variety of familiar rights, powers, privileges, and remedies.

Sec. 7-08. Interests of substance. The individual's interests in the economic sphere are recognized in many important

* (I.R.) Pound also lists at this point, as a further head, the protection of the individual's privacy and sensibilities. No doubt this head represents a proper inclusion for a complete discussion such as Pound's, but as our purpose is merely to give a brief account of the recognition of individual interests, and as the inclusion of this item would require more explanation and discussion than our space allows, I have decided to omit it.

² See Daily v. Parker, 152 F. 2d 174 (1945), quoted in sec. 6-06, problem 3.
legal policies. These interests cover all of the individual's claims regarding property, contracts, and related matters. They constitute the subject matter of the law of property and the law of contracts. These interests are recognized and the policies behind them are announced in the provisions of the constitutions which guarantee the property and the liberty of individuals, as well as in numberless enactments and decisions, which expound the rights, powers, and privileges of the individual.

The recognized interests of the individual in this sphere can be subdivided into:

a. The individual's claim of the opportunity to acquire tangible things. This claim is commonly given recognition in the form of powers and privileges of acquiring tangible things in standard ways, as by occupation, by purchase, by gift, by exchange, by will, and by inheritance.

b. The individual's claim to use and control tangible things acquired. This claim finds recognition in various rights, powers, privileges, and immunities of ownership and possession. The policy behind the recognition of this claim to use and control tangibles is typical of the policies which lie behind the legal recognition of all the claims of the individual. The individual must be allowed to control his own destiny. The individual who has property need not worry about the morrow. Hence, the legal policy of protecting his use and control of tangibles is a policy of encouraging him to make his own future secure.

c. The individual's claim of the opportunity to choose a vocation. Of this claim to free choice of vocation, a recent writer says:

"It is this aspect which a famous judge much later symbolized in 'the natural right to be an iceman.' The Jeffersonian

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1 This aspect of property is sometimes characterized by the phrase, "property for security." It includes not only the property-holder's security as regards his own future, but also his ability to assure the future living of other persons dependent upon him for support.
democratic spirit drew from the principle of equality of citizens the corollary that all men should have equal access to all offices, pursuits and professions. Though carried at times to remarkable lengths, it did draw attention to the important fact that the claim to free choice of vocation is not merely a claim of substance, to earn a salary. It is also an intimate claim of personality affecting the activities and environment of each man's life. . . .”

The individual was guaranteed by our constitutions against certain governmental interferences with his choice of a vocation. But the policy of the law was far from any guarantee of a job to the individual. It was essentially a guarantee against discrimination. Equality of opportunity to engage in any ordinary line of work was guaranteed; in particular, limitations and inequalities of opportunity based on race and color were outlawed by the Federal Constitution.

d. The individual's claim of freedom of contract—his opportunity to make such contracts as he pleases. This claim has been recognized very fully by our law from the foundation of our country down to the present time. In the language of Jessel, M. R., a famous English judge, in a decision rendered in 1875, “. . . if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting. . . .” As we shall see presently, the modern social trend in legal policies is resulting more and more in limits on this freedom. Yet it is still substantially accurate to say with Sutherland, J., of our Supreme Court, that “freedom of contract is, nevertheless, the general rule and restraint the exception.”

e. The individual's claim to enforce contracts and other beneficial arrangements with others. Until A and B, the

4 Adkins v. Children's Hospital, 261 U. S. 525 at 546 (1923). However, see the further discussion of this statement in sec. 7-36.
parties to a contract, have concluded their arrangement, both enjoy freedom of contract. This is the individual interest last above discussed. But when their agreement has been completed, each enjoys a new and different interest, the interest in having the contract enforced. This interest also has been strongly stressed by our American legal systems, and still retains most of its pristine vigor.⁵

Often the original policy of our government in the economic sphere has been characterized as a policy of free enterprise, or as an adoption of the economic doctrine of *laissez faire*. These characterizations are good enough if one understands what the doctrines of our government have really been; if not, they can lead to misunderstanding. The danger lies in the fact that both these characterizations give expression to the individual’s claims to liberty and omit to express his claims to security. “Free enterprise” has always involved the individual’s economic claims in both respects. First, it has involved recognition of the individual’s freedom of action, and second, it has involved the assurance to him of the fruits of his acts. These can be regarded as two distinct policies, or lines of policy, regarding his claims. Both are represented in the analysis above developed; both are fully recognized in our legal systems. The policy of allowing free scope for individual action in the economic sphere is clearly adopted by the Federal Constitution in clause after clause; freedom to create property is recognized; also freedom to acquire property and freedom of contract. But no less clearly are adopted the policies of protecting established property rights and established contract obligations. The liberties and expectations of individuals in both these respects have been announced with equal force by state constitutions down to the present day; likewise in judicial opinions interpreting the

⁵ I shall have more to say about the claim to the enforcement of contracts when I come to discuss the social interest in the security of transactions; see sec. 7–15.
constitutional clauses or laying down general principles of law. And not infrequently both policies are stated in statutory form. Free enterprise meant originally, and still means, both freedom of the individual to establish claims and security for them when established.

Sec. 7–09. Alternative classifications and names of policies regarding the individual. The individual interests which have found recognition in government policies have been given a variety of names, such as individual wants, needs, claims, and “rights.”¹ Each of these names has had in the past, and still has, some vogue. Each name has a connotation of its own, but all express an approach to legal problems which puts the emphasis on the individual’s claim. For our present purpose, there is no great issue involved in choosing one name rather than another, but their substantial identity is worth noting so that we shall not become confused when a change of terms is encountered.

It may also have struck you that the individual’s welfare can be broken down and analyzed in different ways. The classifications of individual interests adopted in sections 7–05 to 7–08 is by no means the only one available or in use. In fact, the traditional classification of individual interests is cast in terms of the liberty, the equality, and the security of the individual, rather than in terms of personality, domestic relations, and substance. However, liberty, equality and security, like the other three terms, are very broad and inclusive. They require further subdivision and specification. Liberty in what respects? In regard to the movement of one’s person, the acquisition of property, the use of one’s property, or in what other regard? And similarly of equality and security. When we work out answers to these questions we arrive at

¹ The word “right” is here used in a broad sense, which includes rights, powers, and privileges (e.g., A’s “right” of ownership); and not in the sense of right as we define the term in section 2–19 (i.e., as the correlative of a duty).
about the same place and achieve a list substantially the same as our inventory of individual interests. Nevertheless, as the analysis of individual welfare is often made in terms of liberty, equality, and security, and is very common in judicial opinions, I have included below several problems which are cast in these terms or in some combination of them.

Any selection of material for discussion as well as any classification of it, has its virtues and its shortcomings. These inhere in the emphasis which the selection or classification gives. The analysis of individual welfare in terms of liberty has the advantage of stressing the privileges of the individual; the analysis in terms of security has the advantage of stressing his rights as against others; and the analysis in terms of equality has the virtue of stressing comparisons between one individual and another, so that unperceived discrimination does not enter into the legal treatment of A and of B. The analysis in terms of individual interests, that which we have presented, has the merit of stressing the general importance in legal affairs of the individual's claim; it serves to give weight to the point that a prime policy in wide areas of our law is to give effect and protection to the individual's will.

But you should note that the stress on the individual's claim, as well as the stress on his liberty, equality, and security, means a stress on his advantages. Individuals do not lay claim to burdens. Burdens do not appear in any of the classifications mentioned, except incidentally and as the obverse side of the individual claimant's interests. Of course, a good deal of the time, one man's advantage is another man's burden, and vice versa, so that indirectly the duties of the individual to other individuals are taken account of. But this cannot be said of social duties. The exclusive attention to the individual's claims led to a neglect of claims which were to be made on behalf of society generally. It tended to make lawyers and judges overlook the obligations of the individual
in society, unless these obligations were very striking and clear. The result was that social considerations had a hard time achieving recognition with legal, and especially with judicial, policy makers; a slow and painful process which is to be the main theme of sections 7-12 and following.

Sec. 7-10. Conflicting interests—necessity of choice. Every individual interest mentioned in the foregoing sections is limited in scope. No interest is guaranteed without qualification. Even the most extreme individualist thinkers of the last century saw that individual interests overlap and cut across one another at some point. A's freedom to act becomes at some point a violation of B's personal integrity. A's freedom of speech is limited by a duty not to defame B. A's freedom to acquire property does not include the liberty to take property which belongs to another. The simple fact is that A and B alike want the whole world to hold and to move about in, and both cannot have this unrestricted scope for action. The scarcity of space and things imposes necessary problems of division which the policy maker must face in recognizing individual interests.

To furnish a method or general standard for resolving these conflicts of interest, various criteria have been suggested by those thinkers who cast their formulas in terms of individual welfare. For Bentham, the criterion is to be the solution which will procure the greatest happiness for the greatest number; for Spencer, the liberty of each individual is to be limited only by the like liberty for all; for Felix Cohen, a modern writer, the promotion of the good life for all is the criterion to adopt. Obviously such criteria of choice do not furnish ready or easy methods of resolving conflicts. The policy maker is left with a wide range of discretion, both in deciding what interests to recognize and in deciding how far to recognize and secure each interest. Such general standards do define a general approach to legal problems,
a general line of attack on them; and the policy maker's approach or line of attack is not without importance, as I shall show later. In any event this kind of general standard is all that the policy maker has to guide his determinations.

But conflicts of interests do not stop with the conflict of A's interest with B's interest. A's interest frequently conflicts directly with a general interest of the community, such as the interest in the public peace or the interest in the public morals. A's freedom of action does not extend so far as to permit him to run naked through the public streets. His freedom of speech does not include the liberty to advocate the overthrow of the existing government by force and violence. At some point the line of demarcation must be drawn between conduct which is, and conduct which is not, permitted. This line is drawn by the policy makers of the community, in the light of the various individual and public interests which they recognize. Such conflicts and the methods of resolving them I shall refer to more in detail presently. For the moment it suffices to say that conflicts of this type are no easier to deal with than the conflicts already discussed, and the methods suggested for resolving them are equally indefinite and difficult to apply.

And finally, even at an early day, practical policy makers of the Anglo-American law realized that there were cases in which the individual, A, was to be protected against his own acts. A's will was not to control, even as to himself. A could not agree to the maiming of his person. The King, it was said, had an interest in maintaining his fitness as a soldier. Also, A could not agree to be killed so as to confer a good defense on his killer. And infants were protected against the effects of their own acts; they could not contract freely. Today we would say that these cases involve countervailing social interests, which the policy maker weighs and finds controlling. But formerly these countervailing interests were not too clearly perceived or named. Such cases were
merely treated as exceptional and not allowed to overturn the general principle which made the individual the master of his own destiny.

Sec. 7-11. Problems. 1. Suppose that D states to X that P is a thief. In fact, D speaks on the basis of misinformation; P has not committed any theft, and his innocence becomes obvious upon investigation. D has violated a prohibitive standard, and P is entitled to recover damages for defamation. On what policy is this prohibitive standard based? If D acted in perfect good faith, can he not assert a countervailing interest? At first blush, it might seem that D has a meritorious defense; but we all know that our legal system has not recognized any such privilege on D’s part. What does this mean in terms of conflicting interests, i.e., policies?

In the foregoing case, the interest of D is sacrificed to that of P. However, if P had formerly been a servant of D, and if D had, in good faith, answered an inquiry as to P’s character, made by Y, another prospective employer, there would again be presented a conflict of interests. But the result would be different; D’s act would be privileged (i.e., permitted). Why?

2. In Ross v. State, a Texas case decided in 1881, the defendants were convicted of the murder of one Hall, a town marshal who had attempted to arrest them. The appellate court decided, in view of the testimony, that Hall had no legal right to make the arrest. The court stated its conclusion as follows:

"Hall, the deceased, having no right to arrest the defendants or either of them, what were the legal rights of the defendants, if, in preventing this illegal arrest, they or either of them slew him? . . .

"As the law, divine and human, gives the citizen the right to stand upon his individual rights, and to use force against

1 10 Tex. App. 455 at 463.
force to successfully prevent the attempted wrong, the citizen whose liberty is thus unlawfully assailed can not only use force, but can increase that force and continue to increase it even to the death if necessary to prevent the attempted wrong, and if he slay his adversary he will be held excused. Otherwise the lawless aggressor, the vindictive oppressor will be permitted to triumph over the rights and liberties of the citizen. Right will be made to do homage to wrong, and look to future redress in the courts of the country. This is not American law. The citizen has the right to maintain his liberty at all hazards, against any and all persons who attempt to invade it unlawfully, taking care not rashly to use or resort to greater violence than is necessary to its protection."

Do you think the court reached a proper solution of the conflicting individual interests here? In holding the defendant's act privileged, the court laid stress on the policy of freedom of movement for the individual. What important community interests (policies) does this court overlook? Compare the following statement in Smith v. Commonwealth:

"While personal liberty is a very highly esteemed right, it is better to undergo the ill convenience of an unlawful arrest, from which the law will deliver, than that human life should be sacrificed, and a dispute as to whether an arrest is unlawful should not be decided with pistols, when it is a matter that the magistrate can speedily determine. . . ."

3. How can you justify a compulsory education law, i.e., a law which requires all children to attend school until they reach the age of sixteen? Suppose "little Willie" prefers to spend his time fishing rather than in school attendance?

4. Stephen:

"The result is that discussions about liberty are either misleading or idle, unless we know who wants to do what, by what restraint he is prevented from doing it, and for what reasons it is proposed to remove that restraint.

\[\text{Smith v. Commonwealth, 196 Ky. 479 (1922).}\]
"Bearing these explanations in mind, I may now observe that the democratic motto involves a contradiction. If human experience proves anything at all, it proves that, if restraints are minimized, if the largest possible measure of liberty is accorded to all human beings, the result will not be equality, but inequality reproducing itself in a geometrical ratio." 8

To illustrate the force of what Stephen says, let us suppose a case where twenty persons, including A and B, are competitors in a particular line of business operating on a national scale. A buys out two competitors; he is then able to obtain supplies at lower prices than B because he buys in larger quantities; he is also able to obtain more favorable treatment in regard to freight rates (rebates); and he can establish advantageous retail outlets for his product. A makes large profits and continues to buy out competitors until only B is left. A then lowers prices so that B is squeezed out of business. What does this story suggest in relation to the point last made by Stephen?

As a matter of fact, some or all of the acts of A above mentioned would be forbidden by federal statutes (Sherman Act, Interstate Commerce Act, Clayton Act, Robinson-Patman Act, etc.). I need not go into details regarding these cross-cutting prohibitions and restraints on A's liberty of contract. What is the general policy behind them?

Policies Regarding the Community

Sec. 7–12. Present-day stress on general welfare. Since the end of the nineteenth century, greater stress has been put on the general good as the objective of legal and governmental policies. Where formerly legal and political problems were discussed almost exclusively in terms of individual claims, discussion today is carried on more and more in terms of the general welfare. By the prevailing doctrine, the indi-

8 Liberty, Equality, Fraternity 182 (1874).
individual is no longer assumed to have an intrinsic value or to enjoy necessary rights.\textsuperscript{1} He is no longer assumed to have essential claims to freedom, equality or security. Instead, there has developed a strong tendency to put the securing of interests on a social basis; a strong tendency to emphasize the good of the community or over-all group.

However, even the switch of attention to community welfare has not represented a complete change of legal policies. It has been, rather, a change of point of view. The policy maker pursues largely the same objectives; but he has a different slant which introduces the social or community welfare factor into his calculations. He recognizes the same policies and objectives under different names. The policy maker of today recognizes the individual’s claims, not as such, but for the social good.\textsuperscript{2} Thus the policy of recognizing individual interests of personality is justified by the community’s interests in the individual’s life. Sound and capable individuals may be regarded as necessary to a soundly functioning community. Hence, individual welfare readily be-

\textsuperscript{1} No doubt the founders of our republic thought of certain individual rights as fundamental and beyond the reach of the policy maker. And in the philosophy of Kant, the individual is assumed to have an intrinsic value. His practical imperative reads: “Act so as to use humanity, whether in your own person or in the person of another, always as an end, never as merely a means.” Watson, \textit{Selections from Kant} (Ed., 1927) 246. Probably it is correct to say that the modern exponents of the “higher law” in this country all maintain similar views. Compare discussion of “higher law” views in section 7-45. These writers hold that there are certain parts of human life which are sacred and not to be controlled for the public good.

\textsuperscript{2} Individual welfare and social welfare do not, accordingly, represent completely divergent objectives. In a certain area the two kinds of welfare may coincide; the individual may be accorded what he wants because it is good social policy to do so; this is the area of legal recognition of his claims in the form of rights and legal interests. Beyond this area of positive recognition lies another where it may be a matter of indifference, socially speaking, whether the individual’s wants are satisfied or not, and where the legal system adopts a policy of neutrality; this is the area of liberties. And beyond this area of indifference and neutrality is one where the individual’s claims run counter to the general good, or the good of other individuals; this is the area of legal prohibition. Compare what is said in sections 2-03 to 2-11, inclusive. See also the remarks of Stone regarding the interchangeability of interests seen from different viewpoints. \textit{The Province and Function of Law} 490–491 (1946).
comes a community objective. In this sense, the state, through its legal system, not only undertakes to secure benefits for its membership as a whole, it also treats the welfare of each individual member as a state objective.

To some extent, the social viewpoint of policy matters is a natural consequence of the fact that policy makers who formulate, and other officials who execute, policies, are social agents. They act for the community, and in its interests. In other words, the machinery of the state is social machinery. This fact tends to give all official thinking a social coloring. It tends to make officials look at all objectives of their activity in terms of the community's welfare. But, in the American legal systems, this tendency to the social or official viewpoint will always be kept within bounds, so long as the present constitutions stand. These instruments prohibit many possible official inroads on the individual's claims. These instruments, together with our individualist tradition, make the individual and his claims the starting point for official action. These instruments take the individual's claims for granted, and have the effect of requiring that social interests be newly established and positively recognized. Our officials cannot forget the individual while they continue to operate under our existing frame of government.

In some parts of the world, this stress on the community interests has been almost as one-sided and exaggerated as the stress on individual welfare was here in the last century. Thus some governments, notably the recent Fascist and Communist regimes, have fallen into ways which sacrifice individual life and personality for some mystical racial goal or party advantage. As is indicated in the text, this extreme of emphasis on group interests would hardly be possible under our American legal systems without a complete change of our constitutions.

Of course, officials may also be controlled by selfish interests or the interests of smaller groups. See next general subtopic, Policies Regarding Other Groups and Communities.

In fact, our strong recognition of individual claims was achieved as a part of a revolution in which the existing government and its officials were displaced by the efforts of nonofficial individuals. These individuals were able to secure the protection of individual claims in setting up a new government. If English and American history prove anything, they show that an established officiandom does not on its own motion recognize individual interests and confer its blessing on individual claims.
In the following sections, I shall try to present an inventory of legal policies regarding the community. The objectives of these policies I shall call “social interests,” following a terminology which has become current through the writings of Pound and others. I shall begin the inventory of social interests with those which are the most ancient and generally recognized:

Social interests in internal peace and order (sec. 7–13)
Social interests in security of acquisitions (sec. 7–14)
Social interests in security of transactions (sec. 7–15)

and then move on to other social interests (secs. 7–18 to 7–24), which have been more recently recognized and adopted.

Sec. 7–13. Social interests in peace and order. Historically, the preservation of peace and order in the community appears to be the earliest objective explicitly recognized and avowedly pursued by politically organized society. It is also probably the most fundamental of all governmental policies, inasmuch as the achievement of most, if not all, other social interests depend upon order. And it is a most comprehensive social policy; it covers a large share of the protection given by government to individual claims against criminal and tortious aggressions by others; and it embraces several social interests to be presently discussed, if the phrase, “peace and order,” be used in a broad sense.

Under the existing American legal systems, the chief responsibility for maintenance of peace and order rests with the states, though the federal government may have to act to preserve order in connection with its ordinary operations, e.g., the work of its courts, or may have to deal with an extraordinary situation, e.g., a general rebellion. The principal means employed by the states to preserve peace and order are state and local police forces, consisting of sheriffs,
constables and other officers, and state military forces, commonly called militia. The federal government maintains a system of United States marshals, a Federal Bureau of Investigation, and various inspectors and executive officers, as well as its military forces.

On the legal side, the policy of preserving peace and order is expressed or implicit in many prohibitive standards applicable to individuals, especially in the standards of the criminal law. This policy is the basis for punishing murder, rape, robbery, and other acts of violence. This general objective is also evident in many legal limitations on the individual’s privilege of self-help. Keeping the peace is involved, too, in numerous correlative standards, applicable to officials. Legal provisions commonly require officials to arrest, suppress, and prosecute individuals who disturb the public order; and the governors and the President are authorized and required by constitutional and statutory provisions to declare martial law in case of serious public disorder.

Sec. 7-14. Social interests in security of acquisitions. You will see in the policy of protecting acquisitions an old familiar face. This policy cannot be regarded as a quite new item in our policy inventories. First, the social interests in the security of acquisitions are already familiar in the sense that they are roughly identical with the individual’s interests in holding things. Recognition of these social interests does not constitute any wide departure from the individualist point of view. The social interests merely represent the social bearing of the individual interests. Recognition of the social interests consists essentially in finding a social justification for the protection of individual claims to control things.

1 The militia is a body of citizens of a state, enrolled in its military force on a part-time basis. The militia is not usually called together for actual service except in emergencies. In both respects, the militia is to be distinguished from a regular army, such as that maintained by the federal government.

1 Sec. 7-08, subdivision b.
Second, the policy of protecting acquisitions may be said to be only a part, or at most, an offshoot, of the policy of preserving peace and order, and in either case, not a new policy. Obviously, the public peace and the security of acquisitions are closely connected. Many disturbances of the peace do relate to the acquisition or control of things; the robber disturbs the public peace at the same time that he violates the security of acquisitions. But the security of acquisitions is such an important phase of public order, and looms so large in legal discussions that it well deserves, and is usually given, a separate place among social interests.²

The social interests in protecting individual acquisitions lie behind all the various legal forms in which private property is recognized. As a recent writer says, "... substantially the whole law of real and personal property, as well as great parts of the law of torts and crimes, are directed to the security of acquisitions."³ And these social interests find recognition (along with the individual) in the American constitutions, notably in the provisions forbidding government to deprive persons of property without due process of law, and in various provisions prohibiting retroactive legislation.

"Acquisitions" in this connection refers to acquisitions of land and tangible goods. "Security" refers to the protection given to the individual’s claims to such land and goods. So that the social interests in security of acquisitions mean the legal objective of making secure the claims of those who establish control of land or goods in prescribed ways, such as by occupation, by transfer or exchange, by inheritance, etc. The individual claims thus recognized are commonly designated "property rights."⁴ They are secured, so far as they

² After all, the number of policies which we distinguish and the distinctions between them that we make, are to be determined mainly by considerations of convenience and common usage.
⁴ "Rights" is here used in a broad sense which includes rights, powers, and privileges.
are secured, by legal remedies, by private actions of different kinds, by limited self-help, and by public prosecution.

Sec. 7-15. Social interests in security of transactions.¹ The policy of recognizing the individual's claims to enforce contracts and other beneficial arrangements with his fellowmen has already been counted among policies regarding the individual. Now, I want to refer to the social reason given for recognizing this claim. All of modern economic life rests upon the sanctity of contractual undertakings. Goods are produced and distributed on the faith of promises by others. Services are performed on a like basis. Security in these respects is the foundation on which all forms of economic activity rest. This security is what Cardozo means when he speaks of the "... overmastering need of certainty in the transactions of commercial life."²

It is a basic policy of all modern governments to furnish the needed security of transactions. In some measure, this is done by providing preordained patterns for contractual transactions and obligations (forms for effective acts) so that all parties who enter into contractual undertakings can know beforehand what the effects of their acts will be, and thus avoid controversy and misunderstandings. But, of course, the ultimate basis for security of transactions is found in the availability of legal remedies to back up promises made. And, so that the assurance of governmental backing for contractual obligations will be doubly sure, the states are expressly forbidden by the Federal Constitution "to pass any ... Law impairing the Obligation of Contracts. ... ."³ This means

¹ Transfers of tangible things are also transactions in one sense. However, I have included these under the preceding head. I have followed the usual practice of distinguishing between contracts and other executory transactions on the one hand, and conveyances, sales, and other executed transactions on the other.


³ Art. I, Sec. 10.
that no state can legislate in a manner to change the obligatory force of an existing contract. 4

Sec. 7–16. Problems. 1. The Constitution of the United States gives Congress power "to provide for the Punishment of counterfeiting the Securities and current Coin of the United States." 1 Acting under this authority, Congress has provided for the punishment of persons who counterfeit the money of the United States or attempt or conspire to do so, or who possess tools, plates, or instruments intended to be used for such purpose. Which of the policies (social interests) above mentioned is primarily involved in this constitutional provision and these statutory enactments?

2. Assume that larceny (theft) is defined by the common law as the act of taking and carrying away the goods of another with the intent to deprive the owner permanently thereof. What policy (social interest) lies behind the judicial recognition of this common law offense?

3. It is a settled doctrine of common law that the possessor of a chattel is entitled to legal protection of his control against all the world except a prior possessor or a person who has the immediate right to possession. Stated the other way around, a defendant in a suit for possession of a chattel cannot rely upon the title of a third person (jus tertii); he cannot assert that someone else has a better claim to the chattel than the plaintiff has. These doctrines can result in sustaining against aggression even the control of a plaintiff who has come into possession of a chattel by wrong, e.g., a thief. Obviously, it is not the policy of our legal system to give

4 Literally, the contracts clause seems to preclude any impairment whatever, but the Supreme Court has interpreted it in effect to mean that no state can unreasonably impair the obligation of a contract. See further, regarding the interpretation of the contracts clause, the discussion in sec. 5–22 above.

In some respects the due process clauses of the Federal Constitution also give some protection to the obligation of contracts; and the various clauses which preclude retroactive legislation have some protective effect in this regard.

1 Art. I, Sec. 8.
protection to the wrongdoer as such. What is the policy behind this broad protection of the possessor's control?

4. Consider the following rules regarding the legal capture of a whale:

"In the Greenland whale-fishery, by the English custom, if the first striker lost his hold on the fish, and it was then killed by another, the first had no claim; but he had the whole if he kept fast to the whale until it was struck by the other, although it then broke from the first harpoon. By the custom in the Gallipagos, on the other hand, the first striker had half the whale, although control of the line was lost. Each of these customs has been sustained and acted on by the English courts, and Judge Lowell has decided in accordance with still a third, which gives the whale to the vessel whose iron first remains in it, provided claim be made before cutting in. The ground as put by Lord Mansfield is simply that, were it not for such customs, there must be a sort of warfare perpetually subsisting between the adventurers." ²

Why is it necessary to have a standard effective act for such cases? What is the prime policy for the court to consider in dealing with such competing possessory claims?

Why do you assume that the English courts adopted a different standard for one place from the standard adopted for another?

5. In a case involving the contention that a foreign corporation, by seeking and obtaining consent to do business in a state, had impliedly agreed to be sued in any county of the consenting state, Holmes, J., dissenting, said:

"In order to enter into most of the relations of life people have to give up some of their Constitutional rights. If a man makes a contract he gives up the Constitutional right that previously he had to be free from the hamper that he puts on himself." Power Company v. Saunders, 274 U. S. 490 at 497 (1927).

² Holmes, Common Law 212 (1881).
How would you characterize the "constitutional right" which a man gives up when he makes a contract? What does Holmes mean by "the hamper that he puts upon himself"?

Sec. 7-17. Human control of environment—increased role of government—law and other means of control. Man is affected by his physical environment in many ways. His activities are shaped by the nature of the place and conditions in which he lives. But the effects of environment on him are not the whole story. The rest of the story has to be told in terms of his control over the environment, his use of the means which it provides, and his production of goods and services to meet his own needs. The environment acts upon man, but he reacts upon it. He remakes his surroundings. He prepares himself against the natural forces which he finds about him. He puts cushions between himself and "nature in the raw." He makes clothes, builds shelters, and lights fires to warm himself, and thus is able to live in climatic conditions for which his natural bare body is not adapted. And he makes use of Nature's resources and produces goods and services for his own ends. He cultivates the soil to produce food. He tames and breeds animals to furnish food and power. He takes minerals, coal and petroleum from the earth in order to create tools and produce energy. He builds roads and instruments of transportation. In short, the world in which man lives is largely a world of his own creation; the natural world puts limits on his activities, but man revamps natural conditions, uses natural resources, and creates goods and services to satisfy his wants.

Natural conditions surrounding the community have always been, and still are, reshaped mainly by individuals acting on their own initiative. For example, A ordinarily decides whether to build a house for himself and what kind to build, and he may build it with his own hands if he chooses.
Another individual, B, may specialize in building for others, as the carpenter or mason does. Both A and B are individual enterprisers, and typical of many individuals in the community. Collectively such individuals contribute heavily to the nature of the surroundings in which they and other members of the community live. Similar observations apply to the utilization of natural resources and to the creation of goods and services for the community. Individual enterprisers are the principal users of natural resources, and the principal producers of goods and services for the community. In fact, as I have already pointed out, our American economic system stands on a solid foundation of individual free enterprise.

But individual enterprise is not adequate to meet many of the needs of the community, and, as I have already pointed out, ours is a day of increasing stress on community interests. With this increased stress on community interests has come an increased demand for community services, and this demand it has fallen largely to the lot of government agencies to satisfy.¹ This has meant that government and law have assumed an ever-increasing role in modern society. This development is well illustrated in the history of our American legal systems.² Beginning at a period when governmental

¹ Here I have spoken of only two possibilities, individual action and governmental action. There are obviously other possibilities than these two. A man may provide shelter for his family as well as himself; an individual may furnish facilities for others for hire, and a group may provide for the welfare of its own members. But governmental activity is the subject of our story. For our purpose it is not essential to consider all the possible alternatives. It suffices to treat the individual’s provision for himself as the only alternative for governmental provision, as this is the simplest and most fundamental alternative, and corresponds with our traditional emphasis on individual free enterprise.

² These systems began in a revolution against established authority. The result was an overstress on individual liberty and a belittling of the role of government. Liberty meant, to the men of that day, freedom from governmental restraint. What our Revolutionary forefathers saw in the large was that the liberties of the individual need to be protected and secured against official misdeeds. Governmental control of the individual was, in their eyes, an evil;
functions were held to a minimum, and legal ends were defined in terms of satisfying individual claims, keeping the peace, and securing acquisitions and transactions, government has gradually developed into an institution to perform a wide variety of community services.

"'Under the compulsion of the changed conditions brought about largely by mechanical and technological development, the modern state has rapidly ceased to resemble the old political organization, whose chief functions were defense, the administration of justice, and the exercise of a rather narrow police power.' "

"Today, the state acts also as a doctor, nurse, teacher, insurance organizer, housebuilder, sanitary engineer, chemist, railway controller, supplier of gas, water and electricity, town planner, pensions distributor, provider of transport, hospital organizer, roadmaker, and in a large number of other capacities.' . . .

"'The supplying of money and credit has become an important government enterprise. In addition to acting as the authority to control the currency, the government has been forced to act as a great credit agency, lending money, either directly or through subsidies, to banks, railroads, insurance companies, private business undertakings, and owners of homes and farms. . . .'"

We are, of course, interested primarily in the effects of this expansion of government functions upon the policies of the legal system. But law is merely one of the means employed by government to effectuate its ends. When we were examining the effectuation of legal standards, we found it necessary to look beyond the strictly legal machinery of governmental control can always be abused, and is not to be extended beyond what is really necessary; the less government the better, one might say. Compare secs. 7-03, 7-08 and 7-11, problem 2.

§ Blachly and Oatman, Administrative Legislation and Adjudication 1-5 (Brookings Institution, 1934), quoted by Fryer and Benson, Legal System 1089 (1948).

4 Committee on Ministers’ Powers, Vol. II, 1932, Minutes of Evidence, p. 52 (memorandum of W. A. Robson) ibid.

5 Blachly and Oatman, loc. cit.
enforcement and to observe the effects of such governmental activities as taxation, spending, and education. So here, I think it is essential to see legal policies in relation to the policies of government as a whole. A legal policy is always a policy of government. Both law and legal machinery are instruments of government; they are created and maintained by government. The policies of government which are expressed in law are often intertwined with and dependant upon other purposes of government. Thus, for example, a statute which requires an income tax return from each potential taxpayer expresses a legal policy which is merely an adjunct or incident of a fiscal policy of the state. The legal requirement of a return is only intelligible in the light of the income tax setup. Likewise, a statute which limits the loads which may be carried by trucks on public highways is almost meaningless unless one sees that this limit is incident to a governmental undertaking to provide and maintain highways. In other words, the regulation of behavior by prescribed standards is only a part, and often only an incidental part, of government functions. The purposes behind regulations—especially regulations applicable to official acts—cannot be understood apart from the policies behind other functions of government.

Hence, instead of continuing in the following sections with a list of the social interests served by legal regulations, I shall try to provide you with a list of the social interests served by governmental measures of all kinds. The list will include the social interests which are recognized by law, and special emphasis will be put on strictly legal policies and measures. But, for the reasons just indicated, all the major policies and measures of our state and federal governments will be included.

Sec. 7-18. Social interests in natural resources. Man depends upon his natural environment for the basic means
of livelihood.¹ The land, the air, the rain, the streams, the lakes, the sea, the forests, the minerals, the fish and other wildlife, are gifts of Nature. So far as these are limited in amount, or irreplaceable, the policy maker has to decide how such natural assets are to be controlled and utilized. He recognizes social interests in their exploitation; or as we commonly say today, he adopts a policy of conservation. He may assign some of these assets to private or individual control; others he may reserve for more or less complete public control. Varying dispositions have been made of different natural resources in different times and circumstances.

Without being too specific as to what we include under the term, we can readily agree that land is the most basic of natural resources. Land has been quite consistently assigned by our American legal systems to individual control and ownership. This was the conception of the proper disposal to make of land which prevailed at the time our federal government was founded.² The private ownership of land was accordingly recognized from the start, and it remains an established tenet of our governmental policy. However, the general recognition of private ownership has not stood in the way of important legal checks on the owner’s control over this natural resource. First, there were checks on the owner’s powers of disposition, intended to keep land free from fetters on use and to insure the free alienation of land. It was recognized by our courts and legislators, as it had been

¹ Man also prepares himself against the natural forces that he finds about him. Partly this preparation is the work of individuals, but to a not inconsiderable extent, preparatory and preventive measures of this type are undertaken by government, e.g., flood and fire control; and steps to prevent the spread of disease, e.g., quarantine, premarital examination, vaccination.

² Though the ownership of land had not been too general or widespread in England, from which our ancestors came, private ownership of land was the general rule there, and the English settlers all had the ambition, which most had not been able to gratify in England, to own land. Here, land was relatively plentiful; it could only be effectively utilized by individual farmers and settlers. It was natural that private ownership was accepted without question.
by English courts and lawmakers, that the owner of land ought not to be allowed to tie it up perpetually so that it could not be freely used and alienated. The social interests in the full use and free transfer of land were appreciated, and, as a result, the owner's individual interest was limited to a complete _usufruct_ for life, coupled with powers to name his successors (by deed, will, etc.) and powers to control their use and disposition of the land for a moderate additional period. Furthermore, the general recognition of private ownership did not in the beginning, and does not now, exclude a considerable degree of governmental control aimed to prevent injury to others by the landowners' activities, e.g., the common-law prohibition of the maintenance of nuisances and statutory prohibitions of the maintenance of dangerous instrumentalities and statutory regulations intended to insure the construction and maintenance of safe and sanitary structures on the land. Nor has the principle of private ownership stood in the way of zoning legislation aimed to insure segregation of uses, and comfortable and, to some extent, aesthetic, conditions of living. And finally, it must be realized that the principle of private ownership was not initially extended to all land. The federal government assumed control of the territories of the West and acted as a governmental proprietor thereof. In fact, the federal government still exercises a not inconsiderable control over the utilization of land through its ownership of vast areas in our western states and in our territorial possessions. As owner, the federal government has

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3 Zoning legislation divides up areas, urban or rural, into zones, and permits only particular uses of land in particular zones, such as residential uses, business uses, uses for apartment houses, and factory uses. Usually the statutes which establish zoning confer a considerable degree of discretion on administrative agencies, to fix and change zones and to determine their application in particular cases.

4 "In the western states the Federal Government owns vast tracts of land. The extent of this public domain may be realized from the following figures: in Arizona, 92 per cent of the lands within that state are owned by the United States Government; in California, 52.58 per cent; in Colorado, 56.67 per cent; in Idaho, 83.80 per cent; in Montana, 65.80 per cent; in Nevada, 87.82 per
been in a position to conserve the resources of this land, e.g., minerals and timber, and to insure its economical exploitation.5

Forests and solid minerals, such as coal, have generally been treated as part of the land, and subject to the same principles and policies as the land itself.6 Oil and gas and subsurface water have usually been regarded as unowned until they are reduced to possession. The owner of the land on which they occur merely has a preferential right to reduce them to control. Nevertheless, the landowner's individual interest in these resources has been subjected to a great deal of legislation of the common regulatory type, intended to control the acts of the individual landowner and the acts of other individuals so as to prevent waste of these important natural resources. Statutes regulating methods of production, use, and marketing of oil and gas are of this type, as well as statutes regulating the utilization of natural water for sale, for power, and for irrigation.7

Wild animals, i.e., fish and game, have usually been treated as vacant property. If on private lands, the landowner has an exclusive right to appropriate them to his own use. If on public lands, our legal systems originally adopted the policy of allowing these resources to be freely appropriated by individuals. But in recent years our governments

cent; in New Mexico, 62.83 per cent; in Oregon, 51 per cent; in Utah, 80.18 per cent; in Washington, 40 per cent; in Wyoming, 68 per cent." Kerwin, Federal Water-Power Legislation 65 (1926).

5 Whether the government has actually used its control to the best advantage is another question.

6 You will be interested to know that in many countries of the world, notably those which belong to the civil law group, all or some of the minerals under land belong to the government and not to the owner of the surface. In those countries, such resources are exploited normally by persons or companies to whom the government grants concessions to search for and extract them from the land.

7 See, for example, as regards legislation relating to oil and gas: Ford, "Controlling the Production of Oil," 30 Mich. L. Rev. 1170 (1932); and as regards the use of water, Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326 (1909).
have asserted more and more control over wildlife, no matter where it may be, in order to prevent its depletion or complete extinction. This control has been exerted by the states and the federal government, either on the basis of a general social interest in conservation or in the name of public ownership of wildlife.  

Other natural assets, such as streams and lakes, are, to a limited extent, recognized as subjects of private ownership. But there is a distinct tendency in the law today to treat streams and lakes, along with the air and the sea, as common property, strictly owned by no one, yet subject to public control of the most sweeping character. Public control is predicated on the policy of making these assets as fully and generally available for the use and enjoyment of all the population as is practicable.

In addition to the above cases, in which the social interest in natural resources is recognized or asserted, we find numerous other instances within the last generation where our governments, especially the federal government, have taken extraordinary pains to safeguard these resources against destruction or injury by natural causes. Public funds have been freely spent to protect forests against destruction by fire, to secure property along rivers against erosion, to drain swamp lands, to reclaim desert lands, and to encourage farmers to use approved methods of land cultivation.

Sec. 7-19. Social interests in production of goods and services. Man creates goods and services to satisfy his own wants. He does not, like wild animals, depend wholly upon the table Nature has set. The individual man may provide

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8 See generally BROWN, PERSONAL PROPERTY, sec. 6 (1936).
9 See Hinman v. Pacific Air Transport quoted in sec. 7-21, problem 1.
for his own needs, or he may, as a business enterprise, undertake to supply the needs of others. Or, in our politically organized society, government may recognize the community’s needs for goods and services, and undertake to insure their production for the benefit of the community as a whole.\(^1\) It is this general interest and the measures taken by government to stimulate and control productive processes that are to be the subjects of the present section.

At the end of the eighteenth century when our government was founded, free enterprise was an outstanding fact in this part of the world. Life was primarily agricultural, and each home produced most of its own goods and services. It was not unnatural to develop economic theories and policies based on this condition of affairs. The policy of free enterprise was explicitly formulated and remained the traditional and generally accepted policy into the nineteenth century. This policy recognized individual initiative as the principal means, if not the only means, of inducing the production of goods and services for self and for others. It saw production as a process depending on self-interest to create for oneself, and as a process relying on profits to motivate creation for others. While these theories of production prevailed, there was not too much scope for the recognition of social interests in the productive process, or for governmental interposition in the production of goods and services.\(^2\)

Nevertheless, the policy of free enterprise was not absolute even in the beginning. It has long been recognized that some restraints might be placed on freedom of enterprise, and that some economic enterprises might be sponsored or undertaken

\(^1\) Again, as in the last two sections, I limit myself to two alternatives: individual action and governmental action. It seems quite unnecessary for my present purpose to discuss other possibilities. See sec. 7–17, note 1.

\(^2\) "The unfettered right to contract was pressed, as we have seen, during these phases as the indispensable means whereby individuals seize such opportunities, whether of work or profit, as the social and economic environment offers." STONE, THE PROVINCE AND FUNCTION OF LAW 533, 534 (1946).
by government itself. And the policy of free enterprise has suffered further serious inroads as a result of the practical needs of our times and their impact on the thinking of legislatures and courts. Even the individualist cast of our constitutions has not been able to stop these social trends. The scope of individual freedom of enterprise is being perceptibly reduced by the two expedients of increasing the number of governmental regulations on the one hand, and of increasing the number of governmental enterprises on the other. Both these expedients involve the recognition of new social interests, or the expansion of social interests already recognized. The shape which these developments have taken is illustrated in the following materials.

First, free enterprise may be directed to the production of the wrong kinds of goods. The profit motive is not always directed to the creation of useful goods, or the rendition of meritorious services. For example, the producer may be tempted to prepare unwholesome food or drugs for the market. Penalties and inspections may be employed by government in order to insure that his products are of proper quality. Or the producer may choose to prepare marijuana cigarettes, or quack remedies for the market; or he may elect to operate a gambling den, or house of prostitution. The community may decide through its policy makers that such goods and services are always coupled with injurious consequences; the community interest in preventing their production may be recognized and appropriate measures to this end adopted.

Second, the productive processes themselves may be carried out in a way, or with means, which are harmful to the community. Thus, coal needs to be mined, and clothing manufactured, but these industries should not be allowed to operate in ways which endanger the lives, limbs and health of persons who are employed in them. The community is
interested in the working conditions in various productive enterprises. It requires the installation of safety devices. It enacts regulative provisions regarding hours and conditions of labor. It prohibits child labor. It charges the persons engaged in producing goods and services with the burden of compensating their workmen for personal injuries suffered in the course of their employment. And, as regards services, such as professional or technical services, government adopts standards to insure the competence and honesty of the persons who render them, e.g., requirements of training for medicine, law, and other professions.

Third, free enterprise may result in monopoly. One large fish may swallow all the rest, or one enterpriser may buy out all his competitors, or join them in restricting the quantity or quality of goods or services rendered to the public. Acts of entrepreneurs, e.g., contracts, conspiracies and consolidations, which result in a monopoly, or which tend to have this effect, may be forbidden outright by law, and administrative agencies may be created to supervise business in order to see that monopolistic trends are controlled. But some kinds of monopoly seem to be inevitable. Such monopolies call for regulation, instead of prohibition, in order to insure the production of the proper amount or kind of goods or services. Thus, the entrepreneur who establishes a local water works usually enjoys a monopoly in fact, as it is not feasible to have several concerns competing in furnishing water to one community. He is not to be left to decide at his discretion on the quantity and quality of service he will give. His monopoly gives him an undue power over others. Such power calls for public control; it has entailed the enactment of many legal regulations, and the creation of a variety of administrative officials to enforce them.

Fourth, the needed but unprofitable enterprise must be reckoned with by government. Since the turn of the century,
it has been appreciated ever more clearly that not all the goods and services which the public requires will be produced through individual undertakings inspired by the profit motive. As these goods and services are definitely needed, there is a social interest in their production, and, as individuals do not have sufficient incentives to act, government has no choice but to take a hand in the productive processes. Some products and services can be made available if government becomes the purchaser thereof at an agreed price, e.g., guaranteed prices to farmers. The production of other goods and services can be induced by the offer of a subsidy of some kind, in order to reduce the producer’s costs, e.g., subsidies by the federal government to the airlines and the merchant marine. Other goods are produced when government affords protection to the producer as against threatened competition, as in the case of the protective tariff to foster home industry. Other products and services will be forthcoming only if governmental agencies furnish them. Of this last type are public highways and the prosecution of atomic research.

Governmental productive enterprises have become a type so important and so common that they deserve special notice. Such governmental enterprises enter fields which cannot be developed profitably by the individual, fields which involve risks too great for the individual entrepreneur to run, fields which demand an amount of capital which the individual cannot obtain, and fields where the public is dissatisfied (justly or unjustly) with the kind of services rendered by private concerns, such as water works or other utilities. For any or all of these reasons, we find governmental agencies projected into the problems of financing and administering enterprises for the public benefit. Among the earliest ventures of this sort, embarked upon by American governments at public expense, were provisions for streets, highways, and bridges. These could hardly be called business enterprises as
they were commonly maintained without cost to the user. More recent governmental undertakings have included water works, sewage disposal facilities, parking lots, transportation facilities and hospitals of various kinds. In the same class fall the provision of parks and playgrounds, the clearance of slums, and the public financing of low-cost housing. And finally, under this head we can place the pending health insurance program of the federal government, which would provide medical and hospital insurance for everybody. All these measures involve chiefly the use of fiscal and administrative powers; government undertakes to create and manage these enterprises to serve the needs of the community.

Sec. 7-20. Social interests in distribution of goods and services. The distribution of goods produced in a community also presents problems of planning for the policy maker. His general end, we shall assume, is to achieve a fair distribution; but great differences of opinion prevail, both as to what constitutes a fair distribution and what are the best methods of bringing such a distribution about. For some collectivists, a fair distribution is an equal distribution of all the goods produced in the community; for others, a fair distribution is one which is relative to the need of the distributee, or to the productive effort which he has put forth. For individualists, the question of the fairness of the ultimate

8 Thus, different branches of government establish hospitals and provide medical care for the indigent, the insane, the feeble-minded, the crippled, the blind and the tuberculous.

4 Such a program was again urged upon Congress by President Truman recently, having been under discussion for several previous years. Whether this program in its pending form is desirable or feasible, or whether it is likely to be adopted in the near future, need not be debated here. The fact that it is seriously proposed, and the further fact that similar health programs have already been adopted in England, Sweden, and other countries of Europe, do point to a growing sense of responsibility of the modern community for the health of all its members, and to the possible assumption by government of a policy of health protection of a very broad scope.

1 I use “distribution” to include both the process of distribution (exchange, sale, gift, etc.) and the end result of the process.
distribution is little stressed; it is simply assumed that freedom to produce and to exchange goods and services will result in a satisfactory distribution thereof.²

Then there are differences of opinion as regards methods of insuring a fair distribution. According to the theories of various collectivists, the state must intervene to insure a division of the product on whatever basis it determines to be fair. This intervention may involve the use of its regulatory or its fiscal or its administrative powers. The intervention may extend as far as the out-and-out appropriation by government of both production facilities and products, and the assignment of definite shares of the product to individuals by, and in the name of, the state. However, according to our traditional theory of free enterprise, the best method of dividing the product is to allow each producer to obtain whatever share he can by his own productive efforts and the processes of exchange.³ Under this view, government adopts a hands-off policy as regards the distribution of goods within the community, and permits the economic processes of production and exchange to work themselves out in their own way; government only enters the picture to protect distributees in their holdings and to secure the processes of production and exchange against extreme forms of aggression by outsiders.

² This is true of the simon-pure advocates of free enterprise; they are not much concerned with the problem of fair distribution; they regard the economic processes of production and distribution as self-sufficient; they are inclined to assume that these processes will work out for the best, if only government does not interfere or tinker with them.

So far as the writers who maintain this view felt that it was necessary to justify the appropriation of a share by A, they found the justification in A's labor as a producer, or in a social compact of some sort. See Locke, Two Treatises on Government (London, 6th Imp.) 215 et seq. (1764). The justification on the basis of A's labor as producer, is commonly called the "labor theory" of property.

³ The first part of this statement is an expression of the "labor theory" of property, referred to in the next preceding note. As regards the functions of property, this statement suggests two: "property for use" and "property for exchange." Compare what is said regarding "property for security" in sec. 7–08, b, and "property for power," referred to later in this section (in the discussion of monopoly).
The tendency in the United States has been to make a compromise between extreme individualist and collectivist policies regarding a fair distribution of the community’s product (goods and services). In making this compromise, government starts with a policy of distribution along traditional lines of free enterprise, but recognizes a variety of limited countervailing policies which cut down its scope. These countervailing policies are expressed in various regulatory, fiscal and administrative measures intended to temper the rigors of free enterprise and protect the community against obvious defects of its operation. These countervailing policies, and the social interests which they recognize, and the governmental measures which they involve, will be the subject of discussion in the following paragraphs.

First, there are regulations intended to make sure that goods and services reach the right persons. For example, certain drugs and poisons and firearms are intended to reach only certain persons in the community. Their general and free distribution is found to be harmful. Opiates and barbiturates are needed by certain persons and may be obtained by them under proper safeguards; but their free use in the community is injurious since it leads to an increase in drug addiction. Pistols may be properly distributed to reliable persons for the purpose of self-defense and the defense of property; they should not be allowed to come into the hands of unreliable persons. Accordingly, these needs for restraints on free distribution are expressed in various restrictive and prohibitive legal provisions which are intended to prevent these products from reaching the hands of the wrong persons.

Second, going far back in Anglo-American law, there have always been some restraints on the opportunities of the “haves” to exact a price from the “have-nots.” Some of the oldest examples are our usury legislation and analogous rules
of common law and equity. Bentham and other ardent individualists fought hard against usury legislation as a contradiction of the principle that each individual should be allowed to look after his own interests. But restraints on usury, and certain other forms of unfair exaction, persisted in spite of individualist attack; they represented an initial recognition of inequality of bargaining power among individuals, a realization of the truth of the New Testament statement: "Unto everyone that hath shall be given, and he shall have abundance; but from him that hath not shall be taken away even that which he hath." These restraints express a social interest in protecting the weak and needy against the abuse of power by those who already possess a large distributive share of the world's goods. And legal prohibitions or regulations of monopoly are variations played on the same theme. The individual who gets a monopoly in the production of goods and services can exact an unreasonable price for them. This means an undue advantage in the distribution of goods. It means that he obtains an excessive distributive share in the total product of the community in return for what he delivers to others. This kind of monopoly power is either prohibited or is closely regulated. Usually some type of administrative agency is created to fix the price which the monopolist can exact for his product or service. Moreover, the monopoly category with its corresponding social interests and restrictive governmental measures, is assuming an ever-greater place in our legal thinking today. Monopoly is largely a function of time and circumstances. The very fact that a producer can demand a price of some kind for his product or service represents some degree of power over buyers. Temporary conditions may result in a shortage of almost any commodity or service, so as to give

4 E.g., legal restrictions on (or invalidity of) transfers of expectancies by presumptive heirs, and the equitable doctrine that the mortgage debtor cannot waive his equity of redemption.

5 Matthew XXV: 29.
an unfair advantage to the producer. During the recent war this happened in regard to a variety of commodities, and particularly in regard to rental properties. The situation was made the basis for emergency price regulations. Indeed, notions of monopolistic enterprises, of "business affected with a public interest," and of inequality of bargaining power, have now been so broadly defined by our Supreme Court that Congress and our legislatures are enabled to classify almost any enterprise under these heads, and authorized to regulate its charges and activities accordingly, provided the enterprise seems to these legal policy makers in their wisdom to be making unfair exactions from the public.

Third, government has sometimes used its various powers to guarantee to each individual the enjoyment of a minimum distributive share; not the absolutely equal share which is the professed aim of communism, but a fixed minimum below which the individual's "take" from the community income is not to be allowed to fall. Such a guarantee is seen in legislation which assures to A a minimum wage, an old age pension, employment insurance, workmen's compensation insurance, and health insurance. It is seen in the legislation which exempts his homestead and the tools of his trade from seizure or execution for debt. But on the whole, our legal systems have remained committed to the free enterprise system. Above a minimum they have not tried to guarantee to A an actual distributive share of any kind. Instead, they have guaranteed to A an equal opportunity to acquire a share by his acts. This opportunity is not a distributive share, because when B has acquired something it is no longer open to acquisition by A. And this opportunity is not a guarantee of a job, because when B takes a job, there may be none left for A; B's opportunity to work may exclude A's chance for a job. However, today the job holder is asserting, and to some extent, successfully, preferential and seniority rights
with regard to employment. So far as this is true, the job holder has something more than an equal, but empty, opportunity to seek a job; he has a guaranteed opportunity to work, superior to that of others. It is only a few steps further, along this route of a legally secure opportunity to work, to the recognition of a workman’s “right to his job”—a right which the protagonists of labor have been vigorously pressing for legal recognition ever since the day of the “sit-down” strike. 6 Whether such recognition will come, and whether it is desirable that it should, is not for us to decide; we are only interested in noting the trend of the times.

Fourth, government has used its tax powers to cut down the distributive share of A, who has acquired a substantial portion of the community’s goods or income. If, then, government pays over the proceeds of the levies, directly or indirectly, to B, who has a small share or none at all, this obviously operates to reduce the difference between A’s and B’s financial positions. For example, our governments in this country have imposed income taxes, graduated to rest more heavily on large incomes; they have exacted estate and inheritance taxes, similarly graduated, from decedent’s estates; and they have collected special dues from presumably opulent employers of labor. When government later pays out old age pensions from the proceeds of these impositions, taxes and dues, or when it compensates a workman for losses due to unemployment or injury, government is, in effect, cutting down one set of incomes and enhancing another set. Government is, in effect, charging the free enterprise system with the burden of collecting and paying a minimum share of the community’s product to persons who would otherwise receive small, or negligible, distributive shares.

Finally, there are the enterprises undertaken by government which were discussed in the next preceding section

(sec. 7–19). I refer to roads, highways, parks, playgrounds, parking lots, water works, sewer systems, housing, hospitals, etc. These enterprises produce services at public expense. Sometimes, such enterprises furnish goods or services, i.e., distribute them, to all equally, gratis or at a nominal charge. Sometimes they furnish goods and services gratis to those who cannot pay, e.g., medicines and medical and hospital services for the indigent; and furnish the same goods and services at a substantial charge to those who can pay. And sometimes they furnish their products to the members of the public at a charge sufficient to sustain the whole burden of financing, as in the case of many modern building projects, parking lot projects, etc., commonly referred to as “self-liquidating.”

Sec. 7–21. Problems. 1. Hinman v. Pacific Air Transport.\(^1\)

Haney, Circuit Judge.

"From decrees sustaining motions to dismiss filed by defendants in two suits, appellants appeal and bring for review by this court the rights of a landowner in connection with the flight of aircraft above his land. . . .

"Appellants allege, in the bills under consideration, facts showing diversity of citizenship and that the amount in controversy exceeds $3,000 exclusive of interest and costs; that they are the owners and in possession of 72½ acres of real property in the city of Burbank, Los Angeles county, Cal., 'together with a stratum of airspace superjacent to and overlying said tract . . . and extending upwards . . . to such an altitude as plaintiffs . . . may reasonably expect now or hereafter to utilize, use or occupy said airspace. Without limiting said altitude or defining the upward extent of said stratum of airspace or of plaintiff's ownership, utilization and possession thereof, plaintiffs allege that they . . . may reasonably expect now and hereafter to utilize, use and occupy said airspace and each and every portion thereof to an altitude

\(^1\) (U. S., 9th Cir., 1936) 84 F.2d 755 at 756 et seq.
of not less than 150 feet above the surface of the land. . . .
The reasonable value of the property is alleged to be in excess of $300,000.

"It is then alleged that defendants are engaged in the business of operating a commercial air line, and that at all times 'after the month of May, 1929, defendants daily, repeatedly and upon numerous occasions have disturbed, invaded and trespassed upon the ownership and possession of plaintiffs' tract'; that at said times defendants have operated aircraft in, across, and through said airspace at altitudes less than 100 feet above the surface; that plaintiffs notified defendants to desist from trespassing on said airspace; and that defendants have disregarded said notice, unlawfully and against the will of plaintiffs, and continue and threaten to continue such trespasses. . . .

"The prayer asks an injunction restraining the operation of the aircraft through the airspace over plaintiff's property and for $90,000 damages in each of the cases.

"Appellees contend that it is settled law in California that the owner of land has no property rights in superjacent airspace, either by code enactments or by judicial decrees and that the ad coelum doctrine does not apply in California. We have examined the statutes of California, particularly California Civil Code, § 659 and § 829, as well as Grandona v. Lovdal, 78 Cal. 611, 21 P. 366, 12 Am. St. Rep. 121; Wood v. Moulton, 146 Cal. 317, 80 P. 92; and Kafka v. Bozio, 191 Cal. 746, 218 P. 753, 29 A. L. R. 833, but we find nothing therein to negative the ad coelum formula. Furthermore, if we should adopt this formula as being the law, there might be serious doubt as to whether a state statute could change it without running counter to the Fourteenth Amendment to the Constitution of the United States. If we could accept and literally construe the ad coelum doctrine, it would simplify the solution of this case; however, we reject that doctrine. We think it is not the law, and that it never was the law.

"This formula 'from the center of the earth to the sky' was invented at some remote time in the past when the use

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2 Editor's note: The court here refers to the old maxim, "Cujus est solum ejus est usque ad coelum," which meant literally that the owner of land owned the airspace above it to an indefinite height (to the heavens).
of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use.

"This formula was never taken literally, but was a figurative phrase to express the full and complete ownership of land and the right to whatever superjacent airspace was necessary or convenient to the enjoyment of the land.

"In applying a rule of law, or construing a statute or constitutional provision, we cannot shut our eyes to common knowledge, the progress of civilization, or the experience of mankind. A literal construction of this formula will bring about an absurdity. The sky has no definite location. It is that which presents itself to the eye when looking upward; as we approach it, it recedes. There can be no ownership of infinity, nor can equity prevent a supposed violation of an abstract conception.

"The appellants' case, then, rests upon the assumption that as owners of the soil they have an absolute and present title to all the airspace above the earth's surface, owned by them, to such a height as is, or may become, useful to the enjoyment of their land. This height, the appellants assert in the bill, is of indefinite distance, but not less than 150 feet. . . .

"We believe, and hold, that appellants' premise is unsound. The question presented is applied to a new status and little aid can be found in actual precedent. The solution is found in the application of elementary legal principles. The first and foremost of these principles is that the very essence and origin of the legal right of property is dominion over it. Property must have been reclaimed from the general mass of the earth, and it must be capable by its nature of exclusive possession. Without possession, no right in it can be maintained.

"The air, like the sea, is by its nature incapable of private ownership, except in so far as one may actually use it. This principle was announced long ago by Justinian. It is in fact the basis upon which practically all of our so-called water codes are based.

"We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of
our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world.

"When it is said that man owns, or may own, to the heavens, that merely means that no one can acquire a right to the space above him that will limit him in whatever use he can make of it as part of his enjoyment of the land. To this extent his title to the air is paramount. No other person can acquire any title or exclusive right to any space above him.

"Any use of such air or space by others which is injurious to his land, or which constitutes an actual interference with his possession or his beneficial use thereof, would be a trespass for which he would have remedy. But any claim of the land-owner beyond this cannot find a precedent in law, nor support in reason."

How far does the court recognize the claims of Hinman, and another, to the airspace over their land? What social interest in this space does the court recognize? 3

How does the court dispose of the old maxim according to which the possessor of land has "possession of the column of air situated above the surface to an indefinite height"?

2. Crane v. Campbell, Sheriff. 4

Mr. Justice McReynolds delivered the opinion of the Court.

"The question presented for our determination is whether the Idaho statute, in so far as it undertakes to render criminal the mere possession of whiskey for personal use, conflicts with that portion of the Fourteenth Amendment which declares

3 The scope of the social interest in the airspace over privately owned land has been variously conceived and defined in the case law and statutes. See Ball, "The Vertical Extent of Ownership in Land," 6 UNIV. OF PA. L. REV. 631 (1928); and RESTATEMENT OF TORTS, Explanatory Notes, Tentative Draft No. 7, 1931, p. 51. This matter is a subject for your further consideration in your courses in Torts and Rights in Land. For our present purpose, the only important points are (1) that a social interest is recognized where none would have even been suggested before 1900, and (2) that the individual land-owner's interest is correspondingly limited.

4 245 U. S. 304 at 305 et seq. (1917).
"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent to their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. . . ."

"As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. . . . And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.

"We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the State.

"The judgment of the court below must be

"Affirmed."

What individual interest did Crane assert here?

What social interests lay behind this Idaho statute, according to the Supreme Court?

How did the Court square the recognition of these statutory aims with the policies of the Fourteenth Amendment?
How did the Court connect the mere possession of liquor (like Crane's) with the production and distribution of this prohibited article?

3. *Adkins v. Children's Hospital.*

Mr. Justice Sutherland delivered the opinion of the Court.

"The question presented for determination by these appeals is the constitutionality of the Act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia, 40 Stat. 960, c. 174. . . .

"The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question. . . . (Citations including *Adair v. United States*, 208 U. S. 161). . . . Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.

"In *Adair v. United States, supra*, Mr. Justice Harlan (pp. 174, 175), speaking for the Court, said:

"'The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . In all such particulars, the employer and employed have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. . . .'"

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative author-

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5 261 U. S. 525 at 539 et seq. (1923).
ity to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. . . ."

The Court (three justices dissenting and one justice not sitting) decided this question in the negative and held the statute unconstitutional.

What is the policy ascribed by the Court to the framers of the Fifth Amendment? What becomes of the social interest which the Congress of the United States recognized and attempted to protect?

However, in *West Coast Hotel Co. v. Parrish,* the *Adkins Case* was overruled and minimum wage legislation was held to be valid (four justices dissenting).

"Mr. Chief Justice Hughes delivered the opinion of the Court.

"This case presents the question of the constitutional validity of the minimum wage law of the State of Washington. . . .

"The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the State, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. *Parrish v. West Coast Hotel Co.,* 185 Wash. 581; 55 P. (2d) 1083. The case is here on appeal.

"The appellant relies upon the decision of this Court in *Adkins v. Children's Hospital,* 261 U. S. 525, which held invalid the District of Columbia Minimum Wage Act, which was attacked under the due process clause of the Fifth Amendment. . . .

"The point that has been strongly stressed that adult employees should be deemed competent to make their own

"*300 U. S. 379 (1937).*
contracts was decisively met nearly forty years ago in *Holden v. Hardy*, supra, where we pointed out the inequality in the footing of the parties. We said (Id., 397):

"'The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self interest is often an unsafe guide, and the legislature may properly interpose its authority.'

"And we added that the fact 'that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.' 'The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.' . . .

"We think that the views thus expressed are sound and that the decision in the *Adkins Case* was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. . . .

"There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may

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7 Editor's note: 169 U. S. 366 (1898).
take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its lawmaking power to correct the abuse which springs from their selfish disregard of the public interest. . . .

"Our conclusion is that the case of Adkins v. Children's Hospital, supra, should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is ‘Affirmed.’"

This decision gave judicial sanction to the legislative recognition of a social interest in minimum wages. How would you characterize this interest? How is it to be reconciled with the policy of free contract expressed in the Fourteenth Amendment?

Sec. 7-22. Social interests in human stock. With Alexander Pope, the policy maker can say that the proper study of mankind is man. Almost everything that has been said from the beginning of our story has told how the policy maker concerns himself with ways of controlling and protecting an existing generation of men. But the policy maker may also be confronted by basic population problems. He may consider the future of the human stock. He may face problems which relate to the quantity and quality of tomorrow’s population; he may take measures to control the number and kind of individuals who will make up the community.

As regards quantity, the dangers of overpopulation have been most often suggested by theoretical writers. For ex-
ample, Malthus and others have stressed the tendency of population to outgrow the available food supply. Practical policy makers have occasionally made overpopulation an excuse for an aggressive foreign policy in which additional *Lebensraum* was sought. For the most part, however, practical policy makers have worried rather about the possibility that the human stock, or the particular branch of it to which they happened to belong, would die out. Occasionally in world history, some policy maker, like Hitler or Mussolini, has sung both songs at the same time, without any real regard for consistency. He has demanded more room and encouraged the production of more cannon fodder at the same time. In this country, government has, on the whole, pursued a policy of *laissez faire* in this area as in many others. While this policy can hardly be identified with a definite purpose to foster an increase in population, the net effect of *laissez faire* has been just that. The population of our country has increased, through births and immigration, many fold in the one hundred and seventy years of its independent existence. Most of us take pride in our rising population figures, national and local. Certainly, there is no indication yet of a serious legislative purpose to check or limit the number of persons who are to inhabit our country; and so far, there has not been any occasion for legislators to consider offering positive incentives for a population increase.

As regards the quality of our population, more concern has been manifested in recent decades and has found expression in governmental measures. Eugenists have been telling us for several decades that the human stock is rapidly degenerating in quality. They ascribe the degenerative trend to reverse selection in the processes of human reproduction. They declare that this reverse selection is due to wars which kill off the better, stronger men and thereby leave the next generation to be fathered by the less fit members who are
not taken for military service; that it is due to reckless procreation by unfit persons, such as the feeble-minded, as compared with restraint and birth control exercised by the better stock, thereby increasing the proportion of the unfit in each succeeding generation; and that it is due to our general humanitarian measures, such as hospital and maternity care, sanitation, etc., which keep the unfit and weak alive so they can reproduce their kind, instead of allowing them to be eliminated by the operation of disease, starvation, and other natural causes. Not all scientists agree that this picture of degeneration is an established fact, but many of our legislatures have accepted the statements of eugenists as correct and have made them the basis for laws to provide for the sterilization of unfit persons. The immediate purpose of this legislation is to check the downward trend of the human stock by preventing the further procreation of its inferior members. A secondary purpose is to reduce the burden of weak and unfit persons which future generations will have to care for and support.

Query: The same persons who support the sterilization program also aid in the establishment of birth control clinics in many of our cities, to furnish contraceptive information and devices to the poor. Why? These same persons are also opposed to legislation prohibiting the dissemination of contraceptive information and devices; they claim that such legis-

1 And some religious groups are strongly opposed to the eugenic program of sterilization as well as birth control clinics to aid in cutting down the birth rate among the poorer classes. Such measures are held to be contrary to divine law. See ENCYCICAL OF POPE PIUS XI, "On Christian Marriage," Dec., 1930 (Paulist Press).

2 Of late years also, more and more concern has been expressed about the increasing proportion of the aged in our population. This increase is ascribable chiefly to improvement in living conditions and to advances in medicine. The net effect of the increase in the percentage of elderly people will obviously be felt in the pension burden of the future, and probably in other ways which affect the taxpayers. However, thus far no policy makers have shown any indication of a desire to cut down the length of life, though perhaps some policy makers, in granting old age pensions, have been troubled by the prospect of an ever-growing burden.
lation operates as an adverse qualitative measure. Why do they say that this is its effect? In form, such legislation is merely a prohibition of individual checks on the quantity of population.

Sec. 7–23. Social interests in transmitting knowledge. Man's creative efforts as regards his environment do not stop with his immediate physical surroundings. Man develops a social environment as well.

"On top of the natural physical environment such as the ape-man and his kind had to deal with, our bigger brains have built an artificial environment made up of ideas, tools, customs, institutions, skills, techniques of all kinds, man-made and absolutely essential to our well-being. This is the social heritage, or culture." ¹

This artificial or man-made environment is transmitted from one generation to another. Each new generation is indoctrinated with the learning of the past. Thus, each new generation of men is enabled to begin with the fruits of the experience of its predecessors and not start with a clean sheet.

It is possible to leave the transmission of the cultural heritage wholly to the efforts of individuals. Much of the work of transmitting does occur in this way; parents instruct children, age instructs youth, and friend instructs friend. But this method can be modified and formalized by the organization of schools. The earliest schools in Anglo-American history were church schools or private schools. However, the fathers of our country cherished, and undertook to realize, an ideal of public education.² The states early as-

¹ Cooley, Angell and Carr, Introductory Sociology 6 (1933).
² Interestingly enough, the fathers of our country adopted an exactly opposite policy as regards religion, and embodied that policy in our constitutions. They explicitly forbade the establishment of a state religion by the First Amendment to the Federal Constitution and by many of the state constitutions. This prohibition was the outcome of unfortunate experiences with established religions, both in Europe and in the American colonies. Religion was to be left to the free choice of the individual, or to groups voluntarily formed. Government was not to exercise any preference among religions, or to con-
sumed the task of bringing the knowledge which had been accumulated in past ages to our entire population. We who are committed to the tenets of democracy can hardly doubt the soundness of what Lowell once said: "But it was in making education not only common to all, but in some sense compulsory on all, that the destiny of the free republics of America was practically settled." 8

The educational function is, of course, primarily concerned with the maintenance of schools for children. However, today we also find public agencies furnishing education to adults, sponsoring musical and artistic programs, furnishing instruction in farming methods, and providing informational radio broadcasts of many types. In some parts of the country, public or semi-public agencies also provide artistic and physical training, and furnish information regarding health and care of children. Indeed, I believe we can see in present trends a greater public interest in positive moral training. For example, a systematic sex education is now being given in some of our public schools, and ideas of fairness, sportsmanship, and proper social behavior are being stressed there in more definite form than they have ever been before.

Query: Why does the state undertake the task of education? Why not leave education of each individual to his own initiative or to that of his family? Why not leave education to the initiative of persons who start private schools? Why not leave education to such agencies as the church?

Sec. 7-24. Social interests in growth of knowledge—freedom of opinion and expression. The state may take account of the need to develop new ideas as well as the need to

tribute to their support. Jefferson and Madison were among the early protagonists of these views, and were largely responsible for their general adoption. For an interesting discussion of this whole problem as it stands today, see Everson v. Board of Education, 330 U. S. 1 (1947).

disseminate the knowledge which has been handed down from the past. Our American governments have always put great stress on the need for progress in knowledge.\textsuperscript{1} They have adopted progress as a major objective to be pursued, and have recognized freedom of thought and expression as the primary means of achieving it.

New ideas originate with individuals, hence opportunity must be allowed to individuals to invent them. As Mill says, the function of liberty is to encourage “different experiments of living,” which is another way of saying that individual liberty is the means of developing new ideas. As a state policy we find this objective of developing further knowledge expressed in constitutional provisions which guarantee freedom of the mind in the form of free thought and free opinion.\textsuperscript{2} We find it expressed in the clause of the Federal Constitution which empowers Congress “to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”\textsuperscript{3} The one type of clause shows government guaranteeing freedom to think out new ideas; the other shows it offering positive encouragement for the use of this freedom along socially useful lines.

But new ideas have to be tested. Free discussion is recognized by our governments as the principal method of testing. It is recognized as the sieve through which new ideas must pass in order to become accepted. Accordingly, freedom of discussion is to be encouraged. As a state policy we find this

\textsuperscript{1} Among social interests may be counted progress in various other respects, especially progress in regard to the material conditions of life. Several such social interests have already been mentioned, though the name “progress” has not heretofore been used. Thus, better peace and order in the community, greater security for acquisitions, enhanced security of transactions, better utilization of natural resources, more adequate production of needed goods, are all forms of progressive development.

\textsuperscript{2} The First and Fourteenth Amendments to the Federal Constitution and similar provisions of state constitutions.

\textsuperscript{3} Art. I, Sec. 8, Cl. 8.
objective expressed in constitutional clauses which guarantee freedom of speech, freedom of the press, and freedom of assembly. Our governments pursue a definite policy of *laissez faire* in this regard. Justice Holmes has expressed this policy in a passage which is one of the finest in our legal literature:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wage our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . ."  

This policy of free trade in ideas is still maintained by our governments, especially by the federal government. Although the policy of *laissez faire* has suffered serious inroads in the sphere of economic activity (business, property and contracts), the collectivist trend has not been effective to cut markedly into the sphere of freedom of opinion and freedom of expression. One finds these freedoms as rigorously upheld

4 Dissenting opinion in Abrams v. United States, 250 U. S. 616 at 630 (1919).
in the recent decisions of the Supreme Court as they ever were in the early days of our history.

Sec. 7-25. Inventory as check list. The items mentioned in the last section complete our inventory of social interests. Before I leave the subject of social interests, however, I want to say a few words about the utility of such an inventory. The inventory is primarily useful to the policy maker. It consists of actual objectives pursued, adopted, or professed by policy makers of the past. It serves the policy maker of today as a list of possible objectives to consider. Like the list of purchases that I intend to make on a trip to town, an inventory of social interests serves the policy maker as a check list. With such a list in hand, the policy maker is insured against the possibility of overlooking or forgetting any item.

Two special dangers of overlooking social interests accentuate the need for a check list such as this inventory. The first danger inheres in the one-sided emphasis on the claims of the individual which has characterized our legal tradition from the beginning down to the present time. This emphasis invites a neglect of social interests which can result in some rather radical miscarriages of justice. You will remember, for example, the Ross case, where individuals were allowed to defend their liberty, even to the point of killing a peace officer who was attempting to arrest them without proper authority.¹ It is possible that not even a check list of social interests would have changed the results in that case, decided under the influence of frontier conditions. Nevertheless, an explicit notice of countervailing social interests would at least have prevented an inadvertent conclusion like that of this case.²

¹ See sec. 7-11, problem 2.
² This is the purport of a frequently quoted critical comment by Holmes, relative to the individualist slant of our judges at the end of the last century: "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such
The second danger inheres in the fact that social interests have to be asserted by officials acting as the representatives of the general good. Individual interests are asserted ordinarily by persons motivated by their own selfish wants; officials only enter the picture in the sense that they grant or withhold recognition to what the individual claims. But as regards social interests, officials not only grant recognition, but executive officials, e.g., prosecutors, are charged with the burden of asserting these interests as well. Their motives for asserting them are not so strong on the whole as the motives of individuals for asserting their own interests. If these social interests are not clearly stated or announced, it is easier for the public official to neglect or lose sight of them.

The inventory also provides a check list for the scholar and the student who try to understand, to predict, or to criticize the operation of the legal system. The social interests enumerated are basic objectives for all the legal processes; for the process of creating law, the process of applying or interpreting it, the process of repealing or changing it. If you, as students, attempt to explain or predict a particular statutory enactment, a particular judicial decision, or a particular type of official action, you will do so predominantly in terms of social welfare. If you approve a particular provision of statute, a particular judicial decision, or a particular type of individual or official action, your basic reason for approval will be that the provision, decision, or action harmonizes with one or more of the listed social interests or conduces to the achievement of one or more of such interests. If you disapprove a particular provision of statute, a particular decision, or a particular type of individual or official action, your basic reason for disapproval will be that the provision, decision, or action harmonizes with one or more of the listed social interests or conduces to the achievement of one or more of such interests. If you disapprove a particular provision of statute, a particular decision, or a particular type of individual or official action, your basic reason for disapproval will be that the provision, decision, or action harmonizes with one or more of the listed social interests or conduces to the achievement of one or more of such interests.

considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said." Holmes, "The Path of the Law," 10 HARV. L. REV. 457 at 467 (1897).

3 Trustees, guardians, executors and administrators, however, assert claims on behalf of others.
sion, or action runs counter to one or more of the listed interests, or that it fails to take account of all the legal ends that ought to be considered in the situation where the provision, decision, or action operates. In other words, this inventory gives you a set of basic factors to use in explaining and predicting all types of activities which fall within the framework of the legal system, and a set of recognized criteria for judging the soundness of these activities.\(^4\)

Sec. 7–26. Conflicting policies—necessity of choice. But policies conflict with one another; they overlap and cut across one another. The policy maker must choose between them. He cannot give effect to any of them without limit. The pursuit of each and every one of the policy objectives in our inventory has to be qualified by the pursuit of other cross-cutting objectives. Even a man’s right to life, or the community’s interest in having his life continue, cannot be treated as absolute; the policy maker ordinarily calls upon the individual to risk his life in defense of the state, and often provides for the forfeiture of the individual’s life as a punishment for crime. Similarly, the objective of maintaining the security of acquisitions may have to be qualified by the fiscal needs of the state. The owner of property will not be allowed to hold it without obligations. The man who has a large income may have the lion’s share of it taken away under

\(^4\) It is well to remember that different authors make different inventories of state policies and social interests. They classify objectives in various ways, and emphasize different aspects of the general welfare. I mention this point because I do not want to suggest that my inventory is anything more than a convenient one, one of many possibilities. I certainly do not regard this inventory as necessary, final, or complete. Compare, for example, Pound’s inventory to be found in his Outline of Jurisprudence (5th ed.) 96 et seq. (1943).

Furthermore, variant names are used by different writers for what I have called “policies” and “interests.” Judges often refer to them as “rights” and “public policies.” Pound sometimes calls them “legal ends.” More often, he refers to them as “social interests.” The name which is chosen is not too important. It is important, however, to realize that substantially the same thing may be meant by different names. If this fact is not appreciated one may fail to recognize the rose when someone chances to call it by another name.
present legislation in the form of income taxation. The con­
formed bachelor may be charged a heavy school tax to educate
the children of others. The security of acquisitions is qualified
by other public needs such as the need to support the state
itself and all its varied undertakings.

So a mere inventory of policies is not enough. It will not
resolve these conflicts. Even when he has an inventory before
him, the policy maker must choose between conflicting and
cross cutting interests. He still has the problem of weighing
one interest against another, and deciding which is to be
preferred where both cannot receive recognition. Can we
offer the policy maker any guidance in making his choice?
Do we give him any landmarks to go by in steering between
conflicting social interests?

We can offer the policy maker a general picture of what
he is trying to do. We can remind him that his over-all objec­
tive is to serve the welfare of the community; or, in line
with the old tradition, to secure the claims of the individual.
Or, we can give him a general picture in somewhat more
detail, such as the following by Pound:

“For the purpose of understanding the law of today I
am content with a picture of satisfying as much of the whole
body of human wants as we may with the least sacrifice. I
am content to think of law as a social institution to satisfy
social wants—the claims and demands involved in the exist­
ence of civilized society—by giving effect to as much as we
may with the least sacrifice, so far as such wants may be
satisfied or such claims given effect by an ordering of human
conduct through politically organized society. For present
purposes, I am content to see in legal history the record of
a continually wider recognizing and satisfying of human
wants or claims or desires through social control; a more
embracing and more effective securing of social interests; a
continually more complete and effective elimination of waste
and precluding of friction in human enjoyment of the goods
of existence—in short, a continually more efficacious social engineering.” ¹

Here, Pound views the law “as a social institution to satisfy social wants.” This is its grand objective. It is intended to further the general welfare by recognizing and satisfying as far as possible “the whole body of human wants.” The task of legal regulation is one of “a continually more efficacious social engineering.” While these ways of defining the policy maker’s problem are as good as any I have seen, they are chiefly valuable for the purpose of perspective. They define a point of view for the policy maker. They do not furnish him any easy criterion for resolving conflicts between social interests. He is merely admonished to bear in mind social wants and to try to satisfy as many of them as he can. Such suggestions to the policy maker are about on a par with the common admonition to an individual, “Be good.” Nevertheless, they do define a social approach for the policy maker. In this sense they have significance in guiding his determinations.

Beyond such general pictures, one is not able to offer the policy maker much guidance in making his choice. Particular policy makers may be helped and controlled by rules and presumptions of various sorts, as we shall find in the next subtopic. But on the whole, the guidance which previous policy makers and theoretical writers can offer is not great. The reason is not far to seek. Social interests and individual interests are not quantitative ideas which can be measured in terms of size or heaviness. They cannot be reduced to units, laid on two sides of a scale, and weighed. The weighing of interests is rather a metaphor than a description of an actual process. Competing interests are incommensurable, and yet the policy maker must choose which interest to secure

¹ Introduction to the Philosophy of Law 98 (1922).
and how far to secure it. The weighing of interests reminds of Bentham’s hedonistic calculus of happiness factors. In fact, Bentham’s formula of justice, the greatest happiness of the greatest number, is not very different from Pound’s general picture “of satisfying as much of the whole body of human wants as we may with the least sacrifice.” Both schemes involve essentially the same problems of trying to measure the immeasurable. In the last analysis, much is left to the policy makers’ unguided judgment and his unconscious reactions; the policy makers’ choice is affected more by personal and social factors than by instructions regarding the method of choice.

Sec. 7-27. Problems. 1. Consider the relation to the growth of knowledge of such governmental projects as the recently developed research in atomic physics, the government supported program of research in medicine and general science, and the long-established research of the Department of Agriculture. Are these governmental measures consistent with the policy described in section 7-24? On what basis can such measures be justified?

2. What is the significance of the extensive research programs carried on by large industrial enterprises, such as General Motors, General Electric, and United States Rubber, which engage large numbers of experts as employees to work out problems of improving their respective products? How is this method of producing new ideas related to the policies described in section 7-24?

3. Brown:

“As the student has doubtless long since discovered it is frequently impossible for the law to mete out exact justice. Often contending parties each present claims which in themselves are worthy of recognition and protection, but which unfortunately so conflict that both cannot be satisfied. In such a situation the law has no other alternative than to make a
choice, recognizing that in so doing one of the parties must be made to suffer in spite of his freedom from any fault. Such an occasion is presented when one who has no title to a specific chattel, and no right to sell it, nevertheless does so sell it to another who in good faith pays full value therefor to the wrongful vendor. Either the rightful owner must lose the goods, which are retained by the bona fide purchaser, or the bona fide purchaser must surrender the goods to the rightful owner and lose the price which he has paid to the wrongful seller. The recognition of the original owner's claim as against that of the innocent purchaser is moreover injurious to the interests which society has in fostering trade and commerce. Business will suffer if purchasers cannot be assured of the title to the goods which they buy. In this dilemma the common law, as well as the civil law, has chosen to prefer the claims of the rightful owner, though as will be seen considerable of a compromise has been made. . . .

"The most notable exception to the rule that no title to property can be passed by one who is himself without title, is in the case of money and of negotiable commercial paper such as promissory notes, bills of exchange and bank checks. It is obvious that this exception is due to the exigencies of trade and commerce which demand that the media in which payment is made shall circulate freely from hand to hand without placing upon the recipient the burden of determining the state of the title of him who offers the money or commercial paper in payment, usually an impossible task. . . .

"This principle fully established in the common law is now codified in the Uniform Negotiable Instruments Act in force in every state of the United States." 2

How far does Brown work out the solution here in terms of individual interests? How far in terms of social interests? Specifically, what are the conflicting social interests here? Which interest is preferred and why?

1 As a matter of fact, Brown is in error in his statement of the civil law. French law, as well as the law of Germany and other continental countries, has adopted the proposition that possession is the equivalent of title (possession vaut titre), and accordingly any possessor can confer legal title on a bona fide purchaser for value; only the thief and the finder are unable to give the purchaser a good title.

4. Suppose the legislature of state X is considering the enactment of a compulsory vaccination law, and realizes that a large group of persons in the community adheres to the Christian Science faith and is opposed to vaccination. Which of the governmental policies mentioned in our inventory are involved? Which would probably be preferred in this situation? Why?

5. In *Gitlow v. New York,* the Supreme Court of the United States upheld a New York statute punishing those who advocate, advise, or teach the duty, necessity or propriety of overthrowing or overturning organized government by force, violence or any unlawful means, or who print, publish, or knowingly circulate any book, paper, etc., advocating, advising or teaching the doctrine that organized government should be so overthrown. The majority opinion declared that this statute did not penalize the utterance or publication of abstract doctrine or academic discussion having no quality of incitement to any concrete act, but denounced the advocacy of action for accomplishing the overthrow of organized government by unlawful means. And the majority opinion held the statute to be constitutionally applied in prosecuting defendants for printing and publishing a “MANIFESTO” advocating and urging mass action which should progressively foment industrial disturbances and, through political mass strikes and revolutionary mass action, overthrow and destroy organized parliamentary government; even though the advocacy was in general terms and not addressed to particular immediate acts or to particular persons.

Mr. Justice Holmes dissented; he said:

"Mr. Justice Brandeis and I are of opinion that this judgment should be reversed. . . . I think that the criterion sanctioned by the full Court in *Schenck v. United States*,

249 U. S. 47, 52, applies. 'The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent.' . . . If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.'

What are the conflicting objectives here? Where does the majority opinion draw the line between them?

Where would Holmes and Brandeis draw the line between these conflicting policies? What do you think of Holmes' suggestion about allowing a proletarian dictatorship to have its way? What has been the policy as regards change and progress of the dictatorships which we have known in recent years? Should their known policy on this point have any bearing on the question whether a dictatorship should be allowed to have its way?

4 Ibid. 672-673.

5 "Democracy ought to instruct its citizens in its own values instead of feebly waiting until its system is wrecked by private armies from within. Tolerance does not mean tolerating the intolerant." MANNHEIM, MAN AND SOCIETY IN AN AGE OF RECONSTRUCTION 353 (1940).
Sec. 7–28. The state and other social institutions. One finds in human society a multitude of organizations which formulate standards of behavior and exercise control over behavior. The state, the school, the church, the club, the labor union, the professional association, the stock exchange, and organized baseball, are examples. These agencies are called social institutions.

Of the role and nature of social institutions Park and Burgess say:

“Every society and every social group, capable of consistent action, may be regarded as an organization of the wishes of its members. This means that society rests on, and embodies, the appetites and natural desires of the individual man; but it implies also, that wishes, in becoming organized, are necessarily disciplined and controlled in the interest of the group as a whole.

“Every such society or social group, even the most ephemeral, will ordinarily have (a) some relatively formal method of defining its aim and formulating its policies, making them explicit, and (b) some machinery, functionary, or other arrangement for realizing its aim and carrying its policies into effect. Even in the family there is government, and this involves something that corresponds to legislation, adjudication, and administration.”

Each of these institutions exists in a world of men where other institutions exist. All are organizations, more or less complete, of one subject matter, to wit, the members of the human race. The state is more prominent and fully developed than any of the other organizations. It embraces an entire community. Most of the other groups are merely partial organizations of a community of which the state is the all-inclusive organization. It is inevitable that the state and these other control institutions should interact and com-

1 Introduction to the Science of Sociology 45–56 (1930).
pete with one another in various ways. The coexistence and activities of other control institutions within the community pose policy problems for the state. The state and its officials orient themselves in defined ways toward the activities of other groups organized within the community. Moreover, the state itself is an organization of men. The maintenance of this organization and the definition of its functions present policy problems for the state and its officials; the latter adopt definite policies regarding the continued existence and the functions of the state. And finally, the state and its officials must face policy problems regarding its relations to other states, i.e., politically organized communities. These policies regarding organized groups, within and without the community, are to be the matter for our attention in the present subtopic. They will be taken up in three subsequent sections, entitled as follows:

Policies regarding subordinate groups (sec. 7-30).

Policies regarding the state's own organization and functions (sec. 7-31).

Policies regarding other states (sec. 7-32).

Sec. 7-29. (Optional.) Features and functions of social institutions. You will appreciate better these problems of the orientation of the state toward organized group activities if we pause to compare the state and its functions with other social institutions and their functions. The state and other developed institutions involve these common features:

1. Group of members. A group such as the labor union or the American Medical Association has a definite but limited membership. The membership of the state embraces the entire population of a community.

2. Division of members into two functional parts: Controllers and controlled. In some of the simpler institutions such as the family, control may be exercised by a small
number of controllers or even by a single person. In the state, control is always exercised by many persons. We can for the present purpose refer to these controllers in the state as officials. There is a higher degree of specialization and subdivision of function among state controllers than among the controllers of any other institutions. State officials may be subdivided on a functional basis into legislative, executive, judicial, etc. They may be subdivided on a hierarchal basis into superior and inferior officials. They may be subdivided on a territorial basis between counties and other geographical units.

3. *Standards of behavior for members (the controlled).* The institution through its controllers establishes standards of behavior for its members. For example, the American Medical Association maintains its standards of right behavior commonly known as medical ethics. The labor union prohibits its members from working in a nonunion establishment, or from crossing a picket line. The state has special agencies, i.e., the legislature, the courts, etc., which formulate standards, and it has a more complete and detailed array of standards prescribed for the control of the behavior of its membership than any other institution.

4. *Machinery and methods for effectuating its standards.* Each institution develops its own machinery and methods for making its standards effective. A medical society, for example, can expel or suspend a member who is guilty of an infraction of its rules, or can deprive him of access to hospital facilities which are controlled by the association or its members. Similarly, a labor union can expel members or mete out lesser forms of disciplinary penalties to them. The church in a similar way can exclude from membership and can discipline members in various ways. It can threaten persons with what Ross calls "other-world sanctions," i.e., penalties in afterlife. But such sanctions are, I fear, less
effective today with the general population than they used to be. The state, in comparison with these other institutions, has a more complete arsenal of sanctions and control devices. It uses criminal prosecution, official supervision, the private lawsuit, the reward for individual action, and other methods which have been more fully considered at an earlier point.¹ In addition, it employs education through its public school system to mold the young and develop habits and attitudes which will insure the effectiveness of its standards.

5. Standards of behavior for the controllers (officials). The institution maintains standards for the behavior of its controllers. The controllers are the persons through whose acts standards of the institution are made effective; and the controllers, like those whom they control, need standards to guide their actions. Such standards define the times when control is to be exercised and the manner of its exercise. Collectively, they may be said to make up an institutional constitution. Every well-developed institution has a set of standards which define official operations in this sense. In the state, such standards apply to all persons who exercise its authority.

6. Devices and methods of controlling the controllers. In most social institutions machinery and methods of effectuating the obligations of controllers are rather indefinite and undeveloped. In the main, the pressure of group opinion upon those who are in charge of group affairs is relied upon to hold the controllers in check. In many institutions it is hardly worth while to establish more potent sanctions. How much difference does it make whether the president of the ladies' literary club misuses her power? But in other institutions, such as the labor union or the professional association, the consequences of abuse of power may be serious, and the need for restraints on controllers may be very real, since they

¹ See sects. 2–15 to 2–28.
exercise on behalf of the association power over the bread and butter of members, and since they affect the welfare of many persons outside the group as well. In the state, first reliance is put upon schemes of organization which establish one official agency in a position of supervisory authority over another. The weakness of such schemes is that there is no agency to check the top agency. To meet this difficulty, the modern democratic state relies upon the creation of co-ordinate official agencies which check one another, a scheme of checks and balances which sets off one group of controllers against another.²

7. Institutional policies or objectives. The institutional group pursues certain objectives as such. Medical practitioners are organized to promote the welfare of their profession. The labor union aims to improve the economic and social conditions of its membership. The objectives of the state are broader and more varied. The state is expected to secure the general welfare—the welfare of all the people within its sway, not a particular kind of good for a limited group; at least, that is the professed aim of American government in all its forms and parts. To analyze the state and its functions thus, in institutional terms, reduces to a common denominator the state and other social control agencies. I think you will find this helpful in understanding the interactions of the state with other institutions, and the policies of the state toward other institutions—about which I now want to speak.

Sec. 7–30. Policies regarding subordinate groups. Within wide limits, the state does not concern itself with the formation or activities of other organized groups, e.g., a ladies' literary club or a neighborhood ball team. It neither favors nor opposes them; its policy is, on the whole, one of indifference toward them. Its policy-making agencies discover no

² See secs. 3–22 et seq.
special benefit and no special harm in the existence or behavior of these groups, and accordingly, they adopt a neutral position in regard to them. This area of indifference or neutrality parallels the area of liberty for the individual. There also government adopts a neutral or hands-off attitude. Here, government allows individuals to form groups and allows groups to act without interposing any restraints and without affording any support for their aims and activities.

But some organized groups serve highly useful functions in the community. The state, acting through its policy makers, recognizes in their existence and operations definite social interests. Such groups the state tries to foster in various ways and in varying degrees. For example, the state traditionally extends its protection to the family; it encourages the formation of families and safeguards family relationships against outside interference.\(^1\) It establishes forms and requirements for entering into the marriage relation, and methods for terminating that relation by divorce or annulment; it penalizes adultery and fornication; it creates legal liability for the support of wife and child. And economic groups receive the state’s blessing, too. The state encourages the formation of groups to carry on trade and business. It provides for the creation of business corporations and other business associations; it provides for the establishment of banks, insurance companies, transportation companies, etc. The state protects the operations of these groups and gives effect to their acts. To certain business groups, the state may give subsidies; to some groups, it may extend protection by enacting tariff laws to safeguard against foreign competition. In recent years, labor organizations have been strongly supported by our federal government and by many of the states. These governments have sought to guarantee to labor groups

\(^1\) See the earlier discussion of individual interests of family members in sec. 7-07. Here we are concerned with the family group as a recognized social entity.
the opportunity to form and maintain unions without interference by persons on the outside. The formation of these unions has been encouraged in order to equalize the bargaining power of workmen in dealing with the large employer on whom they depend for a livelihood. Finally, the state encourages the organization of groups for charitable, social, and other nonprofit purposes. These, like business corporations, are invested with powers of acting as a legal unit, powers of owning property, powers of making contracts, etc. Charitable and religious and educational institutions fall under this head; they are often given exemptions from taxation and other fiscal advantages. All these different group organizations are alike in that they perform needed community services. They are encouraged and protected by regulative, fiscal, or administrative measures of the state because they serve the interests of the community.

Besides the specific functions which organized groups are intended to serve, they also serve the community in a regulative capacity. They set up standards of behavior for their members and enforce them through their own institutional machinery. This regulative function of other social institutions is especially important in relation to the regulative function of the law. So far as these institutional standards coincide with legal standards, and so far as they are institutionally effectuated, a part of the load of enforcement is taken off the legal machinery. Thus, for example, organized medicine is not only important to the community because it aids in the provision of medical services, it is also significant because it maintains canons of ethics for its practitioners to control their dealings with one another and with the public. If these canons are in accord with the general welfare, the state can well afford to back them up, wholly or in part, and give aid to the organized medical profession in enforcing them. Similarly, the state may find definite social interests
in protecting such institutions as the family and the church, not only because of the primary functions that they perform, but also because these institutions create and enforce standards which regulate the behavior of members of the community.\(^2\) I have in mind such standards as those regarding truth telling. The church by its standards enjoins truthfulness and forbids lying. Similar standards are inculcated by training in most families. Such standards coincide generally with standards and objectives, recognized as desirable by the state. Our organized educational institutions, the public schools, normally support the same standards. And the legal machinery of the state is directed to the enforcement of the same standards. As regards testimony in court, the state enjoins truth telling and punishes perjury. As regards business transactions, the state requires correct statements of fact and backs up this requirement by threats of actions or penalties for fraud. As regards the dealings of officials with officials, involved in the operation of the legal system, the reliance of each official on the correctness of statements of others is taken for granted. Indeed, it is hard to imagine what the practices regarding truth telling would be in our community, and how legal machinery would be created adequate to carry the burden if these other social institutions were not in the picture, and were not enforcing standards substantially coincident with the standards of the law.\(^3\)

On the other hand, groups may be organized whose activities run counter to state policies. The general ends of certain groups are so far opposed to state policies that the state attempts to prohibit their formation entirely. In this sense,

\(^2\) We can, to use Pound's terminology, refer to the state's interest in maintaining these extralegal standards as the social interest in the *general morals*.

\(^3\) In an analogous way, one might point to the regulative utility of family and church in many other respects. The standards of these institutions normally coincide with the standards of the law in regard to acts of theft and acts of sex intercourse outside the marriage relation. To the extent that these institutions work effectively in the processes of training and enforcement, the task of the law in these respects is reduced.
the state may try to prevent the organization of a gambling syndicate, or of a society whose purpose is to overthrow the government by force. Or the conflict with governmental policies may arise rather out of the methods commonly used by an organized group such as the Ku Klux Klan. The Klan may profess to work for good ends, but it operates secretly and employs violent means, both of which are ordinarily disapproved by organized government. The result may be an outright prohibition of this organization, intended to strike at the unlawful methods usually employed by it.

As regards other subordinate groups, the hostility of the state may be not complete, but partial. The state may only undertake to prevent certain acts of these groups which are injurious to persons who are inside or outside the group. Suppose, for example, that an association of merchants attempts to fix prices. From the point of view of the merchants, this may be regarded as a justifiable and desirable act; it may be intended by them to insure reasonable profits. But the fixing of prices in this manner is a practice which is or may be harmful to others; it leads to injury to the buying public, and is definitely prohibited by law. Similarly, labor organizations may resort to violence in labor disputes, or, in regard to persons outside their membership, may attempt to enforce demands by boycotts. These acts may be quite justifiable from the point of view of labor organizations, and may accord fully with the standards which the organization itself recognizes. But both acts may affect injuriously persons outside as well as inside their membership, and the state may adopt a policy of prohibition or restriction. The theory behind governmental interference in such cases is that the state as the representative of the whole community must move to suppress the activity of any group which seeks to promote its own interests at the expense of injury to an
individual, injury to another group, or injury to the public as a whole.

Sec. 7-31. Policies regarding the state's own organization and functions. No less important than the policies which the state adopts regarding subordinate groups in the community are the policies which the state maintains regarding its own organization and functions. One can speak of them as policies of the state regarding itself.¹ In one aspect, all the policies which we have heretofore considered relate to the state; they are policies of the state in the sense that they are pursued by the state or in its name. But thus far we have considered only policies which were directed to an objective external to the state itself. The policies with which we are here concerned are those whose objectives are the state's own organization and some of the state's functions.

One basic policy question for the state relates to the change of its organization. Is this organization to be subject to change? The American governments are established under constitutions, and these constitutions provide definite machinery for the change and amendment of governmental organization. What about change by revolution? What about efforts of individuals or groups to overthrow the government by force? So far as I know, no government here or elsewhere has ever recognized this as a permissible form of change. Where such an overthrow has occurred, it has been accomplished despite the state. In countries where dictatorships are in power, usually revolution represents the only possibility for change. The policy of the established dictatorship is opposed to change of any kind. Democratic and liberal groups

¹ Also, we must not forget that policies of the state regarding its own organization and functions are really the policies or attitudes of its officials regarding the state's operations. This is one of the places where it is especially important for clarity of thinking, to realize the connection of policies with actual policy makers. See sec. 7-02, and note ** thereto.
are necessarily revolutionary groups, and the full power of the state is exerted to suppress them. They have no opportunity under such a state policy to bring about change in a lawful manner.

Other basic policy questions for the state relate to the use of the state’s powers for its own support. I think it is proper to say that the state itself is a state-supported institution. By supporting itself and its own functions, the state serves indirectly to secure the various interests which it protects and fosters. Subordinate policy questions concern the means which the state will use in supporting itself: What tax sources will it draw upon? How far will it make exactions from the rich? How far from the poor? How will it distribute its available funds between one undertaking and another?

Government in the United States can deal appropriately with acts of individuals or groups which threaten its destruction. It can penalize the acts of those who advocate its overthrow by force. The federal government punishes treason, espionage, trading with the enemy, and acts of sabotage. All our governments restrain and punish acts of individuals and groups which interfere with the performance of governmental functions. They protect public property against theft or injury, and they accord special protection to government officials while they are acting in the performance of their duties.

Another important type of policy question concerns the functions which the state itself is to assume. The state may assume only a few and narrow functions. This was the traditional policy of our governments until relatively recently. Instead of assuming functions itself, the state may adopt a policy of encouraging individuals or organized groups to perform needed social services. In the last section I showed how the state may stop short of assuming functions itself and aid subordinate group organizations which perform social functions. Thus, the state has encouraged universities and
colleges, privately endowed, to perform educational functions, and helped them in various ways, as by subventions and tax exemptions.

Or the state may assume many and wide functions. It may create organs of its own, designed to take over functions previously performed by private agencies, or create government agencies to render services not theretofore performed. I have already referred to the tendency of the modern state to take on more and more functions, exemplified by what has been done by governments in Europe as well as by our own governments, state and federal. These have created a multitude of agencies to perform social services. I do not refer here merely to government corporations, such as the Home Owners' Loan Corporation, though these are to be included, too. I have in mind organizations such as our system of public education, extending from elementary schools to universities. These represent the governmental assumption of the chief role in education. Public education is hardly a century and a half old. At an earlier time, education was the function of the family or the church, or was given in private schools. These schools are still, to a large degree, encouraged by our government. Nevertheless, the public schools and universities have now taken over the greater share of the burden of education in this country. And the public educational institutions of the American state are now as completely incorporated into its structure as are the courts and the organs of taxation.²

² The established church is historically important and still exists in many parts of the world, though it is no longer possible in this country to create such an establishment because of constitutional prohibitions. Usually the state furnishes the established church with most of its funds, and combines with it in a close union of members and enforcement machinery. Yet the established church is not merely an organ of the state. Accordingly, the established church falls between the complete assumption of government control and the independent group organization which is merely subsidized.

Under the recent fascist regimes of Italy and Germany, major business organizations and labor unions were, as I understand the matter, converted into semipublic agencies along lines similar to that of an established church.
Sec. 7-32. Policies regarding other states. If we had in the world a superstate, it might be endowed with authority to control the relations of one state to another, and to fix the policies which each state should pursue in relation to other states. But no such central international power exists. Each state asserts practically unlimited authority over its external affairs. One of the normal functions of every state is to deal with foreign states and their subjects. Through some agents or agencies each state determines what is commonly called its "foreign policy." In the United States, this role is assigned by the Constitution to the federal government, and more specifically, to the President and Senate.

The most aggressive policies regarding other states are represented by war, offensive and defensive. War is the crudest and most radical method of dealing with other nations. For the purpose of prosecuting war, armed forces are prepared and kept ready. Many of the acts and measures of our federal government are actuated by this war policy. The government creates and maintains an army, navy, and air force; it regulates by law the internal activities of the military forces as well as the relations of the individual citizen to them.

1 I have not overlooked the fact that some supernational institutions, such as the Catholic Church, bear both internal and external relations to the state. Such an institution organizes persons within the community, but its sway also extends beyond the community. Such organizations pose no new type of policy problems for the state. From the state's point of view, these problems are of two types; internal relations, like the relations to subordinate groups in the community, and external relations, like the state's relations to other states. I have not felt that an additional heading was needed in order to cover the policies involved in such double relationships.

2 The League of Nations was a beginning. And the United Nations is another start; but so far its authority has not attained very considerable significance.

3 The individual states are explicitly excluded from action in this area by several provisions of the Federal Constitution. See Art. I, Sec. 9.

4 However, the House of Representatives also has a hand in shaping foreign policy. The influence of the House is exerted chiefly through its control over taxing and spending. But the House also makes its views felt by its participation in the lawmaking processes.

5 You can see in the organization and maintenance of the military establishment an excellent illustration of the intermixture of fiscal, administrative, and
Alongside control over warfare stands federal control over the importation and exportation of goods. Benefits and harms may accrue to the people of the United States through these acts as well as through acts of war. Benefits have been invited by a policy of free trade in articles needed by domestic economy. Harms to the domestic population, e.g., from opium or from diseased food products, have been combated by restrictive or prohibitive legislation. Injuries to the domestic economy, e.g., hurtful foreign competition with domestic goods, have been met by restrictive laws or by protective tariffs.

A parallel control is exercised by the federal government over immigration and naturalization. For more than a century of our national life, the federal government pursued a policy of *laissez faire* as regards immigration; almost unlimited entry to this country was allowed to foreigners, and immigrants were readily admitted to citizenship. These policies were based on a felt need to fill up the vast open spaces of our West with people, especially with farmers from Europe. The first departure from these policies was represented by the Chinese Exclusion Acts, intended to protect American labor against the importation of cheap competitive labor from the Orient. Since the turn of the century, restrictions on immigration have multiplied enormously, so that now we have many restraints on both the *quality*, e.g., physical and mental health, occupation, moral character, etc., and *quantity* of immigrants, e.g., the quota system which fixes the number of persons of each nationality who can enter the United States. And naturalization is hedged about by many regulative measures in governmental undertakings. See further on this point, sec. 7-17.

6 Though this policy has sometimes been offset by the financial requirements of government, imports have been subjected to tariffs in order to raise revenue.

7 Emigration and loss of citizenship are also subjects for possible federal attention. Emigration has received little if any notice; loss of citizenship is covered fully by federal laws dealing with nationality.
safeguards, calculated to prevent incompetent and undesirable persons from acquiring the status of citizens.

To a very limited extent, relations of governments to one another are covered by international law. This law professes to fix the patterns of behavior which states should follow in regard to one another and one another's nationals. However, the policies of international law are narrow and limited. International law is directed primarily to the policy of maintaining order between states; secondarily, it seems to be aimed to mitigate the harshness of war when peace is not kept. Moreover, there are no well-defined agencies for making international law, as there are for creating domestic law. International law has developed chiefly through the voluntary adherence of independent states to common usages. These usages, by express or tacit acceptance, have taken on something of the general character of legal standards. In addition treaties can be constitutive of international law. But there are no well-defined methods or agencies of enforcement to back up the standards of what is called international law. And the behavior patterns of international law are by no means complete and explicit. The result is that in practice the acts which any government will undertake and the policies it will pursue are, in the main, self-determined and not actually controlled by externally prescribed standards or policies.

Sec. 7-33. Problems. 1. In a note in the Michigan Law Review in 1934 appears the following statement of a problem:

In this connection it is also worth noting that our Federal Constitution makes a treaty entered into by the federal government a part of the internal law of the United States. Art. III, Sec. 2. Such a treaty operates on persons and property in the United States essentially as federal statutes operate.

At once the analogy to a contract between individuals comes to mind; this contract establishes obligatory lines of action for the parties who enter into it. But a treaty between states can do more. It can serve as the adoption of a constitution, and in this sense set up a frame of international government and determine policies and standards for the operation of that government.
In April of this year a Minnesota physician, Dr. Clayton E. May treated for gunshot wounds a certain undesirable person, John Dillinger, very much in demand by the police. He further neglected to inform the police concerning his ministrations, and as a result, was tried in a federal court on a charge of harboring a fugitive wanted under a federal warrant, found guilty, and sentenced to serve two years in a penitentiary and to pay a fine of $1,000. Said a prominent English medical journal in commenting on the case '... colleagues in every country will applaud his action in not betraying a professional trust.'

After this statement of the problem, the note writer discusses it and concludes that there is no legal justification for the position taken by the English medical journal.

How is this question related to our discussion of state policies toward organized groups? Do you agree with the note writer or with the English medical journal? Why?

2. A few years ago a group of employees of the Home Owners' Loan Corporation organized an association in the District of Columbia called Group Health Association, for the purpose of providing medical service on a prepaid insurance basis to its members and their families. This group undertook to employ licensed physicians to render the medical services which its agreement with its members called for. The activities of such voluntary health associations were strongly opposed by the American Medical Association and its subsidiary societies on the ground that the organization of these associations and their employment of doctors on salary were inimical to the best interests of the medical profession. In order to prevent the operations of Group Health Association, the American Medical Association and the Medical Society of the District of Columbia threatened any doctors who affiliated with, or served Group Health Association, with expulsion from membership. They also denied to doctors who

1 Note, 226 THE LANCET 1183 (1934).
2 32 MICH. L. REV. 1164 (1934).
became affiliated with Group Health Association all privileges of consultation with members of the American Medical Association or the Medical Society, and finally they undertook through their control of hospitals of the District of Columbia to exclude all affiliated doctors and their patients from the use of such hospitals. The American Medical Association and the Medical Society were prosecuted and convicted for entering into a conspiracy to restrain trade. The conviction was sustained in the Supreme Court of the United States.\(^3\)

The technical form of the charge and the specific arguments pro and con are not important for our purpose. How would you interpret this conviction in relation to our present subtopic?

Incidentally, it should be noted that the American Medical Association has completely reversed its position on this point and now promotes the organization of voluntary health associations as an antidote for the more feared “state medicine.” What would be the significance of state medicine (a system in which the state employs doctors to furnish medical service to its population) in terms of the present subtopic?

3. The power of correction, vested by law in parents, is founded on their duty to maintain and educate their offspring. In support of that authority, they must have a “right to the exercise of such discipline as may be requisite for the discharge of their sacred trust.” \(^4\) And this power, allowed by law to the parent over the person of the child, “may be delegated to a tutor or instructor, the better to accomplish the purpose of education.” \(^5\)

“The better doctrine of the adjudged cases, therefore, is, that the teacher is, within reasonable bounds, the substitute for the parent, exercising his delegated authority. He is vested with the power to administer moderate correction, with a proper instrument, in cases of misconduct, which ought

\(^4\) 2 Kent’s Comm. \(*203\) (1896).
\(^5\) Id. \(*205\), 1 Bl. Comm. \(*507\) (1941).
to have some reference to the character of the offense, the sex, age, size, and physical strength of the pupil. When the teacher keeps within the circumscribed sphere of his authority, the degree of correction must be left to his discretion, as it is to that of the parent, under like circumstances. Within this limit, he has the authority to determine the gravity or heinousness of the offense, and to mete out to the offender the punishment which he thinks his conduct justly merits; and hence the parent or teacher is often said, pro hac vice, to exercise 'judicial functions.' 6

What does this judicial declaration suggest as to the basis for family discipline? How is the sphere of family discipline related to the sphere of law? How is the sphere of discipline in the schools limited by the law?

4. The State of Oregon passed a Compulsory Education Act which required every parent, guardian or other person having control of a child between the ages of 8 and 16 years to send him to the public school in the district where he resided, for the period during which the school was held for the current year. The validity of this act was challenged before the United States Supreme Court by the Society of Sisters and by a private school. The Supreme Court of the United States held the act invalid. It declared that the act constituted an unreasonable interference "with the liberty of parents and guardians to direct the upbringing . . . of children. . . ." The court also declared that: "The fundamental theory of liberty upon which all governments of this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." 7

What does this case signify in terms of competing institutional ends and areas of control? A statute which requires parents to send their children to some school until sixteen

6 Boyd v. State, 88 Ala. 169 at 171 (1889).
years of age would be held constitutionally valid. What is the difference?

5. United States v. Schwimmer. A fifty-year-old woman applied for naturalization as an American citizen. At the hearing on her application, and in the preliminary questionnaires, she indicated an unwillingness to bear arms in defense of this country. The Supreme Court affirmed the district court’s denial of naturalization. Holmes, J., dissenting, said:

“... if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate. I think we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant’s way, I would suggest that the Quakers have done their share to make this country what it is, that many citizens agree with the applicant’s belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.”

This decision and a similar decision in United States v. MacIntosh, have been regarded as mere constructions of the intent of Congress. In Girouard v. United States, both these cases were overruled and an interpretation essentially like that which Holmes urged was adopted.

Under the majority opinion of the Schwimmer Case, what policy is ascribed to Congress? Under Holmes’ opinion, what policy is ascribed to Congress?

Determinants of Policies

Sec. 7-34. More specifically about policy makers—the popular will. We have now listed a great variety of possible
policies, and have considered the ways in which they may be interrelated and adjusted with one another. We have yet to deal with the processes through which these policies are formulated and determined. We have yet to consider more specifically who the policy makers are, how their choices are influenced and controlled, and where their policy notions come from. These questions remain for treatment in this final subtopic on the operation of our legal system.

All American governmental institutions rest on the fundamental assumption that "Governments are instituted among Men, deriving their just powers from the consent of the governed."\(^1\) This assumption was part and parcel of social contract theories prevailing at the time when the federal government was founded. In terms of this fundamental assumption, the governed are entitled to fix the policies which government is to serve, and the methods and machinery through which these policies will be effectuated.\(^2\) No one who had been brought up in the midst of the American tradition would ever think of questioning either of these propositions.

However, the popular will is, for the most part, inarticulate and unformulated; its practical effect on the operations of government is indirect and roundabout. The popular will

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\(^1\) Declaration of Independence, unanimously passed by the Congress of the thirteen United States of America, July 4, 1776.

\(^2\) Indeed, the proceedings by which the federal government was established could well be viewed as the making of a popular compact. While the original naive conception of a popular compact has been discarded, the basic conception of popular sovereignty has not. This conception not only appears in the Declaration of Independence and the writings of various founding fathers, it lives on unchallenged and vigorous as ever; it is definitely announced in the Federal Constitution. The preamble to that instrument declares:

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

And the Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
can rarely be said to originate and carry through a policy determination of its own. Normally, the popular will is expressed through various agencies which profess to act as its representatives: the framers of constitutions, the legislatures, the courts, and other officials. To some extent, the popular will is expressed through the choice of officials who announce their advocacy of proposed programs. In some states, it can be expressed through the use of the initiative and referendum. In the main, however, the popular will is expressed only indirectly through measures formulated and proposed by official agencies, such as a constitutional convention or a legislature.

The limitations on the choice of policies which the people (popular will) may adopt by establishing constitutions or replacing or amending those it has, are theoretically negligible. If the people chooses, it can adopt any kind of government or any kind of policy whatever.\(^3\) If unlimited power is to be found anywhere in our legal systems, analogous to the power of the British Parliament, this power is vested in the people. To be sure, such power is more a theory than a practical fact. The people is a rather inert body, as I have already pointed out. The people is governed by personal and social factors, which will be discussed in later sections. It is amenable to suggestions and advice; it is restrained, like every other agency of government, by traditional standards.\(^4\)

**Sec. 7-35. Framers of constitutions as policy makers.** The framers of constitutions are obviously in a position to determine and formulate the policies to be pursued by the govern-

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\(^3\) This is definitely indicated by the preamble to the Constitution, which declares that it is adopted by the people of the United States, and by the Tenth Amendment, which reserves powers not given to the federal government, to the states and the people (see next preceding note). As Justice Holmes suggested in Gitlow v. New York (see sec. 7-25, problem 5) there is nothing in our Constitution to prevent the adoption of communism in this country if our people should want it.

\(^4\) See also the discussion in sec. 7-45 of the question whether there are superhuman criteria of justice to guide policy makers.
ments which they establish. And, like the people, the framers are not subject to any immediate restraints on their choices. They are checked only by personal and social factors.¹

To a substantial extent, the framers of our constitutions have laid out the policies for governmental agencies to pursue. For example, the framers of the Federal Constitution declare in the preamble thereof that the federal government is ordained and established “in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and to our Posterity.” Again the framers of the Federal Constitution confer on Congress the power to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . .”² Such expressions of policy are explicit but they are very general. The government is intended to act for the general welfare, to provide for the common defense, and so on. Like other inventories of governmental policy heretofore mentioned, such formulations do not mean much as guides, unless they be broken down and stated in more specific terms.

However, explicit declarations of policy are not usually found in constitutions any more than in statutes. The framers are content to establish the principal organs of government and to define their powers. The ends for which these powers shall be used, the policies which the organs of government shall pursue, are not explicitly and specifically stated; they are left to implication from the powers given. Congress is given power to regulate interstate commerce. The purposes for which the power can be used are not defined. Is the use of this power limited to the protection and promotion of the flow of commerce? Can the power be used for the moral

¹ I refer here to the checks by human acts, ways, and institutions; the question whether there is a “higher law” beyond human control, which guides policy makers and others, is reserved for discussion in sec. 7–43.

² Art. I, Sec. 8, Cl. 1.
betterment of the community by preventing the shipment of lottery tickets across state lines? Can Congress use its control over commerce to improve working conditions and prevent child labor in industry? All these questions of policy in the use of the commerce power had to be answered, but all of the answers had to be found outside the specific language of the Constitution; and so of the purposes for which most of the powers conferred on the federal government by the Federal Constitution and on the state governments by their respective state constitutions. Powers are granted, but the purposes and policies for which the powers are to be used are left undefined.

Now while the framers of our constitutions have not been inclined to state the purposes for which powers might be used, they have taken great pains to prohibit their use for certain purposes. The framers have been concerned to prohibit acts of government which interfere with individual rights and liberties. These prohibitions of governmental action definitely limit the policies which government may pursue; they restrict the methods by which policies may be carried out. The federal government is expressly forbidden to abridge freedom of speech, of the press, and of assembly. Federal and state governments are forbidden to pass ex post facto laws and other retroactive legislation, and to deprive persons of life, liberty or property without due process of law. The state is forbidden to "pass any . . . law impairing the obligation of contracts," or to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," or to "deny to any person within its jurisdiction the equal protection of the laws." The state and federal constitutions contain imposing arrays of provisions which guarantee jury trial in civil and criminal cases, which safeguard the individual against arbitrary arrests and searches, and which secure for his use the writ of habeas corpus. But the reasons for all these guarantees and pro-
hibitions are not stated out. They are taken for granted. They are implied and not expressed. Why is the liberty of the individual given all these forms of protection? The Declaration of Independence and the early constitutions indicated that these liberties were regarded as natural endowments of the Creator, and required no justification other than that fact. This point of view has gradually changed. Today liberties of the individual are justified in terms of utility or policy. Even if we talk of them as natural rights, we try to find practical reasons for free speech, for the individual's right to hold property, for the guarantee of jury trial in criminal and civil cases, for the writ of habeas corpus, etc. Maybe these reasons or policies were implicit in earlier theories of natural rights and liberties. Maybe these reasons or policies are merely the invented rationalizations of our time. In any event, the need is strongly felt nowadays to invoke the policies behind the constitutional guarantees, as aids in applying and limiting them. This fact has put upon courts and theoretical writers, even more than upon legislatures, the burden of formulating and stating the policy considerations behind constitutional provisions, which the constitutions themselves do not express.

Sec. 7-36. Legislatures as policy makers. In actual fact, the legislatures (and I include the Congress of the United States) deal with policy matters more frequently and settle more policy questions than any of the other policy makers. They are, in practice, the chief agencies to determine the policies of government. They determine policies whenever they exercise any of their powers; when they enact statutes, when they create offices, when they impose taxes, and when they appropriate money. The legislatures act in these various ways with purposes in view, and to say that they determine policies is simply to say that they do have ends in view when they act.
But the legislatures must act within the constitutional framework. In this respect, these bodies are limited in their function as policy makers. They are checked by the express provisions of the constitutions, and by the policies of these instruments which are read into them by the courts. In this respect, the legislatures are in a different position from the people and the constitution maker. The latter are outside the constitutional framework, and free from constitutional limitations.\(^1\) They might, for example, abolish private property, which the legislatures definitely could not do. The subjection of the legislatures' activity to constitutional limitations is what gives their policy making its peculiar character. How do these constitutional limitations affect the policy making of the legislatures?

The positive grants of power to legislate are usually so broad and general that they permit the legislative body to do almost anything that it chooses. In this regard, the grants of legislative power to the federal government are typical. What Congress can do in the exercise of its commerce power, its power to tax, its power to spend, its war powers, and its control over the currency, is almost unlimited. Under the decisions of the Supreme Court in the last fifteen years, there is practically no way to challenge the necessity for using any of these powers or the purpose for which any of them is used.*

The prohibitions of particular types of legislation and the guarantees of individual rights are more seriously limitative.

\(^1\) The general idea here expressed is correct. I do not feel that it is necessary to clutter up the text with such qualifications as: 1, the proposition that even the popular will, as for example in amending a constitution, must follow the prescribed constitutional procedures for adopting an amendment; and 2, the proposition that even the framers of a state constitution cannot transcend the limitations of the Federal Constitution.

Offhand, these prohibitions and guarantees might seem to stand in the way of any legislative regulation or control whatever. When the Federal Constitution (and likewise those of the states) makes such declarations as that Congress shall make no law abridging freedom of speech or the press, that no state shall pass a law impairing the obligation of contracts, and that no state shall deprive any person of life, liberty or property without due process of law, the declarations leave no room, if literally read, for legislative qualification or limitation. But our courts have definitely held from the beginning that these prohibitions and guarantees are not absolute. They do not stand in the way of some legislative regulation and limitation.

The character and amount of permissible legislative control varies with the subject matter. As regards freedom of the mind and the guarantees of personal liberty, the Supreme Court and the state supreme courts have held the reins on legislation rather tight. They have stressed the importance of freedom of the mind and freedom of the person as the foundation for all our other rights and liberties. Any governmental interference in these areas has to be definitely justified. A law restricting liberty of mind or person must be predicated on actual social need. The presumption is in favor of liberty and against any type of restriction. The burden of proof is on the lawmaker (or on any one who relies upon such a law) to show that a real need exists. And the Supreme Court is prepared to examine the question of policy for itself. In short, the opportunity of the legislatures to introduce restrictive policies and measures in these areas is strictly limited.**

2 The statements in this and the next succeeding paragraph are somewhat oversimplified, but they suffice for the purpose in hand. If anyone desires a more detailed and accurate conception of the law, he can obtain it by consulting the authorities cited in the next two notes addressed to the initiated reader.

** (I.R.) These views are indicated in the following cases: Schenck v. United States, 249 U. S. 47 (1919); Meyer v. Nebraska, 262 U. S. 390 (1923); Near v. Minnesota, 283 U. S. 697 (1931); Grosjean v. American
On the other hand, the legislatures enjoy a much wider latitude for policy determination in the economic sphere. Down to the advent of the New Deal, the so-called "conservative" majority of the Supreme Court was ready to treat all clauses of the Constitution alike. It took the position that liberty is the rule and restraint the exception in all spheres, whether economic or personal. It was ready to require that legislation controlling property and contract be sustained by adequate social reasons and to indulge a presumption in favor of liberty and against restriction of property rights and freedom of contract. But the "liberal" minority of the Supreme Court (Holmes, Brandeis and Stone) insisted on a different presumption in this sphere. It wanted to presume that Congress or the legislature had acted with sufficient warrant and was justified in limiting individual economic interests. And this former minority view is the one which has prevailed with the majority of the New Deal Supreme Court. The effect of this view has been to place the burden of proof on those who challenge legislation in the economic sphere, and this burden is not easy to support. This means that the constitutional protection for economic interests has been largely taken away. The legislative policy makers are practically free to prefer what interests they choose, individual or social, in the economic sphere.***


3 See Adkins v. Children's Hospital, quoted above in sec. 7-21, problem 3.

*** (I.R.) These views are indicated by the following cases: West Coast Hotel Company v. Parrish, 300 U. S. 379 (1937); Railroad Commission of Texas v. Rowan and Nichols, 310 U. S. 573 (1940); Federal Power Com-
Sec. 7–37. Courts as policy makers. Courts are established for the immediate purpose of handling litigation. They are intended to apply legal provisions prescribed by the various formulating agencies above mentioned: the popular will, the framers of constitutions, and especially the legislatures. Such legal provisions include not only rules and principles of behavior for individuals and officials, they include also legal policies and methods. The courts are intended to effectuate policies and employ methods which have been predetermined by these formulating agencies; they are not expected to lay out policies by judicial fiat or to devise methods or machinery to carry them out. As Cardozo said, "When the legislature has spoken, and declared one interest superior to another, the judge must subordinate his personal or subjective estimate of value to the estimate thus declared. He may not nullify or pervert a statute because convinced that an erroneous axiology (here: judgment of policy) is reflected in its terms." ¹

This does not mean, however, that the courts have not had a large part in shaping legal policies and methods over the long pull. Most of the important policies of our legal system have had their first explicit formulation in judicial decisions. Legislation was relatively rare in the Anglo-American legal systems until the last few decades; both specific legal mandates and declarations of policies could be found only in the cases, and even today, many of the principal policies of the law of property, contract, and tort have to be sought for in the case law. For example, the whole of the doctrine of consideration and the policies behind it must be sought in judicial declarations. The same is true of the basic principles according to which compensation is awarded for tortious injuries,

¹ The Growth of the Law 94–95 (1924).
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e.g., the principle that liability must be based on fault; the principles regarding protection of the individual's reputation against defamation; and almost all the other policies of tort law. So that we are quite justified in saying that while the courts are bound to accept the policy determinations of the legislatures whenever these policy determinations are distinctly made, the courts themselves, through the slow processes by which litigation is settled in case after case, have built up and formulated many of the accepted notions of what our law is for and what our legal system is trying to achieve. Indeed, these common law policy notions constitute a very considerable part of the items in our inventory of legal policies.

Moreover, in the processes of statutory interpretation, the courts are often required to embark on an exploration of the uncertain sea of policy. Not infrequently, legislative declarations of policy are absent or indistinct, as I have already said. Legislatures have not been prone to state explicitly what policies lie behind their acts. They have been inclined, on the whole, to limit themselves to more or less specific directions to individuals and officials. The courts are left to infer what the legislative objectives of these directions are. And when these objectives cannot be inferred with certainty, the courts are really called upon to declare a policy themselves. To be sure, the courts do not arbitrarily select this policy; they do not conjure a legal policy out of thin air. As Cardozo says in a later part of the passage above quoted, "Even when the legislature has not spoken, he (the judge) is to regulate his estimate of values by objective rather than subjective standards, by the thought and will of the community rather than by his own idiosyncrasies of

2 In developing policies, courts regard themselves as bound by constitutional limitations, similar to those which apply to the legislatures. In addition, they recognize the binding force on their actions of such common law doctrines as the doctrine of precedent. See Stone, The Province and Function of Law 500 (1946).
conduct and belief." In other words, even when the judge must supplement the policy determinations of legislation, he is limited by the ordinary canons of legislative interpretation and judicial lawmaking.

Lastly, and probably we must say most important of all, the courts under the American doctrine of judicial review are the final interpreters of the constitutions. In this capacity, they expound not only the specific provisions, but the policies and methods which are prescribed by these documents. The framers of the constitutions, like other Anglo-American legislators, have not usually stated the policies which their legislative declarations are intended to serve. They have left policies to implication. The consequence has been that the courts have filled in the policy factors which were lacking. A good example is the development which the clause regarding free speech and free press has received at the hands of the Supreme Court. The clause itself declares simply that Congress shall not pass any law abridging freedom of speech or of the press. The reasons for this provision are not stated. Justice Holmes, in various opinions, states what he regards as the policy reasons behind this clause: "that the ultimate good desired is better reached by free trade in ideas," "that the best test of truth is the power of thought to get itself accepted in the competition of the market," that these freedoms are not to be limited unless there is "a clear and present danger" of a speaker's bringing about substantive evils which the state has a right to prevent, and that "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought. . . ." These views ascribe to freedom of thought and expression a superlative importance and a preferred standing. They have been definitely adopted by the Supreme

3 See note 1 above.
4 See previous references to these views of Holmes in secs. 7-24, 7-27, problem 5, and 7-33, problem 5.
Court. They define the nature, the strength, and the limitations of the policy of free speech and free press. They operate just as effectively in the world of practical affairs as if they were written into the Constitution itself. And it goes almost without saying that a similar filling-in of policy notions has occurred in the interpretation of the commerce clause, the due process clauses, and all of the other important clauses of the Federal Constitution, not to speak of similar significant clauses of the state constitutions.

The practical bearing of this process of filling policy terms into the constitutions lies in its effect on the scope of governmental powers. The courts strike down as invalid legislative as well as other governmental action which runs contrary to the policies that they read into the constitutions. The courts’ own policy in this regard may vary considerably. The courts’ interpretive role may be performed in various ways; and the way they choose involves an important policy determination. Thus, for instance, the Supreme Court of the United States might originally have adopted a policy of favoring state’s rights and local autonomy. Or, it could lean on the side of federal powers, as it actually did. Here was a policy determination of basic importance. Again, as regards the relation of government and individual, the courts can adopt widely differing policies. The courts can regard themselves as bound to protect the individual in every way possible, as they have in effect done in regard to free speech and the guarantees of personal liberty. If the courts adopt this attitude and follow a policy of close supervision and scrutiny as regards governmental action, the scope of governmental powers is

5 Compare the discussion here with that in the last two paragraphs of the next preceding section; see also the cases and other authorities there cited.

Also it is at the point where courts undertake to fill in policy notions that their answer to the question whether there is a superhuman criterion of justice becomes most significant. If the courts accept the postulate of a superhuman law which controls policy makers, the courts can invoke this law as a basis for limiting or striking down policy determinations by the legislature and others. See further discussion of this point in section 7-45.
necessarily narrowed. On the other hand, the courts can adopt a policy of deciding all questions of doubt in favor of governmental action, even where it impinges upon individual freedom. The practical effect of such a judicial attitude is to expand the powers of all the other agencies of government. It matters not whether the courts positively recognize the powers of these other agencies, or whether they simply permit the exercise of powers by a refusal to review cases where they are exercised. The practical importance of the supreme courts lies in their limitative function, their function as a restraint on the other organs of government. Their refusal to review governmental acts withdraws this limiting effect and serves as a license to other organs of government to expand the areas of their activities.

Recently we have witnessed a change in the Supreme Court's attitudes which has permitted the expansion of governmental powers along the lines just suggested. The Supreme Court has swung over to a policy of \textit{laissez faire} in regard to the acts of other organs of government in our federal system. This policy has been variously called a policy of judicial self-limitation, a \textit{laissez-faire} policy, and a hands-off policy. However designated, this policy represents a reduction in the role of the Supreme Court as a check on the activities of other branches of government. The hands-off policy was a cardinal tenet of the Holmes constitutional philosophy. Its adoption by the "reconstituted Supreme

\footnote{The reasons for this hands-off policy cannot be better stated than in the words of Justice Holmes in his first opinion as a member of the Supreme Court:}

\begin{quote}
While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this Court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economic opinions, which by no means are held 'semper ubique et ab omnibus.'” Otis v. Parker, 18 U. S. 606 at 608–609 (1903).
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Court" furnishes the explanation of most of the changes in the meaning of the Federal Constitution which have occurred since 1937. The policy extends to the organs of the federal government and also to those of the states. It extends to legislative, executive, and administrative agencies alike. Only in regard to freedom of the mind and the personal guarantees has the opposed policy of close and strict interpretation of governmental powers been maintained. In the economic sphere, the hands-off policy prevails. Correlative to this hands-off policy of the Court, the powers of federal and state governments have expanded or been permitted to expand. Especially noteworthy has been the expansion of federal powers and functions; but the change has affected state powers significantly, too. The change has permitted a vastly increased governmental control over property, business, and all forms of economic activity.7

Sec. 7–38. Problems. 1. Consider the following decision, rendered in 1875, in which Jessel, M. R., a famous English judge, works out the solution of a policy problem:

"Now, it was said on the part of the Defendant, that such a contract as that which I have mentioned, a contract by which an inventor agrees to sell what he may invent, or acquire a patent for before he has invented it, is against public policy, and it was said to be against public policy, because it would discourage inventions; that if a man knows that he cannot obtain any pecuniary benefit from his invention, having already received the price for it, he will not invent, or if he does invent will keep it secret, and will not take out a patent. It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into

7 For the authorities on these various points, see the three notes for the Initiated Reader, attached to sec. 7–36.
freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. . . . Does any one imagine that it is against public policy for an artist to sell the picture which he has never painted or designed, or for the sculptor to sell the statue, the subject of which is to be hereafter given to him, or for the author to sell the copyright of the book, the title of which is even as yet unknown, or, more than that, that a contributor to a periodical may agree that he will devote himself to the exclusive service of a certain periodical for a given period, for a given reward? These examples are, to my mind, entirely repugnant to the argument that there is any public policy in prohibiting such contracts. On the contrary, public policy is the other way. It encourages the poor, needy, and struggling author or artist. . . . This appears to me to apply as much to a patent invention as to any other subject which the intellect can produce. A man who is a needy and struggling inventor may well agree either for a present payment in money down, or for an annual payment, to put his intellectual gifts at the service of a purchaser. I see, therefore, not only no rule of public policy against it, but a rule of public policy for it, because it may enable such a man in comparative ease and affluence to devote his attention to scientific research, whereas, if such a contract were prohibited he would be compelled to apply himself to some menial or mechanical or lower calling, in order to gain a livelihood."  

What three primary policies enter into the court's thinking here? How would you characterize these three policies in

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1 Printing and Numerical Registering Company v. Sampson (1875) 19 L. R. Eq. 462 at 465-466.
terms of social interests? Which of them receives the court’s nod? Why?

What is the practical bearing of this judge’s statements that, “if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting,” and that “you are not lightly to interfere with this freedom of contract”?

What different choice is made by a legislature which fixes statutory minimum wages and maximum hours; or by a legislature which prescribes the terms and provisions which shall and shall not be written into a fire insurance policy or a life insurance policy?

2. In the following case, Mackay, J., of the Ontario High Court concluded that a particular kind of contractual clause was ineffective. Note the method which this judge followed in arriving at a principle of public policy to apply in the case before him. Where did he find this policy declared? In effect, who made the policy determination regarding race discrimination which Mackay, J., applied?

“Application . . . for a declaration that a certain restrictive covenant is void. . . .

“Mackay, J.: The restrictive covenant which is the subject of this proceeding and which by the deed aforesaid the grantee assumes and agrees to exact from his assigns, reads as follows: ‘Land not to be sold to Jews, or to persons of objectionable nationality.’ Counsel for the applicant seeks the discharge and removal of this covenant on these alternative grounds: first, that it is void as against public policy; . . . The matter before me, so defined, appears to raise issues of first impression because a search of the case law of Great Britain and of Canada does not reveal any reported decision which would be of direct assistance in this proceeding. . . .

“The applicant’s argument is founded on the legal principle, briefly stated in 7 Hals. (2nd ed.), pp. 153-4, that:

\[\text{Re Drummond Wren [1945] 4 D. L. R. 674.}\]
'Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy.' ... 

"It is a well-recognized rule that Courts may look at various Dominion and Provincial Acts and public law as an aid in determining principles relative to public policy: See Walkerville Brewing Co. v. Mayrand, [1929] 2 D. L. R., 63 O. L. R. 573.

"First and of profound significance is the recent San Francisco Charter, to which Canada was a signatory, and which the Dominion Parliament has now ratified. The pre­amble to this Charter reads in part as follows:

"'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . and for these ends to practice tolerance and live together in peace with one another as good neighbors. . . .'

"Under Articles 1 and 55 of this Charter, Canada is pledged to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

"In the Atlantic Charter to which Canada has subscribed, the principles of freedom from fear and freedom of worship are recognized.

"Section 1 of the Racial Discrimination Act provides:

"'1. No person shall,—

"'(a) publish or display or cause to be published or dis­played; or

"'(b) permit to be published or displayed on lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium which he owns or controls, any notice, sign, symbol, emblem or other represen­tation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons.'

"The Provincial Legislature further has expressed itself in the Insurance Act, R. S. O. 1937, c. 256, s. 99, as follows:
Any licensed insurer which discriminates unfairly between risks within Ontario because of the race or religion of the insured shall be guilty of an offence.

Moreover, under s. 6 of the Regulations passed pursuant to the Community Halls Act, now R. S. O. 1937, c. 284, it is provided that ‘Every hall erected under this Act shall be available for any public gathering of an educational, fraternal, religious or social nature or for the discussion of any public question, and no organization shall be denied the use of the hall for religious, fraternal, or political reasons.’

Proceeding from the general to the particular, the argument of the applicant is that the impugned covenant is void because it is injurious to the public good. This deduction is grounded on the fact that the covenant against sale to Jews or to persons of objectionable nationality, prevents the particular piece of land from ever being acquired by the persons against whom the covenant is aimed, and that this prohibition is without regard to whether the land is put to residential, commercial, industrial or any other use. How far this is obnoxious to public policy can only be ascertained by projecting the coverage of the covenant with respect both to the classes of persons whom it may adversely affect, and to the lots or subdivisions of land to which it may be attached. So considered, the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics, or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this Province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas. The unlikelihood of such a policy as a legislative measure is evident from the contrary intention of the recently enacted Racial Discrimination Act, and the judicial branch of government must take full cognizance of such factors.
"Ontario, and Canada too, may well be termed a Province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law Courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While Courts and eminent Judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

"That the restrictive covenant in this case is directed in the first place against Jews lends poignancy to the matter when one considers that anti-semitism has been a weapon in the hands of our recently-defeated enemies and the scourge of the world. But this feature of the case does not require innovation in legal principle to strike down the covenant; it merely makes it more appropriate to apply existing principles. . . .

"My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate. . . .

"An order will therefore go declaring that the restrictive covenant attacked by the applicant is void and of no effect.

"Order declaring covenant void." 3

3 A similar result was reached by the Supreme Court of the United States in Hurd v. Hodge, 334 U. S. 24 (1948). The court based the result on a construction of the Civil Rights Act as well as on a public policy of the United States. See also Shelley v. Kraemer, 334 U. S. 1 (1948), where the court held that enforcement of such covenants by state courts was prohibited by the equal protection clause of the Fourteenth Amendment. See discussion of these cases in 46 Mich. L. Rev. 978 (1948).
3. Miller v. Schoene. By statute of Virginia, an administrative officer was authorized to order the destruction of red cedar trees as a means of preventing a disease called "cedar rust" which grows at one stage on cedar trees, and which infects, and injures apple trees at another stage. The cedars were valuable for ornament and for lumber. Apple-growing was one of the principal businesses of the state. The owner of some cedar trees, ordered to be destroyed, challenged the validity of the statute and the order made thereunder. The Supreme Court held that the statute and order were not invalid under the due process clause of the Fourteenth Amendment.

Stone, J., delivered the opinion of the Court. In part he said:

"On the evidence we may accept the conclusion of the Supreme Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other."

Here the legislature makes the primary choice between competing policies; and then what follows? What is the role of the Supreme Court? How does it enter the picture?
4. Hoff v. State of New York.\(^5\) Read again the report of this case as set out in section 5-13, problem 3.

What is the principal policy which the court works out here? Where does the court discover this policy? In Article I, Section 4, of the Constitution of New York? In the statutes referred to? Outside of either constitution or statute?

What bearing upon the decision of the case has the court's view that "Our constitutional guarantees of liberty are merely empty words unless a person imprisoned or detained against his will may challenge the legality of his imprisonment and detention"?

What is the role of the writ of habeas corpus in relation to this policy? What is the role of the action in the present case? What is the relevance of the judge's view that "The writ of habeas corpus is the process devised centuries ago for the protection of free men. It has been cherished by generations of free men who had learned by experience that it furnished the only reliable protection of their freedom"?

Sec. 7-39. Effects of policy-makers' attitudes. In our time, there has been much talk about the attitudes of the individual, and about the sum total of his attitudes, which is commonly called his "personality." This kind of talk has been a natural consequence of the current scientific interest in social psychology. The purport of this talk is that the actor's attitudes are determinative of everything he does, explain what he does and, if known, put one in a position to guess what he will do. In this connection, I am reminded of a popular story about the late laconic Calvin Coolidge. He had been to church and was asked what the sermon was about. He answered, "About sin." When further pressed to know what the preacher had said about this interesting subject, he answered tersely, "He was agin it." This last was enough to describe the preacher's general readiness to act by word

\(^5\) 279 N. Y. 490 (1939).
or deed in opposition to sin; it gave a good idea of the kind of man he was and what to expect from him.

Analysis in terms of attitudes and personality has been especially common in discussions of the judicial process. It is urged that the judge's personality shapes and determines the ways in which he decides cases.¹ And, of course, the same type of analysis can be applied to the policy maker. His own attitudes can be viewed as prime determinants of the policies and methods as well as the specific patterns of behavior which he puts into the form of law. I have already referred to the importance of the attitudes of the Supreme Court and their effects on the determination of policy.² Other instances in which the attitudes of individual officials have counted in the determination of policy come readily to mind.³ Chief Justice Marshall's views and attitudes played an enormous part in shaping our federal government and the role which it was to play. He believed firmly in the need to maintain a strong central government. He dominated the Supreme Court, and through its decisions made possible the widest exercise of federal powers and functions. One can hardly imagine what the present condition of this country would be if Roane or some other strong protagonist of state's rights had sat on the Supreme Court instead of Marshall. As Professor Ross has said, personal ascendancy is not yet a neglectable quantity "even in the rigid articulated mechanism of the 'legal state.' Despite its statutory framework, an office bulges when filled by the man of command, shrinks when occupied by mediocrity."⁴ In our own recent history we have an outstanding instance of what Ross has in mind.

¹ See Frank, Law and the Modern Mind (1930).
² See sec. 7–37, ad fin.
³ Jefferson's views, and Jackson's likewise, strongly affected the course of American policy, and the attitudes and beliefs of various legislators have been equally influential.
⁴ Social Control 289 (1900). To much the same effect is Emerson's dictum, "An institution is the lengthened shadow of one man." (The Essay on Self-Reliance 19 (1905).)
Whether or not one likes the policies pursued or the methods used by the late President Roosevelt, one can hardly deny the importance of his contributions both in promoting new policies and in putting them into effect. He not only fathered important legislation, but by appointing judges to the Supreme Court whose views coincided with his own, he completely changed the Court's attitudes on the interpretation of the Federal Constitution and insured the great mass of New Deal legislation against the threat of constitutional attack.

But not every would-be policy-maker's attitude is decisive in this way. To say that the policy-maker's attitude is decisive of policies adopted can lead to a gross misunderstanding. In our system, more than one person, and usually more than one agency, normally participates in any policy-making act. To say that we have a communist in Congress does not mean that his attitudes result in the adoption of communist policies by the government. The fact that we have a conservative or a radical member of the Supreme Court does not necessarily mean that his policy views will attain recognition in the decisions of the whole court. Justice Holmes was for many years vainly urging on the court the adoption of policies which the majority of his brethren could not share. Only after he had left the Court, and after the President had "reconstituted" it, did Holmes' views receive a majority sanction. So that when we speak of the policy-maker's attitude, as determinative of policy, we must always remember that this means some policy-makers' views, not every policy-maker's view, and that the policy maker whose views are

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5 It seems to me that not infrequently the assertion that the judge decides as he chooses is made by persons who overlook or neglect this collective aspect of his work. His judgment must not only satisfy the individual judge himself, but be rationalized in a form which will receive the approval of enough of his brethren to constitute the majority of a court. (However, see what is said in the sixth paragraph of sec. 3-18 regarding the possibility of "one-man" opinions.) Only relatively minor matters are decided by the single judge, and usually any decision is subject to the scrutiny of some larger group.
expressed in binding form must usually have the concurrence of a substantial number of his brethren in order to make his views operative.

Sec. 7-40. Influence of others on policy makers. No one can deny that what an actor does depends on what he is. But some writers seem inclined to use the explanation in terms of existing attitudes as if it were final and complete. As a matter of fact, attitudes do not serve as a final explanation; they merely explain action in terms of readiness to act. They are like the old explanation of gravitation in terms of a quality of heaviness. Such explanations only invite further investigation. Existing attitudes can be explained in terms of the general experience and background of the actor; they can be explained in terms of his native endowment. Together, these factors make the actor what he is and determine his present attitudes. Furthermore, action is aroused by specific experiences, and these largely determine the direction of action; so that the actor's attitudes do not furnish a complete explanation. Not only is it important to realize that an actor is prepared to act in a certain way, it is also important to realize that his action requires some specific new experience to set it off, and determine its direction. The actor's readiness to act may be compared to a pistol that is loaded. The pistol is ready to shoot, but some other agency must pull the trigger and determine the direction of shooting. All of which brings us to the point to which I am leading: every actor's action and its course is determined partly by the kind of man he is, but it is determined also by the acts and suggestions of others. What others do and say, influence the actor both in regard to what he does and what he says. He receives from them both information and stimulation.

The policy maker obtains both information and inspiration from others. These others may be within the governmental
system, as where the President suggests the passage of a law to Congress, or they may be on the outside of government, and simply offer ideas, as writers like Pound and Wigmore have done in our day. In a very broad sense, all persons who contribute either suggestions or knowledge which influences the policy maker can be regarded as sources of the policies which he adopts.

I have already suggested several sources of this sort which may affect the policy maker's choice of policies. First is an inventory of policies, adopted by other policy makers. This can serve him as a source of suggestions upon which to draw if he chooses.\(^1\) Jefferson and Hamilton contributed more or less informal statements of this sort; they formulated the political policies and ideas which the fathers of our country later embodied in our Federal Constitution, and which Congress and the courts later applied in its application and interpretation. And behind these two writers stood others here and abroad, from whom they had borrowed their ideas. Second is a general picture of what the lawmaker should try to do. This kind of suggestion offers him a general point of view or approach, if he is seeking to orient himself with reference to his job. The general picture which I presented was that of Pound,\(^2\) but many other such pictures have been developed and presented in the past by legal writers and legal philosophers. Third, there are more or less specific criteria of choice to be found in the writings of persons inside and outside of government. One finds in judicial opinions and theoretical writings suggestions that moral considerations are to be placed above economic; that economic interests are to be preferred to aesthetic; that protection of the person is to be considered ahead of protection of property; and two such criteria of choice which we have already discussed, that freedom of the mind is more important than freedom in the

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\(^1\) See sec. 7-25.
\(^2\) See sec. 7-26.
economic sphere, and that freedom is the rule and restraint the exception. None of these suggestions is really coercive as far as the policy maker is concerned. At most, a suggestion of this sort can serve as advice to him. The available forms of suggestion are so varied and take so many forms that the policy maker can make almost any choice he wants. He chooses a policy which accords with his attitudes provided he can find one.

The reason why the policy maker relies on others to formulate and suggest policies is not hard to understand. Not many policy makers are prepared to do this kind of work for themselves. Ideas originate with individuals as all invention does. Invention may consist in the development of new methods and ideas. It may consist of a new and better formulation of what is implicit in existing methods and ideas. But originality is a rare commodity among us; it is not given to many to invent new policies or methods. One can hardly expect the average legislature to contain legal philosophers, or the average court to be manned by creative geniuses. As a rule, busy legislatures and courts have no time to think out new policies or ends. As Lord Halsbury said, "I deny that any Court can invent a new head of public policy." And even more, it holds true that one cannot expect much in the way of novelty or invention from the legislative law-

3 See secs. 7-36 and 7-37.
4 We have already considered coercive suggestions. These are the legal patterns for his act, such as the constitutional framework which controls the legislature's choices, and the rules of judicial lawmaking and constitutional and statutory interpretation which control the choices which a court may make.
5 Janson v. Driefontien Mines [1902] 2 K. B. 311. Probably Lord Halsbury meant by this statement that courts lacked the legal power rather than the factual ability to invent new policies. On the other hand, however, Stone expresses the view that courts can and do exercise this power when it is necessary, only he thinks the necessity to invent is very rare because of the broad scope of the policies which have already been recognized. He says: "If 'heads of public policy' be understood, as Lord Wright has hinted, to refer merely to the kind of interest protected, the wide scope of such heads will help us to see why he thought that the invention of new heads was almost 'inconceivable.'" STONE, THE PROVINCE AND FUNCTION OF LAW 501 (1946).
maker. All our lawmaking agencies derive almost all their ideas regarding policies and methods either from the legal tradition or from the suggestions of nonofficial individuals or writers of today.

Sec. 7-41. Group influence on policy makers. Just as the policy maker may borrow ideas from preceding policy makers and from individuals and writers, he may borrow from the usages of some other institutional group. Acting on the state’s behalf, the policy maker makes the policy or standard of a nonlegal group a state policy. This process of borrowing standards often occurs in the case of practices of business and professional groups. The legal ways of dealing with commercial paper, for example, have for the most part been drawn from the usages of bankers and businessmen. The latter serve as sources of law, to use a conventional phrase, and thus a coincidence of standards results. Or the legal system may undertake to effectuate a policy which prevails in many churches and families—it may forbid dealings in intoxicants; it may pass a prohibition law. One of the most common instances in which our law has borrowed its policies and standards from other social institutions, such as the church and the family, has been the case of proper sex behavior. Here one finds many laws enforcing socially established standards of behavior, such as laws prohibiting sex intercourse between unmarried persons, penalizing acts contributing to the delinquency of children, forbidding the dissemination of obscene literature, and forbidding indecent exposure of the person.

An organized group, such as an association of farmers, workmen, manufacturers, professional men, or war veterans may do more than suggest policies to the policy maker or offer him ideas for adoption; it may exert a positive political pressure on the policy maker and exert a decisive control over the policies which the policy maker and other officials
pursue. This can be done by democratic methods, as by putting representatives in the "seats of the mighty," or by exerting political pressure on those who occupy such seats. Or it can be done by methods which are illicit, as by bribery or corrupt bargains. Either way the group's policy becomes the policy of the state. The governmental machinery is made to serve as an instrument for effecting the particular policies of the dominant group. The latter can enact laws in its own interest, apply and enforce existing laws in a self-serving manner, or spend public funds for its own advantage. Usually this type of domination is partial only; a group merely obtains certain laws or other measures through its influence over the legislature or other officials. Up to a certain point we look upon the exertion of group influence as a normal phenomenon in our democracy. In fact we rely upon the conflicting and countervailing selfish interests of different groups to offset and check one another through democratic processes. But beyond a certain point, we regard the exertion of political pressure and the exploitation of influence with governmental agencies as a misuse of power for particular group advantage. It is not easy to make the distinction in practice. For our present purpose we need do no more than suggest that the distinction can be made and that it is a matter of degree.

A more radical kind of group domination appears where a military clique, or a popular mob, or a patriotic group forcibly seizes political power by revolution. We have had only one such revolution in this country, that by which our ties with Great Britain were severed. This kind of change usually involves some important alterations of policies and methods, and a sweeping displacement of top officials. But

1 Of course individuals as such may do all these things; but usually individuals lead or organize groups and, through control of the latter, exercise control over larger organized groups like the state.

2 The slaveholding group of the southern states seized power therein at the outset of the Civil War, and attempted to sever connections between the Confederate States and the United States; but this group was ultimately vanquished by the power of the United States.
even the promoters of revolution do not usually attempt to
destroy the going state and create another in its place.\(^3\) Instead, they substitute new pilots who will steer the ship of state on a different course.

**Sec. 7-42. Social and historical determinants—stability in state policies.** The great mass of behavior patterns in any community, including methods of doing things and policy notions, are handed down from the past. They are passed along from generation to generation. In this sense, our ways and policies of today are fixed and determined by our forefathers. We have many of ours, for example our notions of the importance of liberty and personal security, from our colonial ancestors and their English forebears. Our ways and policy notions are explainable in terms of the evolution of the civilization in which we live.* They represent the experience of previous ages in regard to ways of living and the ends of various kinds of activity.

These traditional patterns of behavior and traditional notions of policy are built into each individual by training and education. They become part of the individual’s habits of action and modes of thought. Aristotle, one of the greatest political thinkers of all time, accepted slavery as an institution,

\(^3\) Occasionally a revolution has aimed to obliterate an existing state organization and to replace it with a new organization of its own. This was true of the Communist Revolution in Russia, which aimed to make a complete change and was successful in so doing. The first French Revolution also made, temporarily, an almost complete substitution. In this instance, however, the old state organization was restored after a time; later revolutionary changes of government in France have been of the character mentioned in the text.

* (I.R.) This fact was built up into a complete theory of legal development, by a “historical school” of jurists of the nineteenth century. According to their view law is nothing but “the jural form of the habits, usages and thoughts of a people” (Carter). “Throughout, it (law) is the product of silently working forces, not of the arbitrary will of a law giver” (Savigny). “Law is conceived as self-generative, evolving its rules in the form of customs without the interposition of conscious human agency or choice” (Dickinson). See critical discussion of this view by Dickinson, “The Law Behind Law,” 29 COL. L. REV. 113, 285 (1929) and items by Pound and Cardozo, cited therein; and extensive analysis of views of the “historical school” by STONE, PROVINCE AND FUNCTION OF LAW 421 et seq. (1946).
and concluded that it was based on a sound policy. He main­
tained that:

“He who by nature is not his own but another’s and yet
a man, is by nature a slave. . . . But is there anyone thus
intended by nature to be a slave, and for whom such a con­
dition is expedient and right, or rather is not all slavery a
violation of nature? There is no difficulty in answering this
question, on the grounds both of reason and of fact. For that
some should rule, and others be ruled, is a thing, not only
necessary, but expedient; from the hour of their birth, some
are marked for subjection, others for rule.” He concluded
that “some are by nature free, and others, slaves.”

Human slavery depends on a complex set of legal arrange­
ments. Can anyone doubt that Aristotle’s opinions of human
slavery and the legal arrangements connected with it would
have been different, if he had been brought up in the United
States today?

What is true of individuals generally is, of course, true
of the individuals who happen to become policy makers. It
is true of the individuals collectively who constitute smaller
groups, and true of the members of the all-inclusive group
which we call a community or society. Behavior patterns of
past generations become the behavior patterns of today. They
represent habits and points of view common to the members
of the community, and common to the present community
and its predecessors.

When we put the contribution of today’s lawmaker along­
side this mass of traditional patterns of behavior and tradit­
ional notions of policy, his accomplishments appear relatively
small. His creative role seems to be almost negligible. The
great stream of behavior patterns, standards, and policies,
flows by the lawmaker almost untouched and unchanged;
his acts are like bursting bubbles on the surface of the stream.

1 Jowett, The Politics of Aristotle 7–9 (1885).
He takes for granted most of his social heritage, and tacitly accepts it; even when he undertakes to make changes, he weaves his innovation out of old material. The traditional material which forms his cultural background embraces three elements which it will be useful for our purpose to differentiate: the folkways, the mores, and the legal traditions of the community.

The first of the traditional patterns of behavior are the *folkways*, to use the now familiar terminology of Sumner. These patterns of behavior are habitual and common to a group of persons. As Sumner observes, folkways are habits for the individual and customs for the group. Examples of folkways are the practice of sleeping in beds, of sitting in chairs, of wearing buttons on coat sleeves, of having notches on men’s coat collars, and so on. These common modes of behavior grew up unplanned and unnoticed by those persons whose behavior conforms to them. Neither the lawmaker nor anyone else has anything to do with their origin. Since they arise and are followed without intention and without thinking, they do not involve any policy factors.

The second traditional factor consists of what are called *mores*. These develop out of the folkways.

“People are caught in the folkways before they know it. Whenever they become aware of the fact that they are ‘in’ the folkways, and criticize them and approve them, and continue to follow them, these folkways become ‘mores.’

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2 See generally on the subject matter of this and the following paragraph, Sumner, *Folkways* (1906).
4 Lumley thus summarizes the doctrine of Sumner regarding the origin and nature of folkways: “People have similar individual needs and begin to satisfy them in similar ways in the same environment. This procedure makes folkways. The people did not intend to make folkways; they intended to satisfy their personal needs. But in doing this, they acted uniformly, repetitiously; they made mass action.” (Means of Social Control 5, 6 (1925).
5 “Mores” is the plural of a Latin word whose singular is *mos*, meaning custom.
The mores are those folkways which have been examined, judged useful and beneficial, and made into approved activity patterns.”

These differ from the folkways simply in the sense that individuals or groups discover a purpose or policy behind these ways, and accept this purpose or policy as the reason for following them. But, as with the folkways, one cannot point to any definite person or place of origin; their beginning is like that of ancient hymns and folksongs, cloaked by the veil of anonymity. The important feature of the mores is that they stand as guides for action. They are standards of behavior. And as the need for observance comes to be felt more strongly, these mores are adopted and backed up by various social institutions. At this point, our lawmaker may enter the picture. He may draw legal standards from the mores. The recent prohibition law stands as a good example of the fact that laws can be built on the ways of behavior (abstinence) which are regarded as right by a substantial part of the community, and be imposed on the rest of the community as the legally approved and sanctioned way of behavior. And the lawmaker may overrule the mores in part, as he did by the prohibition legislation which cut across the established ways of persons inclined to imbibe. For the most part, however, he does not disturb the mores. They are significant simply as aids in the job of social control, created and kept going by agencies entirely outside the legal system.

Finally, established law and legal ends constitute part of the traditional background of the policy maker. Here, I would include the constitutions, the statutes, the common law, established rules of method, and notions of what all these legal devices are for. I would include also the works

6 Lumley, Means of Social Control 6 (1925).
7 As regards the nature and functions of the established legal context or background, see secs. 5-12, 5-16, 5-17, and 6-01 et seq.
of text writers and legal theorists. But someone may ask, are not the first mentioned items binding law, and not merely tradition? That they are binding cannot, of course, be denied, but that they are also part of the legal tradition is no less true. That they are binding simply means that they are a special part of the tradition to be accepted by Tom, Dick and Harry, and not disregarded as lightly as other traditional material may be. Our Constitution was adopted over a century and a half ago, and with a few changes is still operating. Many statutes have a like age, and normally, statutes continue to operate until changed. The common law is a continuous body of legal ideas, legal rules and legal methods, beginning in England and running down to today. The lawmaker of the present does not create or change any substantial part of his legal background; he accepts it and takes it for granted. It constitutes his stock of legal ideas.

When the lawmaker does undertake to create novel standards or strike out on new paths of policy, he cannot depart far from the traditional. Especially the judicial lawmaker hesitates to reach beyond the old material; his traditional methods require him to stick to hallowed principles and create as little as possible. And the legislative lawmaker is definitely a child of his day. He enacts standards and pursues ends which are already well known and commonly recognized. He reworks and clarifies traditional ideas. He introduces novelty in detail or manner of statement. He combines old elements in a new way. He borrows a novel idea from some thinker. But this modern Aristotle is himself limited by the notions of methods and policy of the community in which he lives. Neither he nor the legislator who follows him can raise himself far above the traditional ideas with which he has been indoctrinated.  

But our appreciation of the import of the traditional factors in the shaping of policies and standards must not lead us to deny entirely the creative contributions of legislator and judge. These are most important, too. See chapters 4,
It is this traditional element, this legal lore, inert and built into members of the community, which gives stability to law, to legal institutions, to legal policies. Like habits generally, this built-in element is stable and hard to change. It represents the cumulative contributions of past generations to the ways and the ideals of the present. It adds certainty to your calculations and mine because we know how other people think and feel; and we know because we think and feel the same way as they do, having been trained in the same legal culture. 9

Sec. 7-43. Change in state policies. Generally, policies are inherited, as we have just seen. But conditions change, and different policies become necessary. It is not only important to appreciate and formulate the policies that have been handed down from the past, it is important to see the need 5, and 6, and also the next section. On this point Justice Cardozo has well said:

“Savigny's conception of law as something realized without struggle or aim or purpose, a process of silent growth, the fruition in life and manners of a people's history and genius, gives a picture incomplete and partial. It is true if we understand it to mean that the judge in shaping the rules of law must heed the mores of his day. It is one-sided and therefore false in so far as it implies that the mores of the day automatically shape rules which, full-grown and ready made, are handed to the judge. . . . The standards or patterns of utility and morals will be found by the judge in the life of the community. They will be found in the same way by the legislator. That does not mean, however, that the work of the one, any more than that of the other is a replica of nature's forms.” NATURE OF THE JUDICIAL PROCESS 104-105 (1921).

And Dickinson adds that the judges “do not create the materials out of which the new rule is built, but they use them, select, reject, combine, emphasize, in short give form and life to them, as their personality and intellectual equipment dictate; and if this is not creative activity, no creative activity is performed by human beings.” “The Law Behind Law,” 29 Col. L. Rev. 284 at 305 (1929).

For a full discussion of the point here made, see the items by Cardozo and Dickinson here cited as well as the items by Pound and Stone referred to in note * above.

9 Of course, the legislator or judge may leave the existing order untouched because he does not think of the possibility of changing it; or he may leave it untouched because he regards stability as a desirable end. These two attitudes must not be confused. The intentional support of stability is involved in the recognition of social interests in peace and order, in security of acquisitions, and security of transactions.
for changes in them. This is normally the work of individual theorists and writers. Such men are the first to appreciate that certain policies need to be served and are not being served, or that existing standards do not serve the needs that they are intended to serve. They formulate new policies and measures to meet the needs of the day. They study past lore in order to learn what changes need to be made.

The state and other social institutions have special agencies to formulate, declare and effectuate their policies. One of the prime functions of these agencies is to make changes, when, as and if policy changes are needed. In the words of Cardozo, “Through one agency or another, either by statute or by decision, rules, however well established, must be revised when they are found after fair trial to be inconsistent in their workings with an attainment of the ends which law is meant to serve.”¹ And I would add that these agencies are intended to act no less when it is necessary to change the ends which law has served in the past. To some extent, the changes in policies and methods are made without a full awareness of what is occurring. The policy maker passes a new statute, for example, to meet a specific need, and does not realize that he is departing from the policies of the past. The policy maker only realizes the direction he is following when some individual thinker becomes aware of the discrepancy between the traditional formulation of policy and the actual policies which are being pursued. Such a writer calls the discrepancy to the attention of the policy makers, and reformulates the policy of the time. But usually the function of the writer who studies policy changes is not merely to call attention to a change which has already come about. It is rather to call attention of policy makers to changes which need to be made in order to meet changed conditions. For example, the inequality of bargaining power in employer-

¹ The Growth of the Law 120 (1924).
employee relations was first talked about by theoretical writers and social reformers. It was thereafter recognized by many legislatures in social legislation, and lastly recognized by the judiciary which held a restraining hand on the policies that could be adopted under our constitutions.

It takes time for new policies to pass through this process of discovery, formulation, and adoption. There is always a strong tendency to adhere to the old. This is just another way of saying that habit and custom are strong. It is always hard to break their shackles. The leader in the policy field must overcome blind inertia and the tendency to adhere to what has always been done. Policy makers are not ready to accept forthwith suggested changes. There is always a space of time between someone’s perception of a need and the recognition of this need by the policy makers of society. This period of delay is commonly called the cultural lag. Changes in law, like changes in all other forms of control in society, are subject to this lag. Law and legal policies always tend to fall behind the times.

However, policies are never completely stable. No list of policies is good for all time. Not only does any list of policies change with circumstances, but the emphasis on particular policies shifts as different social conditions develop. The history of our Western civilization shows striking changes in the policies professed by government. Four stages in the conscious thinking about the end of law are differentiated by Pound.²

Primitive government has acted chiefly to keep order. Its primary function has been the preservation of public peace. Its aim, explicit or implicit, has been to prevent open fighting among clans and other groups. In our attempts to regulate employee-employer relations, we are today in approximately this primitive stage of legal control. We have not yet reached

² Introduction to Philosophy of Law 72 et seq. (1922).
the stage where other ends than the public order weigh heavily in the solution of conflict. In general, the victory is allowed to go to the side with the greater economic power—so long as violence does not occur. Much the same observations can be made regarding efforts to regulate the field of international relations. Conflicts in this sphere are not settled on the basis of fairness but on the basis of power and danger to the public peace. There is no effective superstate, and whatever check is exerted in the name of law is put forth chiefly to forestall open warfare between states.

At another stage in political development, peace and order are expanded to include the security of acquisitions and the security of transactions. But even in this stage the state does not look far beyond considerations of stability and security. The general function of the state and its legal system may be summed up in terms of security, or of preservation of the status quo.

At a later stage, at least in the history of western European and Anglo-American legal systems, the emphasis shifts to the individual life, and particularly to individual liberty. The role of the law is conceived in a negative way. The function of the state is supposed to be to secure to each individual the maximum of liberty consistent with the like liberty of all. This was the period of history in which our American republic was born. This conception of state and legal function dictated many of the clauses of our constitutions; these instruments are replete with guarantees of individual liberty and security, all framed under the influence of the general idea that government is a necessary evil to be kept within fixed and narrow limits.

3 Brandeis, J., dissenting in Duplex v. Deering, 254 U. S. 443 at 488 (1921), refers to this aspect of labor disputes, and suggests that it is possible "to substitute processes of justice for the more primitive method of trial by combat."
4 See sec. 7-32.
5 See secs. 7-08, 7-14, and 7-15.
Since the turn of the century our ideas of state policy have taken on a more social color. This does not mean that former conceptions of state objectives have been abandoned. It only means that they have been qualified and supplemented by a new stress on the general welfare. In the last century, the United States was predominantly rural and largely undeveloped. Goods were usually produced and consumed in the same locality; problems of transportation and marketing were relatively simple. The main objective of the government was to encourage the settlement and development of the country. Individual initiative could be relied upon to bring this about; the philosophy of liberty was an excellent philosophy for an age of discoverers and colonizers, as Pound has said. But the situation today is radically different and a different philosophy is required. Our country has become predominantly urban, highly industrialized, and overcrowded in major areas. Account has to be taken of the integrated processes of production, the complicated and extended lines of transportation, the delicate balance between markets and the supply of goods, and the effects of these complexities on the persons involved in them and on the community at large. There has been accordingly a shift of emphasis from problems of development to problems of evolving fair methods of producing goods and fair methods of distributing them. In putting more stress on these problems and in expressing this in the objectives which it attempts to achieve, the state today is simply responding to the conditions of our time.  

The policy maker must be always on the alert to make changes in our legal system as they are needed. History needs to be studied for what it can teach, but the hand of the past should not hold us to a helpless adherence to what is out-

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6 There are the questions, too, how far and how fast to go in substituting social effort for individual effort. Many lawyers, judges, and other solid thinkers believe that we have been moving too far too fast lately in the direction of socialization.
dated. Holmes has expressed this notion in the following felicitous language:

"The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. . . . It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

But stability has its importance too. "The revision is a delicate task, not to be undertaken by gross or adventurous hands, lest certainty and order be unduly sacrificed. . . ." It is always a nice question for the policy maker to decide whether the advantages of change outweigh the advantages of continuity. Change must not be made too rapidly and without consideration of consequences. Not always is change for the better. Just as there are some persons who are temperamentally inclined to assume that whatever is, is good, there are also those who are temperamentally inclined to assume that whatever is new, is better.

Sec. 7-44. Problems. 1. In an address to Congress, January 6, 1941, President Roosevelt spoke of the "basic things expected by our people of their political and economic systems." It goes without saying that Hitler would not have mentioned the same basic things on the same date. I quote

Roosevelt’s remarks and ask that you explain how his remarks illustrate the general points made in section 7-40. What is the purpose of this inventory?

“The basic things expected by our people of their political and economic systems are simple. They are:

- Equality of opportunity for youth and for others.
- Jobs for those who can work.
- Security for those who need it.
- The ending of special privileges for the few.
- The preservation of civil liberties for all.
- The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living.”

2. Explain how group influence on the policy maker is illustrated by the discussion of the whaling customs in section 7-16, problem 4.

3. What do you make of the statement by Holmes that:

“The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. . . . But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.”

What does Holmes mean by the statement that “Continuity with the past is not a duty”? What does he mean by the suggestion that such continuity is a necessity?

4. Consider the following news item in relation to the traditional patterns of behavior mentioned in section 7-42: folkways and mores. Note particularly the word “custom” italicized in each of the first five paragraphs. Which of the two types of behavior patterns is meant by the word “custom” in each instance? The distinction turns particularly on the point at which a policy factor is appreciated.

1 87 Cong. Rec. 46 (1941).
2 Speech at a dinner in honor of Professor Longdell, June 25, 1895.
"WHY PASS ON THE RIGHT. The Conestoga wagon, the farmers’ freight-hauling vehicle of the early days, is responsible for the present custom of vehicles passing on the right in the United States, according to the bureau of public roads.

"Before the extensive use of the Conestoga wagon it was the custom to pass vehicles on the left, following the earlier English rule.

"In England in the days when men traveled armed on horseback, it was the custom to pass to the left so that the sword or pistol arm would be on the side of the man passed. Later, in travel by coach or wagon, the driver sat on the right side to give his right arm free play in wielding the whip, and passing to the left he was better able to avoid entanglements with the wheels of passing vehicles. Traffic passes to the left to this day in England.

"On the continent—in France, Germany, and Italy—the postillion system of driving, by which the driver sat on the left wheel horse, existed in the early days for both coaches and wagons. To a man riding the left wheel horse passing to the right gives a better view of the passing vehicle. In these countries, passing to the right has always been the custom.

"In Italy, until the time of Mussolini, vehicles in the cities, where postillions were customary, passed to the right; in the country, where box wagons were much used vehicles passed to the left. Mussolini made passing custom uniform by decreeing that all should pass to the right.

"The drivers of the Conestoga wagons rode the left wheel horse. Passing to the right was more convenient in spite of the fact that it was the custom to pass to the left, as in England. Drivers riding the ‘lazy board’ of the Conestoga wagon—a board between the two left-side wheels that pulled out and could be ridden when driving from the side of the wagon—preferred passing to the right, and traffic was passed on that side.

"The deep wagon ruts in the singletrack roads made by the Conestoga wagon drivers were followed by other traffic."

5. During the latter part of the fifteenth century, between 1464 and 1470, Sir John Fortescue wrote a famous tract entitled *De Laudibus Legum Angliae*. Fortescue was for many years Chief Justice of England. He espoused the Lancastrian cause during the latter part of the Wars of the Roses and went into exile when the Lancastrian party was defeated. He wrote this tract for the benefit of Edward, Prince of Wales, eldest son of King Henry VI, during his exile in Barrois. In chapter 17 he says:

"The realm of England was first inhabited by the Britons; afterwards it was ruled and civilized under the government of the Romans; then the Britons prevailed again; next, it was possessed by the Saxons, who changed the name of Britain into England. After the Saxons, the Danes lorded it over us, and then the Saxons prevailed a second time; at last, the Normans came in, whose descendants retain the kingdom at this day: and during all that time, wherein those several nations and their kings prevailed, England has nevertheless been constantly governed by the same customs, as it is at present: which if they were not above all exception good, no doubt but some or other of those kings, from a principle of justice, in point of reason, or moved by inclination, would have made some alteration or quite abolished them, especially the Romans, who governed all the rest of the world in a manner by their own laws. Again, some of the aforesaid kings, who only got and kept possession of the Realm by the sword, were enabled by the same means to have destroyed the laws and introduced their own. Neither the laws of the Romans, which are cried up beyond all others for their antiquity; nor yet the laws of the Venetians, however famous in this respect, their Island being not inhabited so early as Britain; (neither was Rome itself at that time built;) nor, in short, are the laws of any other kingdom in the world so venerable for their antiquity. So that there is no pretence to say, or insinuate to the contrary, but that the laws and customs of England are not only good, but the very best."  

*De Laudibus Legum Angliae*, translated from the Latin by Francis Gregor, 50 et seq. (1874).
Do you think Fortescue's assumption that if the English customs "were not above all exception good" the English kings would have altered or abolished them, is a safe assumption?

Can you find an easy explanation for his view "that the laws and customs of England are not only good, but the very best"?

6. Does the family serve the same functions, socially speaking, in America at the present time as it did a century ago? Does it serve the same functions in an industrial society as in a primitive society? Various writers have observed that changes in family life resulting from the transition from home industry to the factory system have created new social problems. They have stressed the point that modern economic changes have largely destroyed the effectiveness of the family as a social disciplinary agency, and a great increase in juvenile delinquency has resulted.

How do these facts affect the social role of the state, the school, and law?

Sec. 7-45. Basic criteria for policy makers—nature and consequences. The foregoing sections of this chapter have been intended to describe various legal policies which find expression in all or part of our American legal systems and to explain how such policies are formulated and determined. Our account has shown, first, what the major policies have been, and now are; second, what human agencies make or contribute to policy determination; and third, what factors, such as habit, inertia, and mere lack of imagination, serve as limits on policy determination. This account of the process of policy determination—which I shall hereafter call the "empirical" theory— is predominant in the judicial opinions

1 The theory takes a variety of directions, each of which carries a different emphasis. The general method is the same in all. "Empirical" is the adjective which I have chosen to use. Other adjectives sometimes applied to the theory are: "scientific," "realistic," "pragmatic," and "positivistic." The adherents of the theory are prone to use the first two adjectives, scientific and realistic,
and legislative declarations of American policy makers today. It finds expression in the writings of Holmes, Pound, Wigmore, Llewellyn, and other leading thinkers. It adopts essentially the philosophical position of men like James and Dewey.  

The gist of the "empirical" theory is that our basic criteria of justice, our notions of policy, as well as our methods of resolving policy problems, are the work of human agencies. The theory holds that criteria of justice are derived from human experience. It avers that man, individually and collectively, standardizes his contacts with the world about him. According to this theory man systematizes his experiences in prescriptive terms (for direction and guidance) as well as in descriptive terms (for information); he builds up goals and methods of action from his experiences, including his internal experiences, or feelings and felt needs. These goals and methods are merely grand inductions or generalizations which will organize his activities and dealings with the inanimate world and with his fellows. And, as these basic guides are created by man to serve his purposes, they are subject to revision and change by him as he finds that his needs or purposes change. Nevertheless, it is observable that man does not change these basic guides very often or very rapidly. They have a considerable degree of stability as a result of inertia and the fixity of man's habits. They are like buildings as they carry rather favorable implications; those who are not friendly to the "empirical" theory are inclined to use the latter two adjectives, which have acquired in their hands a definitely unfavorable connotation.

2 As a recent writer well says:

"The fundamental legal philosophy in America today is still pragmatism. Its best known instance is of course sociological jurisprudence as developed by Roscoe Pound. In a revolt against nineteenth century idealism Pound imported European ideas of the nature of law, fitted them to current pragmatic theories of philosophy, and with their aid gradually reworked the whole structure of American legal thought."


3 See again the discussion of the important uses of language, directive and informative, in secs. 1-07 et seq.
which have been constructed and which for a long time endure unchanged. The buildings can be torn down and replaced by others when they cease to meet the needs of those who use them. So, the guides and criteria for proper action, built by man, are observed to be quite solid and lasting, and yet, they are also subject to be revised or discarded when they prove inadequate or cease to serve as satisfactory guides for man’s activities.

But I would be leaving my account of the factors which enter into policy determination in an incomplete and one-sided form if I did not present another theory in regard to basic criteria of justice. This theory, which I shall call the “higher law” theory, has always been represented in our American legal thinking. It declares that the “empirical” theory does not tell the whole story; in fact, it does not tell the most important part of the story about criteria of justice. The “higher law” theory postulates criteria which are outside human experience and are not created by man. This theory “has had a longer, continuous history than perhaps any other which still finds enlightened adherents in any field of thought.” It has been consistently maintained by Christian doctrine, and notably in the doctrine of the Roman Catholic Church, from St. Augustine and St. Thomas Aquinas to the modern neo-scholastics. The theory was accepted by the founders of our republic, who gave definite expression to it in the Declaration of Independence and the Preamble to the Constitution. In its secular form,

4 Other names applied to the various forms which the “higher law” takes in the writings of its different adherents are “law of nature,” “natural law,” “moral law,” and “Divine Law.”

5 Dickinson, “The Law Behind Law,” 29 Col. L. Rev. 113 at 114 (1929). Actually, the “higher law” theory takes various forms. But for our purposes only two are important: 1, the secular form or theory of natural law, and 2, the religious form, of which the best known type is neo-scholasticism. Other forms, illustrated in modern writing, such as the theories of Stammler, Kohler, and others, have had no marked influence on current American thinking, and are therefore not to be specifically discussed herein. For a discussion of them, see Stone, The Province and Function of Law (1946).
as a theory of "natural law," the theory can count among its supporters a substantial share of the best-known philosophers, moralists, and legal thinkers, from Plato and Aristotle, through Kant and Hegel, to writers of the present day.

A full exploration of these two theories and their implications would call for an extended voyage into the perilous seas of legal philosophy. In fact, a full exploration would furnish ample subject matter for a course for advanced students of our legal system. I am sure I am not justified in going far in the examination of these theories in this introductory survey; but I do think I am warranted in presenting here an abbreviated comparison of the two theories, together with their implications, because both theories figure prominently in American thinking about the fundamentals of law.* My statement will be aimed to explain problems and

*(I.R.) Suggestions for further reading on the matter of this section:
Cohen, F., Ethical Systems and Legal Ideals (1933).
Fuller, L., The Law in Quest of Itself (1940).
Hall, J., Living Law in Democratic Society (1949).
Interpretations of Modern Legal Philosophies (Essays in Honor of Roscoe Pound) (1947).
My Philosophy of Law (By Sixteen American Scholars) (1941).
Patterson, "Pragmatism as a Philosophy of Law" (in The Philosopher of the Common Man) (1940).
Pound, R., Interpretations of Legal History, chapter VII, "An Engineering Interpretation" (1930).
An exposition of Roman Catholic doctrine is furnished by FRIEDMANN,
positions without taking sides on the basic issues involved. It will be as nearly objective as I know how to make it; though as an adherent of the "empirical" theory, I may manifest an unintentional bias for that theory. In any case I have no notion that the "empirical" theory is demonstrably right and the "higher law" theory can be shown to be wrong. When we get through this section of the text and the problems in the next section, I do not expect that anyone of you will have found occasion to change from the "higher law" view to the "empirical," or vice versa. At most I hope that some of you will have gotten clearer notions of the implications of the theory you adopt and that all of you will have acquired a tolerant attitude toward the theory you do not accept. The "higher law" theory holds that there are criteria of justice which lie beyond human reach. These criteria constitute "a system of independently existing and inherently valid law having its source wholly outside of government." The


6 It is with great diffidence that I attempt such a statement. A simple statement on this subject is not easy to prepare. It is apt to turn out to be oversimple and unsatisfactory to all parties. Indeed, I have tried hard to convince myself that it is unnecessary, and to find a rational basis for avoiding the task. I make the statement only because I have found that each time that I take up the matter of policy determination with a class, the discussion leads invariably into questions regarding "higher law" criteria of justice; to pass over this subject entirely, leaves many of the most earnest members of the class quite unsatisfied.

7 Much of the writing in favor of each theory is polemical in character. This seems to me both unfortunate and unnecessary. Each theory can be stated in tenable form and each is entitled to respectful treatment by those who do not accept it.

“higher law” is ascribed to a superhuman source, to Nature or more specifically to man’s nature, or to Divine Legislation. The “higher law” is absolute, immutable, and final. It requires no demonstration or proof, as it is self-evident, like the axioms of mathematics. It is revealed to man by intuition or reason. The “higher law” stands, accordingly, like a super-constitution above human policy makers, as our Federal Constitution stands above the acts of federal and state officials. It affords limitations on governmental actions. It is a barrier against unreasonable policies and methods. In addition, the “higher law” serves as source for legislative ideas and policies. It furnishes a positive basis from which to deduce or derive particular policies, such as the policy of protecting the individual’s personality, from the intrinsic value of human life, and the policy of free contract, from the fundamental doctrine favoring individual self-assertion. In the words of a recent writer, the functions of the “higher law” are “to guide, to criticize, and to measure the law as made by legislators and applied by judges so as to keep it in reasonable and just channels.”

Now with these two theories in mind, it will be worth while to compare them and their implications.

9 Though the untrained and unenlightened may have unclear, imperfect or mistaken perceptions of the “higher law” as they may of the axioms of mathematics.

10 As a matter of fact, I think it is evident, from the various pronouncements of the founding fathers, that they believed they were embodying principles of the “higher law” in the constitutions which they framed, notably, in their declarations regarding popular sovereignty, the separation of powers, and the rights of the individual. (Bill of Rights, adopted in the form of the first eight amendments.)

11 Perhaps it is fair to say that the two lines of theory, “higher law” and “empirical,” lay emphasis on different aspects of the thinking process. The “higher law” theory puts greater stress on the deductive side of thinking; it is more concerned with what it can derive from its premises. The “empirical” theory is more concerned with the way it derives its premises and accordingly lays more stress on the inductive procedures. Of course, all thinking involves both generalization (induction) and the use of general premises (deduction); neither can really be ignored. I refer merely to the matter of focus of interest and corresponding emphasis.

12 Haines, Revival of Natural Law Concepts 306 (1930).
The "higher law" theory seems to enjoy a substantial advantage in its proffer of stable and permanent criteria. But this advantage, it is argued by the "empirical" theorist, is really illusory. Criteria of right, and of right governmental policy, have not in fact remained constant throughout human history. Not only does history show that laws and usages have varied and changed among mankind, but that such fundamental criteria as have been propounded by "higher law" theorists, have also varied and changed. Almost any practice which would be condemned today as violative of a "higher law," from polygamy and promiscuous sex relations to ruthless treatment of individuals and groups, has, at many times and stages in the history of mankind, been pursued as an approved policy. The way the "higher law" theorist of today meets this difficulty is to say that the criteria which he now accepts have existed always and to treat the deviations from his criteria as aberrations. He does not admit that his criteria are affected by what persons of any age, or by what "higher law" theorists before him, have accepted. This, for example, is what the advocate of "higher law" does when he speaks of human slavery as contrary to natural, i.e., "higher," law. But Aristotle, one of the most illustrious supporters of the "higher law" theory, did not so regard the institution of slavery, as I have already pointed out. Slavery was universal in his day and he justified it as consonant with principles of natural law. No "higher law" theorist today would so define his criteria of justice as to permit slavery. To the extent that the "higher law" theory takes the form of a

13 SUMNER, FOLKWAYS (1906), chapters 6, 7, 8, 9, 10, and 15.

14 Christian doctrine meets the problem of finding a stable and permanent "higher law" by deriving it from a single source, the Holy Scriptures. Christianity is said to be a part of the common law; it has strongly influenced American legal thinking. See POUND, THE SPIRIT OF THE COMMON LAW, chapter II: "Puritanism and the Law" (1921). Doctrines of the Jewish and other religions need not be considered here as they have not exerted immediate influence on notions of criteria of justice.

15 See sec. 7-42 and note 1 thereto.

natural law, its protagonists reach unanimous agreement only on two points, to wit, that there are fundamental criteria of justice, and that these criteria are beyond human control. In regard to the content of the criteria themselves the "higher law" theorists have never been able to agree.17

The "empirical" theory offers a ready account of variety and change in criteria of justice. These are relative, so it declares, to man's knowledge and his needs. General criteria, such as the welfare of the individual or the community or the group, are more or less emphasized at different times and places; and the specific forms of criteria of justice which are recognized, e.g., the individual and social interests which are protected, also vary with times and circumstances. In short, criteria of justice are relative and changing, not absolute and permanent. But, in opposition to this account, it is argued that the "empirical" theory abandons any real criteria in order to reach this logical result. Indeed, it is argued that the "empirical" theorist, when he derives his criteria from human sources, is faced with the dilemma of choosing criteria on a mere count of noses, or else of finding no criteria at all. What makes a policy or an act wrong according to the "empirical" theory? Is it the fact that the policy or act runs counter to a generally received opinion of the community? 18

17 After speaking of the long and fruitful history of the ideal of natural law, Felix Cohen says:

"It is not remarkable, then, that in so long and adventurous a history the doctrine of natural law should have been subject to widely divergent interpretations. In general, we may distinguish two main ingredients in this concept, ingredients which have been mixed in all proportions. There is first the notion of value. Natural law is primarily the law that ought to be. The second ingredient in the concept of natural law is the element of universality. Not only have these two elements been united in various ways, but occasionally one or the other has appeared alone in the natural law doctrine. It is with these extremes that our analysis of the theory can best begin." ETHICAL SYSTEMS AND LEGAL IDEALS 101-102 (1933).

18 Theories of a social compact and of a general will once propounded as the bases for governmental authority, also served as intellectual devices through which to establish general or objective criteria of justice. Since the unreality of the supposed compact and general will have been made apparent, criteria resting on these bases have vanished from the practical scene.
Are criteria matters of majority opinion? Are they matters of the transitory opinions of rulers and policy makers? If so, what criteria does one have to oppose to the Nazi policy of exterminating Jews, or to the Soviet policy of utilizing slave labor? In fine, the "empirical" theory seems to be caught between a choice, on the one hand, of majority views in the world community or in smaller communities, and a choice, on the other hand, of the views of some governing minority, such as the officiadmin of the time and place or an elite group such as the Fascist leadership which purports to know what is best for the community.

To these criticisms of his relativist views, the "empirical" theorist makes two answers. First, he says that variety of criteria and relativity of criteria cannot fairly be treated as a lack of any criteria at all; that, in fact, community criteria and opinions, and group criteria and opinions, do furnish real ideals; and that, though these ideals may manifest differences and variations, they also manifest a considerable degree of agreement among the communities of the world, or at least among those communities which we would call the civilized world. The acts of the Nazis and of the Soviet government are opposed by a real world opinion, and the spearhead of the opposition, the governments which led to the public condemnation and punishment of the Nazi crimes against humanity which now stand against the ruthless policies of Russia, are the British Commonwealth and the United States, in both of which the "empirical" theory of justice is now predominant. Second, the "empirical" theorist answers that if this welter of variant criteria is all that we have, we may as well admit the fact; that even the criteria which any "higher law" theorist proposes are but community or group ideals decorated with honorific adjectives; that what makes his criteria seem final, natural, and necessary to the "higher law" theorist is the fact that these are the criteria which he has been brought up with. Accordingly, so runs this answer,
when we talk of a "higher law" as a basis for a policy, for a piece of legislation, or for a decision, "we are merely applying our own social standards and the mores of our own 'chosen' people and asserting for them the quality of universality and perfection." 19

The obvious reply of the "higher law" theory to this last assertion is that the "higher law" and man's rational nature (not his experiences), are what fix in him the criteria he calls natural. Hence, English and American officials, in asserting human claims and rights against Nazi and Soviet tyrannies, are really expressing and responding to their perceptions of the "higher law." And so we wind up here in a sort of impasse: the one theory attributing basic criteria to human inductions, the other attributing them to a "higher law" implanted in man by Nature or the Divine Will.

Is there any solution to this impasse? I believe not. The two lines of theory start with different articles of faith and there is no way to settle the difference of basic beliefs. No theory undertakes to prove the soundness of all the premises on which it stands. As regards the "higher law" theory, the acceptance of certain premises on faith is obvious. 20 But I think it is sometimes assumed by those who accept the "empirical" theory—and assumed with a sort of smug complacence—that "empirical" theory takes nothing for granted. This, of course, is not true. The "empirical" theory, like the

19 Corbin, "Rights and Duties," 33 YALE L. J. 501 at 504 (1924).
20 Thus, a recent neo-scholastic writer says:
"Realism certainly makes a truthful point when it contends that it is essentially skeptical while scholasticism relies heavily upon faith. True it is that scholasticism has faith in traditional law, in man, in his power to reason, in his free will, and in the capacity of the judge to decide legal problems according to rules and principles. Scholasticism does not contend that man is free from prejudice or emotion; that he never acts instinctively. Far from it. But the scholastic jurist believes that it is within the nature of mankind generally to subordinate these emotional factors especially when the problem at hand is the determination of the rights and duties of individuals according to law." KENNEDY, in MY PHILOSOPHY OF LAW (By Sixteen American Scholars) 153 (1941).
"higher law" theory, postulates basic propositions on faith and without proof. For example, in the field of action it assumes that effective action is possible and worth while; that man is able to control men and things through his acts and standards. In the field of knowledge, it has faith in the efficacy of investigative procedures and of experiment and observation as tests for truth. Can one demonstrate that experiment is a better way of arriving at conclusions than intuition is? Perhaps many of us believe that it is, but this is only an assumption, though a basic one. It seems, therefore, that both "empirical" theory and "higher law" theory accept many propositions on faith and cannot avoid it. On this point the two theories are alike, not different. The difference, as regards their articles of faith, lies in the fact that the "higher law" theory accepts its articles of faith as final, whereas the "empirical" theory treats those things which are accepted on faith and those which are regarded, at any particular time, as proven, as subject to rejection and revision if experience at a later stage shows them to be untenable. Its unproven assumptions, as well as those which are proven, are only provisionally accepted.

Among the articles of faith common to the "higher law" theory and the "empirical" theory, as they are developed in this country, are the major tenets of our democratic creed. This creed constitutes a system of policy assumptions and beliefs. The most important are the assumptions regarding equality of men, regarding liberty of the individual, and regarding popular participation in the determination of governmental measures. Opposed to these assumptions can be constructed an equally complete and systematic group of premises, coupled with the aristocratic way of life. Such assumptions were part and parcel of Plato's political creed. Often, those of us who have had a democratic upbringing naively assume that no other political creed than ours can
be entertained by any reasonable person. Quite the contrary is true. Our democratic beliefs are not only wines of recent vintage, but they have not been accepted as generally as the aristocratic kind. The aristocratic creed is, both, more ancient and more prevalent in practice, even today. I do not mean to challenge your faith in democracy. I share the same faith. I do mean to say that many persons, groups, and governments, in the course of history, have not shared our beliefs, and many even today do not share our "enlightened" point of view.

As is suggested in the last paragraph, the two major theories we are discussing are able to get together on the essentials of our democratic creed. This suggests a further important observation—the criteria of justice which are propounded by the adherents of the two theories are not too far apart. Regardless of how they are said to originate and regardless of whether they are viewed as final and absolute or as provisional and relative, the criteria which are offered are not very different and do not lead to widely divergent practical applications. Both lines of theory find room for all the main individual and social interests which we have previously discussed. Only in two areas are the practical differences of any consequence. These are the areas of individual life and personality and of family relationships. Some "empirical" theorists might make a place for euthanasia and abortions, and for radical changes in legally approved sexual relationships. Practically all "empirical" theorists support sterilization, birth control, and liberal provisions for divorce. Certainly, all these measures and the policies they represent run counter to the basic tenets of Roman Catholics, the largest group in our American community which adheres to the thesis of a law above human law. According to these tenets, human life has a divine origin and marriage is a divine

21 This fact is somewhat obscured by the tendency of adherents of both views to argue in an emotional and polemic fashion.
institution; and legislative policies along the lines mentioned are violative of the "higher law" and do not bind the consciences of individuals or officials.  

Part of the explanation of the fact that the two theories wind up in positions which are not too far apart is found in the fact that the two theories start with important common articles of faith; both take for granted the free will of actors, both take for granted that man can control his environment, both take for granted that human behavior can be guided by standards, by prescribed methods, and by idealized goals. But another part of the explanation of the similarity of the criteria propounded by the two theories inheres in the fact that the "higher law" theorist recognizes the validity of the "empirical" method in wide areas. He recognizes that there are fields in which his basic criteria are not involved. He recognizes the possibility of scientific study of human behavior in these areas and the propriety of applying the lessons of science therein. For example, the "higher law" theory would not purport to offer a solution of all problems regarding legal methods or legal machinery. It would not decide whether it is better to have written or oral pleadings in lawsuits, or whether it is better to provide for trial by jury or trial by judge. Furthermore, the "higher law" theory would recognize that there are areas in which its criteria would not determine what goals the policy maker may pursue. The "higher law" theory does not purport to cover all choices of the policy maker any more than human laws cover all choices of individuals and officials. In these uncovered areas, criteria of expediency apply, or, as I would prefer to say, "empirical" criteria.  


23 Probably advocates of the two theories would not fix areas where "empirical" criteria apply in quite the same manner. It is even possible that I exaggerate the size of the area which neo-scholastics would concede to be
is guided at most by the kind of criteria which science can provide. In other words, both lines of theory come together in these areas where the "higher law" theory concedes that policy determinations are beyond its sway. Here, both lines of theory come together in recognizing that "empirical" criteria are applicable to policy determinations, and also in recognizing the privilege and discretion of human agencies freely to determine policies. Both lines of theory would agree, for example, that the human policy maker is competent to deal as he will with most problems in the fields of contract and property; that he may, in the light of human experience, expand or retract the area of free contract; that he may, on this basis, foster monopoly or restrict it; that he may, on the same basis, change the incidents of the ownership of property, and change the types of private property which are allowed and disallowed. Indeed, I would say that these areas where the policy maker can look to experience and use his own judgment include most areas in which human law is applicable.

Both lines of theory recognize the possibility of actual policy determinations which deviate from the criteria which they propound. The "empirical" theory explains such deviations merely as typical divergencies of the actual from the ideal, found in all human affairs. The "higher law" theory condemns such deviations more emphatically, but nevertheless recognizes the possibility of "unjust" policy determinations uncovered by "higher law." Perhaps, too, I do not put my points in just the way that neo-scholastics would put them. I cannot claim to have a complete understanding of their doctrine. However, I regard all of the possible reservations I have mentioned as beside my main point and believe that all "higher law" theorists would grant that point.

The text states the present condition of both law and theory. It is worth noting, however, that every important legislative change in the fields of contract and property, made during the last century, has had to run the gauntlet of serious challenges. Statutes changing rights of inheritance, statutes restricting permissible uses of property, statutes fixing hours of labor and wages, statutes fixing prices of goods, have all been attacked (and sometimes successfully) as unconstitutional, or contrary to natural law, or both.
tions. From early Greek times down to the present day those who have maintained the "higher law" theory have recognized that human governments can make and enforce unjust laws. As an individual may violate the provisions of human and "higher law," governmental agencies can pursue policies such as Hitler's policy of destroying the Jews, which run counter to the "higher law." Sometimes the "higher law" theorist insists, with St. Augustine, that "a law that is not just, seems to be no law at all." But St. Thomas Aquinas and the neo-scholastics do not deny that unjust laws can be and are made. The purport of their theory is, simply, that such laws ought not to be made.

25 At this point we can easily fall into what Cardozo calls mere "verbal disputation," Nature of the Judicial Process 133 (1921). We can become involved in an equivocation about the definition of law. Two definitions are important for the present purpose. First is a definition which would include human laws and the "higher law" in one category, but which would give the "higher law" a superior status. In this sense, it would be said, in line with the dictum from St. Augustine, that human law which runs counter to the "higher law" is no law at all, just as we say in the United States that a statute which violates a constitutional provision is not law. In other words, within the hierarchy of legislation, one law is inferior to, and must give way to, another, in case of conflict between them. But, second, law may be used more narrowly to include only the standards, goals, and methods formulated and promulgated by human government. This is the sense in which I have used the term law up to the beginning of the present section, where we began our discussion of criteria of justice. In this sense, a law may be created by governmental agencies which is unjust and contrary to the criteria of justice postulated by the "higher law" theory or worked out by the "empirical" theory. Indeed, if we resolve to define law in this narrower sense, it is better to call these extrinsic criteria by the name of morals. In that case, I believe that not a few adherents of the "empirical" theory would be prepared to assert that there are principles of morals which are superior to human law and further that these principles are stable and permanent.

26 St. Thomas Aquinas says:

"Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived, according to Prov. viii. 15: By Me kings reign, and lawgivers decree just things. Now laws are said to be just, both from the end, when, to wit, they are ordained to the common good,—and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver,—and from their form, when, to wit, burdens are laid on the subjects, according to an equality of proportion and with a view to the common good." The Summa Theologica, part II (first part). Literally Translated by Fathers of the English Dominican Province, Third Number, 69 (1927), as quoted in Hall's Readings in Jurisprudence 39 (1938).
Human sanctions to effectuate criteria of "higher law" or of "social justice" are not numerous or widely operative. Religious sanctions can be effective within the range where believers are affected. But legal sanctions are not ordinarily available for the very reason that the persons to be controlled are themselves in control of the legal system. The result is that neither the "higher law" theory nor the "empirical" theory undertakes to define very specifically what will happen by way of retribution or correction when, for example, the Nazis determine on a policy of exterminating Jews, or the Soviets on a policy of slave labor. The "higher law" theorist states consequences in terms of conscience; the policy maker violates the dictates of conscience when he acts, and persons supposed to be bound are not bound in conscience. And the "empirical" theorist offers nothing more definite by way of human sanctions to effectuate his criteria of "social justice"; he relies on public opinion of some sort. Obviously, public opinion does not interpose any serious practical barrier to measures which are pursued by a government entrenched in power and possessed of control over the agencies of propaganda and education that operate in the community. However, it is worth remembering that in the United States the Supreme Court is in a position to effectuate criteria of justice as it sees them. The Court can make its criteria effective against policy determinations and acts of other organs of our government. As Haines says: "The United States is practically alone in placing supercensors over its legislative chambers with often nothing more than the elusive rule of reason as a standard." This means that the Supreme Court's policy notions supply the need for criteria of justice; it also means that the Court is able to effectuate its notions. Its policy notions represent collectively the criteria of an elite

27 The Revival of Natural Law Concepts 343 (1930); and as this writer says further: "The ultimate standard of what is reasonable or fair is the judicial conscience." Ibid. 344.
group. The Constitution itself was framed by an elite group of men at a time when belief in liberty and equality of individuals stood at the highest level in history. And unquestionably the criteria of justice which the Supreme Court reads into the Constitution are more exacting than most parts of our community would recognize. The fact that the Supreme Court is in a position to, and does, effectuate its criteria of justice serves in part to explain the relatively lesser interest in "higher law" in this country than in Europe. There has not been the strongly felt need here for a superhuman law to restrain human policy makers.  

The criteria propounded by the two lines of theory we are comparing are alike in another way; both lines of criteria are very general. Both lines fail to offer much in the way of direct guidance to the policy maker. For example, Bentham, who may be classified as an "empirical" theorist, lists four "subordinate" ends to be pursued by the legislator: subsistence, abundance, equality, and security for the individual; he offers the greatest happiness of the greatest number as an over-all criterion. Pound, a modern "empirical" theorist, lists individual and social interests essentially like those we have listed in our inventories in the earlier parts of this chapter, and then offers a general criterion of the "most efficacious social engineering," or, as he also says, a picture of giving effect to the maximum of human wants with the least sacrifice of other wants. The criteria offered by "higher law" theorists are essentially similar, though cast in different terms, and are likewise indefinite and general. None of the programs offered by "empirical" or by "higher

28 European countries have had recent bitter experience with dictators' acts and have not had any effective barriers to oppose against them.

29 See, for example, the passage from St. Thomas Aquinas quoted in note 26 above. See, also, the discussion of Kohler's criteria by Pound, "Interpretations of Legal History," Chapter VII. Kohler talks in terms of maintaining existing values of civilization and creating new values. He says the goal of law is the "furthering of civilization through a forcible ordering of things."
OUR LEGAL SYSTEM AND HOW IT OPERATES

law" theorists provides the policy maker with a simple guide for selecting policies to pursue, or a ready method for solving conflicts such as the conflict between the social interest in free speech and the social interest in the safety of the state. Both programs are so general that they leave opportunity for widely divergent interpretations and for disputes regarding applications. Without an authoritative interpreter to tell the policy maker just what these criteria mean as applied to the specific policy determinations which he has to make, they cannot control his determinations in any direct sense.

Nevertheless, the criteria of justice propounded by the two groups of theorists have real importance. They establish attitudes toward problems of policy determination. They adjure the policy maker to look beyond immediate ends, to goals which might not so readily be thought of. They call his attention to enduring, as against transitory, advantages. They involve a stress on, and a generalization of, the complex factors that enter into policy determination. In short, the invocation of a "higher law" and the reliance on "social justice" alike represent methods of dealing with legal problems in a wide perspective. And what is just as significant, both theories rest on a clear and definite faith in man's ability to shape his affairs according to ideals. Both involve a belief in the efficacy of man's efforts to control his relation-

30 Indeed, it is a common observation in human affairs that the best principle can be misconstrued and used for an improper purpose. As Shakespeare says, "The devil can cite Scripture for his purpose." (The Merchant of Venice, Act I, Scene 1, line 9.) And we hardly need to be reminded of the pious-sounding doctrines which the Nazis cited to cover some of their worst misdeeds. Of course, in these cases, the citations were usually accompanied by actual misrepresentations of fact.

31 Neo-scholastic doctrine does provide an authoritative interpreter to make interpretations so far as they involve the Word of God; final and infallible interpretive authority belongs to the head of the Roman Catholic Church. A comparable authority to interpret criteria of justice, so far as they are embodied in our Federal Constitution, can be said to belong to the Supreme Court. But the interpretations of these two agencies would only be recognized within limited spheres. There is no agency with universally accepted interpretive authority to construe the criteria of justice propounded by "higher law" theory or by "empirical" theory.
ships by standards. Both involve a faith in human progress.  

The two theories may diverge from one another in their accounts of the origin and nature of our ideals. This divergence is important; and I see no way to erase it. But, practically, the difference is not as important and significant as the fact that both lines of theory stand together in postulating man's ability to shape his destiny according to his ideals of justice.

Sec. 7–46. Problems. 1. The Declaration of Independence (1776) begins with this sentence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

How would an "empirical" theorist state essentially these same points?

32 It may be argued that the "higher law" theory is not as progressive in tendency as the "empirical" theory inasmuch as the "higher law" theory postulates fixed and final criteria of justice. Of course, the "higher law" theory does not allow for change in its criteria, and this may mean that its criteria are not as adaptable as "empirical" criteria. But in fact, criteria of "higher law" are so general that they are adaptable to most changes of conditions. Thus, "higher law" theory has been invoked quite as often by those who advocated change to conform to ideals, as by those who opposed change and maintained that existing conditions were just what they ought to be. "Higher law" criteria have served again and again as revolutionary battle cries; that was their function when they were asserted at the beginning of our Republic against the pretensions and arbitrary acts of the British Government. And "higher law" theorists have been found quite as often in modern times among the advocates of social reform as "empirical" theorists. As one neoscholastic writer says:

"It may surprise realist reformers to be informed that thirty years before the United States Supreme Court declared the Minimum Wage Law of the District of Columbia to be unconstitutional, Pope Leo XIII vehemently defended the right of the worker to a living wage in his famous encyclical, Rerum Novarum, and argued for such economic reform on the ground of natural law and natural justice. Incidentally, in this same encyclical will be found a plea for social and economic laws to improve the health, strength, housing, and factory conditions of wage earners, with particular regard to women and children—all proposed and defended in accordance with the law of God and the nature of man." Kennedy in My Philosophy of Law 159 (1941).
2. In his famous dissent in *Abrams v. United States*, Holmes, J., expresses the following views on the subject of freedom of speech and opinion:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

What basic premise does Holmes adopt here? How far would you say he adopts it on faith? How far on the basis of experience?

Does he recognize the possibility of adopting another basic premise?

Does his position here accord with the "empirical" theory of the basis for criteria of justice?


Miller, J.:

"It must be conceded that there are such rights in every free government beyond the control of the State. A govern-

1 250 U. S. 616 at 630 (1919).
2 20 Wall. (U. S.) 655 at 662 (1874)."
ment which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of the governments, are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B."

On what does Miller, J., predicate the "higher law"?

4. The Antelope. 3 An American privateer harassing Spanish ships during the South American revolts against Spain seized slaves from Spanish and Portuguese vessels. The Supreme Court held that on the facts proved, all of the slaves should be disposed of according to United States law, except those shown to have been the property of Spanish claimants, which should be turned over to those claimant owners. As to the contention that these slaves should not

3 10 Wheat. (U. S.) 66 at 120-122 (1825).
be returned, since the slave trade was contrary to the law of nations, Marshall, C. J., said:

"The question, whether the slave trade is prohibited by the law of nations, has been seriously propounded, and both the affirmative and negative of the proposition have been maintained with equal earnestness.

"That it is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission. But from the earliest times war has existed, and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity, one of these was, that the victor might enslave the vanquished. This, which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage. That which has received the assent of all, must be the law of all.

"Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful.

"Throughout Christendom, this harsh rule has been exploded, and war is no longer considered as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. Can those who have themselves renounced this law, be permitted to participate in its effects by purchasing the beings who are its victims?

"Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the
world of which he considers himself as a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favour of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, it was carried on without opposition, and without censure. A jurist could not say, that a practice thus supported was illegal, and that those engaged in it might be punished, either personally, or by deprivation of property."

Here, Chief Justice Marshall distinguishes three kinds of law: the law of the United States, the law of nations, and natural law. How does he relate them to one another? Which law prevails when there is a conflict between natural law and either of the other types of law?

5. State v. Malusky. On May 28, 1928, Joe Malusky entered a plea of guilty to a charge of engaging in the liquor traffic as a second offense. He was sentenced to serve a term of one year and six months in the state penitentiary. The statutes of North Dakota provided for an increased penalty upon conviction of a second offense involving moral turpitude. On appeal, Malusky contended that a violation of the state prohibitory act was not an offense involving moral turpitude. The Supreme Court of North Dakota, speaking through Nuessle, J., held that the violation of the prohibitory act was such an offense within the meaning of the statute. He said, in part:

"The fourth section of the act above quoted is that on which the appellant grounds this appeal. His first and chief contention is that the violation of the state prohibitory act, on account of which he was sentenced, though a felony, is not an offense involving moral turpitude. "The term 'moral turpitude' is not new. It has been used in the law for centuries. It connotes something which is not clearly and certainly defined. See note in 43 Harvard L.

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Rev. p. 117. Generally it may be said that moral turpitude is evidenced by an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow man or to society in general. . . . Many cases may be found in the books dealing with the meaning of the term and attempting to apply it under varying facts and circumstances. Most of the cases seek to make a distinction between offenses mala prohibita and mala in se, and hold that only offenses mala in se involve moral turpitude. If this be the test it avails us little for the difficulty then is to discern the line between the two. History discloses that all offenses were at some time merely mala prohibita and as civilization advanced and social and moral ideals and standards changed they became one after another mala in se. Moral turpitude 'is a term which conforms to and is consonant with the state of public morals; hence it can never remain stationary.' Drazen v. New Haven Taxicab Co. 95 Conn. 500, 111 Atl. 861. At one time the wilful killing of another was not considered evil in itself, and this is so among some savage peoples today. At one time honor was vindicated and guilt and innocence determined by mortal combat between factions or individuals. Even now killing is justified in time of war. Larceny became an offense only as property rights were defined and society sought to benefit itself and protect the individual by penalizing the appropriation of property by those who could not justify such appropriation by the prescribed rules. Sexual crimes became such only as man progressed in civilization. At one time, not so greatly remote, prostitution was not regarded as immoral and in some countries is not even now banned by the law. However much every man may be answerable for his acts to his own conscience, society cannot permit each individual to say for it what is moral and what is immoral. To him who deliberately kills, murder is not immoral. To him who steals, larceny is not immoral. To him who lives only for the gratification of his appetites there is no immorality in doing so. Some standard must exist according to which the determination as to whether act or conduct is moral or immoral is to be made. That standard is public sentiment—the expression of the public conscience. It may be manifest, unwritten, and more or less nebulous, as legend, as tradition,
as opinion, as custom, and finally crystallized, written as the law. Thus the standard is fixed by the consensus of opinion, the judgment of the majority. When the majority is slight there is, of course, greater opposition on the part of the minority to the standard. The majority may become the minority and the standard change. But so long as it is established, measurement must be made according to its terms. So we must say that those things which are discountenanced and regarded as evil and accordingly forbidden by society, are immoral and that the doing of them contrary to the sentiment of society thus expressed involves moral turpitude, and this regardless of the punishment imposed for their doing.”

Reversed on other grounds.

How does Nuessle, J., establish a standard of moral turpitude? Does he reject “higher law” criteria of right and wrong?

6. In *Hoff v. State of New York*, 5 Lehman, J., said regarding the remedy of habeas corpus:

“Our constitutional guarantees of liberty are merely empty words unless a person imprisoned or detained against his will may challenge the legality of his imprisonment and detention. The writ of habeas corpus is the process devised centuries ago for the protection of free men. It has been cherished by generations of free men who had learned by experience that it furnished the only reliable protection of their freedom.”

What assumption regarding the goals of our legal system does Lehman, J., make? Obviously a dictator (or an official acting on his orders) would not make the same assumption.

For what purpose does Lehman, J., have recourse to experience?

7. *Buck v. Bell*. 6 Mr. Justice Holmes delivered the opinion of the Court:

“This is a writ of error to review a judgment of the Supreme Court of Appeals of the State of Virginia, affirming

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5 279 N. Y. 490 at 492 (1939), quoted at length in sec. 5–13, problem 3.
6 274 U. S. 200 at 205, 207 (1927).
a judgment of the Circuit Court of Amherst County, by which the defendant in error, the superintendent of the State Colony for Epileptics and Feeble Minded, was ordered to perform the operation of salpingectomy upon Carrie Buck, the plaintiff in error, for the purpose of making her sterile. 143 Va. 310. The case comes here upon the contention that the statute authorizing the judgment is void under the Fourteenth Amendment as denying to the plaintiff in error due process of law and the equal protection of the laws. . . .

"The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited and that Carrie Buck 'is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,' and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Jacobson v. Massachusetts, 197 U. S. 11. Three generations of imbeciles are enough."

What does this opinion determine? Does it pass on the social desirability of sterilization? Does it decide the question whether sterilization is morally right?
Would a Roman Catholic judge be justified in issuing an order to sterilize a woman like Carrie Buck, pursuant to the provisions of a statute like the one involved here?*

8. At the conclusion of a record of his life, Henry L. Stimson appends an afterword which reads in part as follows:

"This book has recorded forty years spent largely in public life; from this record others may draw their own conclusions, but it seems not unreasonable that I should myself set down in a few words my own summing up. . . .

"No one can dispute the progress made by the man of today from the prehistoric man—mentally, morally, and spiritually. No one can dispute the humanitarian progress made more recently, since those times before the age of steam and electricity, when man’s growth was limited by sheer starvation, and the law of Malthus was an immediate reality. . . .

"I have always believed that the long view of man’s history will show that his destiny on earth is progress toward the good life, even though that progress is based on sacrifices and sufferings which taken by themselves seem to constitute a hideous mélange of evils.

"This is an act of faith. We must not let ourselves be engulfed in the passing waves which obscure the current of progress. The sinfulness and weakness of man are evident to anyone who lives in the active world. But men are also good and great, kind and wise. . . .

"I think the record of this book also shows my deep conviction that the people of the world and particularly our own American people are strong and sound in heart. We have been late in meeting danger; but not too late. We have been wrong but not basically wicked. And today with that

*(I.R.) As to conflicts between conscience and the human law, see Reynolds v. United States, 98 U. S. 145 (1878) (religious belief in polygamy); Jacobson v. Massachusetts, 197 U. S. 11 (1905) (religious belief opposed to vaccination); United States v. Schwimmer, 279 U. S. 644 (1929) (belief opposed to bearing arms); United States v. MacIntosh, 283 U. S. 605 (1931) (belief opposed to bearing arms); Hamilton v. Regents of University of California, 293 U. S. 245 (1934) (conscientious objection to military service).
strength and soundness of heart we can meet and master the future.”

What important articles of belief does this faithful public servant adopt?

How would his views take shape in criteria of justice?

What would be his attitude toward improvement of the law?

9. Sir Austin Henry Layard quotes the following letter written by a Turkish Cadi to a friend of Layard’s in response to “inquiries as to commerce, population and remains of antiquity of an ancient city, in which dwelt the head of the law.”

“My illustrious Friend, and Joy of my Liver!

“The thing which you ask of me is both difficult and useless. Although I have passed all my days in this place, I have never counted the houses, nor inquired into the number of the inhabitants; and as to what one person loads on his mules and another stores away in the bottom of his ship, that is no business of mine. But, above all, as to the previous history of this city, God only knows the amount of dirt and confusion that the infidels may have eaten before the coming of the sword of Islam. . . .

Listen, o my son! There is no wisdom equal unto the belief in God! He created the world, and shall we liken ourselves to him by seeking to penetrate into the mysteries of his creation? Shall we say, behold this star spinneth round that star, and this other star with a tail goeth and cometh in so many years! Let it go! He from whose hand it came will guide and direct it. . . . Thou art learned in the things I care not for, and as for that which thou hast seen, I defile it. Will much knowledge create thee a double belly, or wilt thou seek paradise with thine eyes? . . .

“The meek in spirit (El Fakir),

“Imaum Ali Zadi”

7 Stimson and Bundy, On Active Service in Peace and War 671-672 (1948).

8 Nineveh and Babylon, A Narrative of a Second Expedition to Assyria 1849-1851, 401-402 (1867).
What kind of position would you expect the Cadi to adopt toward changes and improvements in existing law?**

Compare his general attitude with Stimson's. What is the essential difference?

Sec. 7-47. General summary.¹ This completes our picture of the American legal system and its operation. The picture has been developed in terms of acts and standards for acts. In the first chapter, the role of language in the processes of legal control has been explained. In the second, the legal standards which serve as patterns for acts of the individual have been described, and we have seen how these standards are effectuated through acts and used in acts. In the third, legal standards for the guidance of official acts have been taken up and treated in a similar manner. In the fourth chapter, entitled Legislation, I have tried to show how standards are created by the legislature and by analogous subsidiary agencies; how these standards are stated; and when and where standards operate. In the fifth chapter, I have given an account of the processes by which legislative standards are interpreted; I have depicted the role of the judicial interpreter and the functions of rules of interpretation. In the sixth chapter I have offered an analysis of the procedures through which judges apply and make and unmake case law (precedents). And in the final chapter I have listed the recognized objectives or policies of American law; have described the modes in which governmental and other

** (I.R.) Compare what Pound says about the "give-it-up" philosophy, in Social Control Through Law 101 (1942); about belief in the futility of legislation, in The Spirit of the Common Law 46 (1931); and about juristic pessimism, in Interpretations of Legal History 66 (1930).

¹ The first paragraph of sec. 7-45 constitutes a resumé of the main points made in chapter 7. For this reason I dispense with the final section entitled "Summary" which I have appended at the conclusion of each of the other chapters. In its place I substitute a general summary to cover the entire work.
human agencies contribute to policy formulation; and have indicated how tradition and habit, and, according to one view, a "higher law" limit the determination and pursuit of policies.

From the beginning to the end of this portrayal, we have viewed the legal system as a going concern; we have examined the various uses that are made of standards and of prescribed methods to guide the behavior of individuals and officials; we have put stress on the instrumental character of the legal system and treated it as a mass of devices created by man to serve his needs.