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# The Courts and Social Policy: Substance and Procedure

HENRY J. FRIENDLY\*

*Judge Friendly admits that the courts must address themselves in some instances to issues of social policy. He would prefer, however, that a court rest its decision on an ascertainable jural principle rather than support its decision on the basis of its conception of what is desirable social policy. When courts do rely on social or economic data, they should observe procedural fairness as a goal in its own right and as a tool towards obtaining correct and complete information. When the economic and social data is indeterminate, a court should refuse to base its decision on such information. If a decision is made and the courts frame an elaborate decree, they should remember that they are engaged in rulemaking and operate as other rulemakers, keeping close watch over the effects of their ruling.*

The mouth-filling topic announced for discussion can be usefully broken into two parts: Should courts decide issues of social policy? If they do so, are some modifications of the adversary system desirable?

Even as thus simplified, the issue is so profound and the relevant literature so vast that making proper answers would require years of study and thought rather than hours eked out over a few months from the press of other work. What I shall put before you thus is not a lecture but some notes for one which will never be written. Mr. Justice Rehnquist has approached the subject from a novel and thoughtful angle; I shall approach it from a more conventional one. In order to relieve you of inordinate suspense, I will state some tentative answers now.

The courts must address themselves in some instances to issues of social policy, not because this is particularly desirable, but because often there is no feasible alternative. One is reminded of Sir Winston Churchill's remark that democracy is the worst form of government, except that no one has been able to think of a better one.<sup>1</sup> On the other hand, if an ascertainable jural principle will decide a case in a way the court finds acceptable,<sup>2</sup> it will do better

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1. J. F. KENNEDY, *PROFILES IN COURAGE* 264 (mem. ed. 1964).

2. While I am acutely conscious of the question-begging character of this phrase, an effort to define it would require a lecture in itself. Generally, what I mean is a principle drawn

not to support its decision on the basis of its conception of what is desirable social policy and particularly not on disputable social or economic data. When courts need to rely on such data, they should be careful to observe procedural fairness, both as a goal in its own right and as a tool towards getting information that is correct and complete. When the economic or social information is indeterminate, a court should refuse to use such data as a basis for its decision, although such a refusal should not foreclose a later attempt to convince the court when better information may be available. While I do not have time to defend all these propositions, the following discussion will afford some indication of the bases for them.

At first blush the question of whether courts should decide issues of social policy would seem to cry for a negative answer. Judges, whether appointed or elected, were not put on the bench for that purpose.<sup>3</sup> As Justice Frankfurter said: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society."<sup>4</sup> In deciding questions of social policy they thus lack the important qualities of legitimacy and also, at least in the case of judges appointed for life, of accountability to the electorate. All of us must respond in some degree to Judge Learned Hand's remark: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."<sup>5</sup> Moreover, courts can act on questions of social policy only at the call of litigants; then, they generally must act although postponement might be the wiser course. While courts are,

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primarily from the text of a constitution or a statute as illuminated by history and precedential development, or from the trend of common law decisions, rather than one derived directly from a consideration of social or economic views or data. The reader will find elucidation in A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 86-87 (1970); B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (third lecture) (1921); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

3. It could be argued that the Supreme Court has become an exception to this statement. Awareness that many of the Court's decisions on the effect of broadly worded constitutional provisions could reasonably go either way leads the President and the Senate to scrutinize the social attitudes of a nominee with some care. But, apart from the impossibility of an accurate prediction, the life tenure of the Justices prevents them from being a representative cross-section of the electorate of the time. The Court of the early 1930's is a sufficient example; not many Americans, even of a conservative bent, would have wished Justice McReynolds to be speaking for them in the latter part of his 27-year term.

4. *Dennis v. United States*, 341 U.S. 494, 525 (1951). He added that "the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Id.*

5. L. HAND, *THE BILL OF RIGHTS* 73 (1958). Judge Hand went on to say: "Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture." *Id.* at 73-74. See also Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1061 (1975).

or should be, aware of the effects of their decisions beyond the case sub judice, their response is often triggered by outrageous facts that may not be at all representative.<sup>6</sup> Professor Morris R. Cohen considered the judicial system to be "intellectually the weakest part of our government," having "the least opportunity to get information on the issues which it has to decide."<sup>7</sup> Save in a few specialized courts, judges are generalists, and, although much of their virtue has been thought to lie in that very fact, it seriously handicaps them in sifting masses of technical social and economic data.

Unlike legislatures, which may properly frame pragmatic rules having no relation to strict logic,<sup>8</sup> courts should render a principled decision that will apply to a great sweep of cases. Moreover, unlike legislatures, courts are generally confined to prohibiting or enforcing conduct, whether by the award of damages or, in the type of cases we are discussing, more frequently by injunction or declaratory judgment.<sup>9</sup> Legislatures, however, have many further options available to them, including taxation and subsidies. Also, the legislature can offer "sweeteners" in the form of increased benefits of a different sort that will justify the abolition of a rule which, however well conceived in its origin, has become unworkable.<sup>10</sup>

The adversary system, even at its best, is poorly calculated to arrive at the truth; the lawyer's duty is to win his case by any fair

6. The paradigm is *In re Gault*, 387 U.S. 1 (1967). A juvenile court had committed, for a term of six years, a 15 year old boy charged with making remarks "of the irritatingly offensive, adolescent, sex variety" on the telephone to a married woman. The maximum penalty for such an offense committed by an adult was a fine of \$5 to \$50 or imprisonment for not more than two months. It is questionable whether if the facts had been less shocking, the Court would have ranged so far. Other examples are *Lau v. Nichols*, 414 U.S. 563 (1973) and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), discussed in M. HORWITZ, *THE COURTS AND SOCIAL POLICY* 41-42 (1977), an illuminating book from which I have drawn heavily.

7. M. COHEN, *AMERICAN THOUGHT: A CRITICAL SKETCH* 164 (1954). See also M. COHEN, *Should Legal Thought Abandon Clear Distinctions?*, in *REASON AND LAW* 159 (1950).

8. See W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 155 (1959) in reference to the Law Reform [Personal Injuries] Act, 1948, 11 & 12 Geo. 6, c. 41, § 2[1], concerning deduction of one half of industrial injury benefits from recovery for loss of earnings in personal injury damage actions. See also Justice Douglas' statement: "The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) (citation omitted); Dworkin, *supra* note 5, at 1091-92.

9. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1292-96 (1976).

10. See, e.g., Longshoremen & Harbor Workers Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251, where an increase in a scale of workmen's compensation benefits that had become outmoded made it not only politically possible but morally defensible to abolish the triangular action for unseaworthiness of longshoreman versus ship versus stevedoring employer that was plaguing the federal courts. See *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 40 (2d Cir. 1976), *aff'd sub nom.* *Northeast Marine Terminal Co. v. Caputo*, 429 U.S. 998 (1977); S. REP. NO. 92-1125, 92d Cong., 2d Sess. 4-5 (1976).

means. Moreover, the "best" advocacy is rarely seen. Fate may will it that even in the greatest cases one or both sides will be represented by counsel with far less than the highest degree of competence. Moreover, there often are marked inequalities in the resources of the two sides and the skill of their counsel.<sup>11</sup> All of this has been the subject of recent stimulating discourse by Judge Marvin Frankel.<sup>12</sup> One could readily cite additional factors, but the task has been performed by others<sup>13</sup> and what I have said will suffice.<sup>14</sup>

Despite the objections to the courts deciding issues of social policy that I have recounted, it is apparent that they have been doing so for a long time. Professor James Willard Hurst<sup>15</sup> and, more recently, Professor Morton Horwitz<sup>16</sup> have written, penetratingly

11. In cases involving states, the inequality of skill does not always weigh on the side of the state; public interest lawyers and private attorneys working "pro bono" often outclass hard pressed and underpaid offices of city counsel or even of state attorneys general. Perhaps this is a neglected field for pro bono activity.

12. Frankel, *Trials and Procedure—From Private Fights Toward Public Justice*, in *AMERICAN LAW: THE THIRD CENTURY* 155 (B. Schwartz ed. 1976); Frankel, *The Adversary Judge*, 54 *TEX. L. REV.* 465 (1976); Frankel, *The Search for Truth: An Umpireal View*, 123 *U. PA. L. REV.* 1031 (1975).

13. Notably by M. HORWITZ, *supra* note 6, at 31-62, and the books and articles cited therein at 33 n.23. Before his elevation to the Supreme Court, Robert H. Jackson, protesting against the Court's anti-New Deal decisions, wrote of "limitations inherent in legal procedures which make the lawsuit an unfit channel for exercise of political power, and which suggest that those who possess no other implements should scrupulously avoid judgments for which it is not adequate." R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 302 (1941).

14. I have tried to remain aloof from the debate generated by Professor Ronald Dworkin's article, *supra* note 5. The controversy, summarily stated, is this: Professor H.L.A. Hart has written that where existing law is indeterminate, judges of higher courts exercise a "legislative" discretion in which policy considerations may be taken into account. H.L.A. HART, *THE CONCEPT OF LAW* 124-32 (1961). See also Hart, *American Jurisprudence Through English Eyes*, 11 *GA. L. REV.* 969 (1977). This is a view for which he has distinguished predecessors; for example, recall the statement of Justice Holmes: "Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice." O.W. HOLMES, *Law In Science and Science In Law*, in *COLLECTED LEGAL PAPERS* 239 (1920), and B. CARDOZO, *supra* note 2, at 102-05, 112-19.

Professor Dworkin disagrees. In such cases, he argues, the judge may rely on a newly discovered but nevertheless preexisting "principle" which shows that "the decision respects or secures some individual or group right," but not on considerations of "policy" which show only that "the decision advances or protects some collective goal of the community as a whole." Dworkin, *supra* note 5, at 1059. I wish to remain aloof both because the debate is being carried on with such vigor and at such length, notably in 11 *GA. L. REV.* (1977), where some 450 pages are largely devoted to it, see also the book reviews of DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), reviewed by Gabel, 91 *HARV. L. REV.* 302 (1977) and Lyons, 87 *YALE L.J.* 415 (1977), and because of my own deficiencies. In jurisprudential controversies of this sort I tend to agree with whomever I have read last. Beyond this, it is not clear to me how far apart, in any practically significant sense, the disputants really are.

15. See J. HURST, *LAW AND THE CONDITIONS OF FREEDOM* (1956); J. HURST, *THE GROWTH OF AMERICAN LAW* (1950).

16. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). For a discus-

and exhaustively, on how American courts molded English common law in light of their perceptions of the special needs of our society. These decisions were no less based on social policy because that purpose was not always expressly avowed. Let me add two examples.

In the great debate about courts deciding policy issues, it is strange that so little attention has been paid to a long established instance where judges have been not simply permitted but required to enforce what they believe to be sound policy. None of us, I suppose, was particularly shocked to learn in the first year of law school that courts must refuse to enforce contracts that are "contrary to public policy." Perhaps we were told that an otherwise little known English judge had produced the aphorism: "[Public policy] is a very unruly horse and when once you get astride it you never know where it will carry you,"<sup>17</sup> and that a better known judge had later said: "[J]udges are more to be trusted as interpreters of the law than as expounders of what is called public policy,"<sup>18</sup> and that a Lord Chancellor had even attempted to freeze the categories of contracts contrary to public policy to what they were at the beginning of the twentieth century.<sup>19</sup> We were also taught, however, that in this country courts did not so limit themselves and have felt few inhibitions about expanding the categories of such contracts.<sup>20</sup> Here we encounter a "rule" requiring judges to consider policy, although our law school teachers did not tell us and scholars have not adequately discussed how judges should ascertain policy for this purpose when the legislature has not furnished them with guidance.

We have also witnessed, without much furor having been aroused, what I think to have been the creation of new common law rights due to a judicial perception of policy. The most striking example is the law concerning strict products liability. Fifty years ago,

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sion of changes in the common law of water rights, see *id.* at 34-47; the broadening of a tenant's right to remove "fixtures," see *id.* at 54-56; the retraction of the common law of nuisance, see *id.* at 74-78; the general replacement of strict tort liability by the concept of negligence, see *id.* at 97-99; and the expansion of the concept of contract so as to permit contracting parties generally to substitute a new regime for themselves, see *id.* at 160-210.

17. *Richardson v. Mellish*, 2 Bing. 229, 252 (1824).

18. *In re Mirams*, [1891] 1 Q.B. 594, 595.

19. *Janson v. Driefontein Consol. Mines, Ltd.*, [1902] A.C. 484, 491.

20. See 6 A. CORBIN, *CONTRACTS* (1962); L. SIMPSON, *THE LAW OF CONTRACTS* 430-34, 441-45 (2d ed. 1965); 14 S. WILLISTON, *CONTRACTS* §§ 1628, 1629, 1629A (3d ed. Jaeger 1972); *RESTATEMENT (SECOND) OF CONTRACTS*, ch. 14, Introduction, Note and Reporter's Note, § 320(2), Comments b and c (Tent. Draft No. 12, March 1, 1977). An outstanding example is *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), which struck down, as contrary to public policy, an automobile manufacturer's disclaimer of an implied warranty of merchantability that had been widely used.

Judge Cardozo's then recent decision in *MacPherson v. Buick Motor Co.*,<sup>21</sup> that the duty of care of the manufacturer of an automobile extended beyond the immediate purchaser, was still a novel although quickly accepted doctrine.<sup>22</sup> However, it was well within the negligence model that had become received learning. Subsequently, a decision in Michigan<sup>23</sup> and a more widely known one in New Jersey<sup>24</sup> led to what Dean Prosser called "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."<sup>25</sup> At first an attempt was made to cloak the revolution within the rubric of implied warranty, but this was a strange sort of warranty since no degree of contrary language could disclaim it.<sup>26</sup> The revolution culminated in section 402A of the American Law Institute's Second Restatement of Torts,<sup>27</sup> which is now regularly cited by courts as if it were a statute. Although "warranty" may initially have furnished a crutch that was soon discarded, the motive power behind the victory of strict products liability was a notion of social policy, just as the replacement of strict liability by negligence had been a century before.<sup>28</sup> Dean Prosser presented the arguments which have proved to be convincing to the courts:

The public interest in human life and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products, of full responsibility for the harm they cause, even though the supplier has done his best.<sup>29</sup>

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21. 217 N.Y. 382, 11 N.E. 1050 (1916).

22. See W. PROSSER, TORTS § 96, at 642-43 (4th ed. 1971). As the text points out, the initial limitation to "a thing of danger" was rapidly eroded.

23. *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958).

24. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

25. W. PROSSER, *supra* note 22, § 97, at 654. Dean Prosser himself played no small part in the revolution. See Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

26. The death knell of the "warranty" explanation was sounded by Justice Traynor in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

27. As Dean Prosser, who was the reporter, noted, "[t]he change in the law was so rapid that the Section was actually drawn three times." W. PROSSER, *supra* note 22, § 98, at 657 n.51.

28. See M. HORWITZ, *supra* note 16, at 97-99.

29. W. PROSSER, *supra* note 22, § 97, at 651. Dean Prosser believed that another much urged consideration carried less weight, namely, "the the burden of accidental injuries caused by defective chattels should be placed upon the seller because he is best able to distribute the more or less inevitable losses to the general public by means of liability insurance, treated as a part of his costs, and included in his prices." *Id.* at 650. I am not so sure.

What is this other than the courts deciding a question of social policy through the adversary process?<sup>30</sup> Yet, although there were some outcries from outraged manufacturers, few people today are concerned about this venture in applying judicial views of social policy.

I have dwelt on these two instances of the courts applying their notions of social policy not only because they are interesting in themselves but also because of the calm with which they have been received, in contrast to the storm over judicial policymaking in other instances now to be considered, sheds some light on the problem under discussion. Refusal to enforce contracts that are contrary to public policy and the creation of products liability are entirely in the private sector.<sup>31</sup> The storm has arisen in the public sector and is particularly intense when courts resort to notions of social policy to set aside actions of other branches of government strongly supported by many citizens—notably invalidation of legislative or executive action on constitutional grounds and of administrative action pursuant to judicial review. The criticism is natural. If policymaking authority has been vested in another body, by what warrant does a court substitute its own contrary views? As was said by Professor Bickel: “All too many federal judges have been induced to view themselves as holding roving commissions as problem solvers, and as charged with a duty to act when majoritarian institutions do not.”<sup>32</sup>

In the constitutional area, however, there are important distinctions. Some provisions of the Bill of Rights invite the courts to develop and then to apply notions of social policy. Perhaps the plainest example is the cruel and unusual punishment clause of the eighth amendment. Nearly everyone agrees with Chief Justice War-

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30. Recognizing the problem created for him in *Henningsen* and its progeny, Professor Dworkin seeks to explain the new doctrine as the result of preexisting “principles.” DWORKIN, *supra* note 14, at 24, 27. But this merely moves the inquiry back to the question of where some of these principles come from and why they should be applied not only to manufacturers of automobiles but to all products manufacturers, although not to other persons. Dworkin answers that the “origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.” *Id.* at 40. But that sense of “appropriateness,” in my view, is nothing more or less than an opinion about policy, and whether mediately through the modulation of “principles” or immediately through direct influence, it was “policy” and not “principle” that caused the courts to shift the automobile manufacturer into the strict liability regime while leaving the automobile operator under the rule of negligence.

31. Sometimes the taking of a new direction in the private sector affects the wealth of only the first round of litigants. This was notably true of strict products liability. Once the doctrine was established, manufacturers simply marked up their prices to reflect the cost of insurance or self-insurance.

32. A. BICKEL, *supra* note 2, at 134.



ren's statement that the concept of cruelty is not static but must continually be reexamined in light of "the evolving standards of decency that mark the progress of a maturing society,"<sup>33</sup> although agreement as to exactly what those "evolving standards" are does not always exist.<sup>34</sup> Likewise, the first amendment necessarily takes the courts into areas of policy. With all respect to Justice Black, "shall make no law" does not mean, and could never have been thought to mean, "shall make no law." Congress must make laws that impinge on absolute freedom of speech and of the press in order to protect the nation against foreign danger and internal subversion. Congress and the state legislatures may also make such laws to prevent disorders, to protect individual reputations and to deal with false advertising and pornography. The question is not whether but to what extent freedom of speech will be curtailed, with the first amendment creating the need for an extremely strong justification. Here again, only a few criticize courts for making the policy decision, although many disagree with the results. When the framers adopted the fourth amendment with its first clause prohibiting "unreasonable searches and seizures," they inevitably required the courts to decide what was "unreasonable." Although the Supreme Court has narrowed the inquiry by partially reading the second clause of the amendment relating to warrants into the first clause, value judgments are still required. No one questions the process whereby the Court determines what is or is not unreasonable, even when there are sharp differences of opinion concerning the result. Rather, the debate has been over the Court engrafting on the amendment something that is not specifically there, the exclusionary rule.<sup>35</sup>

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33. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). See also *Robinson v. California*, 370 U.S. 660, 666 (1962). This had been anticipated by *Weems v. United States*, 217 U.S. 349, 373 (1910).

34. See *Furman v. Georgia*, 408 U.S. 238, 385-86 (1972) (Burger, C.J., dissenting); *id.* at 436-39 (Powell, J., dissenting) (discussing contemporary attitudes towards capital punishment).

35. See *Stone v. Powell*, 428 U.S. 465, 482-89 (1976); *id.* at 496-502 (Burger, C.J., concurring); *id.* at 509-15 (Brennan, J., dissenting); *United States v. Janis*, 428 U.S. 433, 443-46 (1976); *id.* at 460 (Brennan, J., dissenting); *United States v. Calandra*, 414 U.S. 338, 347-55 (1974); *id.* at 355 (Brennan, J., dissenting). Here, there is concern whether the Court may have been too easily convinced that "[i]f criminals go free when constables blunder, constables will blunder less." M. HORWITZ, *supra* note 6, at 220. It is not clear that this was in fact the rationale or in any event the sole rationale of *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961). The opinions can be read as resting also on the concept that exclusion is a part of the "rights" guaranteed by the fourth amendment or on the basis that courts should not be a party to a violation of the Constitution. However, Justice Clark, the author of the *Mapp* opinion, later came close to resting the exclusionary rule solely on its supposed deterrent effect in justifying the holding in *Linkletter v. Walker*,

I move now from these relatively tranquil waters to the two cases where the Court's reliance on arguments of social policy has stirred the highest waves of criticism. I apologize for a renewed discussion of decisions that have been written and talked about extensively, but they are familiar and important and, therefore, perhaps can teach us the most.

The first is *Brown v. Board of Education*, and more particularly the psychological footnote.<sup>36</sup> There seems to be general agreement that while *Brown* was a good—indeed, as it now seems, an inevitable—decision, the decision was not, for whatever reasons,<sup>37</sup> embodied in a good opinion. Judge Learned Hand was quick to point out that although *Brown* was generally thought to have overruled the “separate but equal” doctrine of *Plessy v. Ferguson*,<sup>38</sup> and in fact, ultimately led to that result, the opinion did not do so at all. Rather, *Plessy* “was distinguished because of the increased importance of education in the fifty-six years that had elapsed since it was decided.”<sup>39</sup> The reasoning was that: (1) education had become so important as to be “a right which must be made available to all on equal terms”; (2) the Kansas district court had “found” that “[s]egregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system . . . .”; and (3) the Court believed that “this finding is amply supported by modern authority.”<sup>40</sup> All of this led to the crucial statement that “[s]eparate educational facilities are inherently unequal,” and to the conclusion that the equal protection clause had thus been violated. Social policy entered the decision at two points—the Court's emphasis on the special importance of education and its determination that separate education was “inherently unequal.”

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381 U.S. 618, 636-37 (1965), that *Mapp* did not apply to convictions that had become final before it was decided. The Court now characterizes deterrence as the “prime purpose” of or “the primary justification” for the exclusionary rule. *United States v. Calandra*, 414 U.S. 338, 347 (1974); see *Stone v. Powell*, 428 U.S. 465, 482-89 (1976).

36. 347 U.S. 483, 494-95 & n.11 (1954).

37. It has often been suggested that the *Brown* opinion had to be written as it was in order to obtain the desired unanimity and avoid concurring opinions. While the account in R. KLUGER, *SIMPLE JUSTICE* 678-99 (1976), demonstrates that the Chief Justice had his problems in achieving this goal, it does not cast much light on why the opinion was written as it was (except for the inclusion of the final paragraph relating to the remedy, 347 U.S. at 495-96) or on the curious contrast between the opinion in *Brown* and that in the District of Columbia case, *Bolling v. Sharpe*, 347 U.S. 497 (1954).

38. 163 U.S. 537 (1896).

39. L. HAND, *supra* note 5, at 54.

40. 347 U.S. at 492-95.

If one looked only at the *Brown* opinion, it would be clear beyond peradventure that the decision was limited to public education. The opinion expressly stated the question to be "whether *Plessy v. Ferguson* should be held inapplicable to public education."<sup>41</sup> The entire discussion related to this specific area and the holding was that, because of the unique importance of public education, "the doctrine of 'separate but equal' has no place" in that field. The clear implication was that *Plessy* remained alive, although perhaps not entirely well, in other fields of lesser social importance and that an overruling of it in such fields would be done only by a fully explicated opinion, an opinion that would have been rather hard to write in light of the emphasis *Brown* placed on the unique importance of public education.<sup>42</sup>

We know now, as the Court seemingly must have known then, that such conclusions would have been wholly wrong. One needed to read only a few pages beyond the *Brown* opinion itself to find the Court, in *Bolling v. Sharpe*,<sup>43</sup> invalidating school segregation in the District of Columbia, not on the basis of the unique importance of education or the adverse psychological effect of segregated schools on black children, but because "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."<sup>44</sup> At the beginning of the very next term, the Court proceeded to render "a series of subsequent per curiam decisions invalidating state-imposed racial segregation in virtually all areas of life."<sup>45</sup> Hence, "[i]t is not surprising . . . that constitutional scholars . . . have been reluctant to believe that the Court relied to any great extent on the 'modern authorities' cited in its opinion"<sup>46</sup> or on the "facts" found by the Kansas district court,<sup>47</sup> and that these scholars have been busily engaged in rewriting the *Brown* opinion.<sup>47</sup>

Would not the Court have done better to decide *Brown* on the basis of a jural principle as it did in *Bolling*, rather than on the basis of supposed psychological facts? Several such bases could have been derived from the text and the history of the equal protection clause. The Court might have gone to the full extent of saying that any

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41. *Id.* at 492.

42. This is my reading of Professor Wechsler's criticism of the *Brown* opinion in his Holmes lecture, *supra* note 2, at 32-33, although some have construed it as going further.

43. 347 U.S. 497 (1954).

44. *Id.* at 499.

45. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 278 & n.17 (1972).

46. *Id.* at 279-80 & n.24.

47. For a summary of these efforts, see *id.* at 279-83 & nn.24, 30 & 31.

governmental classification based on race was a denial of equal protection.<sup>48</sup> It might have said, less broadly, that any racial classification imposed by a majority upon a minority constituted such a denial. It might have said, still less broadly and with a view to the particular evil that gave rise to the writing of the fourteenth amendment, that any racial classification imposed upon blacks violated the equal protection clause.<sup>49</sup> It might have said, as Professor Goodman has suggested,<sup>50</sup> that since a racial classification is constitutionally suspect, the state had the burden of showing that such classification did no harm, and the finding of the Kansas district court and the opinions of the psychologists were relevant, although not really necessary, to show how far the state had fallen short of discharging that burden. Finally, in light of the doctrine that has since developed, the Court could have said that any racial classification must be shown to be required by a compelling interest and that the state had not done so.

If the Court had taken any of these courses, it would not have been subject to the criticism that it was using psychological evidence of dubious validity,<sup>51</sup> at least on an across-the-board basis,<sup>52</sup> as the justification for substituting its factual judgment that "[s]eparate educational facilities are inherently unequal" for the legislature's factual judgments that they were not. Admittedly, the jural bases suggested above are not interchangeable; each would have had consequences different from the *Brown* opinion and from each other for such issues as the appropriate remedy for de jure segregation, what was to be done about de facto segregation and the constitutionality of reverse discrimination.<sup>53</sup> But the Court and the country would have been better off if the Court had placed the *Brown* decision on jural considerations which were clearly within its province as the interpreter of the Constitution and which would have yielded readier and more acceptable answers in future contro-

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48. See generally Wechsler, *supra* note 2, at 32.

49. This ground might have been too narrow to include the District of Columbia case which had to rest on the due process clause of the fifth amendment.

50. Goodman, *supra* note 45, at 282-83.

51. *Id.* at 279; Epps, *The Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality*, 39 LAW & CONTEMP. PROB. 300, 303-13 (1975).

52. Professor Wechsler questioned early whether "the finding in Topeka [was] applicable without more to Clarendon County, South Carolina, with 2,799 colored students and only 295 white." Wechsler, *supra* note 2, at 33. Certainly it is not self-evident that black children are benefited psychologically by being bussed to a distant predominantly white school where they may meet a blank or even a hostile reception.

53. All this is carefully developed in Professor Goodman's article, see *supra* note 45.

The foregoing, of course, was written several months before the decision in *Regents of the Univ. of Cal. v. Bakke*, 57 L. Ed. 750 (1978), which I have not attempted to reflect.

versies rather than on unestablished facts concerning segregation's psychological effects in public education.

If *Brown* could have been decided without the Court's plunging into the realm of social policy, it is not clear that this can be said of the abortion cases, *Roe v. Wade*<sup>54</sup> and *Doe v. Bolton*.<sup>55</sup> These decisions have alarmed not only those who dislike their result, but others who as citizens, applaud their basic accomplishment, yet as scholars cannot conscientiously defend the Court's having proceeded as it did.<sup>56</sup> The Court recognized a woman's desire to have an abortion not only as a "liberty" protected by the due process clause, a proposition with which almost everyone would agree, but also as a right so "fundamental" that the state may do nothing in the first trimester of pregnancy except require consultation with and performance of the abortion by a licensed physician, and even in the later periods of pregnancy is subject to strict limitations in controlling abortions.<sup>57</sup>

The considerations of social policy militating against both the strict Texas statute considered in *Roe* and the more modern Georgia statute considered in *Doe* were strong indeed. Justice Blackmun described these only partially when he wrote, in a passage that tends to be obscured by the mass of historical data, that:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>58</sup>

This, as I learned in preparing to hear an attack on the New York abortion statute which happily was repealed, was only part of the sad story. Prohibition of abortions had no more prevented them than prohibition of alcohol had prevented drinking. Whereas the

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54. 410 U.S. 113 (1973).

55. 410 U.S. 179 (1973).

56. See, e.g., A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 113-14 (1976); LUSKY, *BY WHAT RIGHT* 15-17, 100 (1976); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973).

57. *Roe v. Wade*, 410 U.S. 113, 154-55, 164-65 (1973).

58. *Id.* at 153.

latter produced bootleggers and speakeasies operating in defiance of the law, the former created illegal abortion mills. While well-to-do women could afford a high-class, high-priced abortionist who rarely was subjected to prosecution, a hospital surgical procedure ostensibly for some other cause, or a trip to a foreign country where abortions were permitted, these options were not open to the poor. The woman of scant means was relegated to the choice between undergoing, or undertaking, procedures threatening her health or even her life,<sup>59</sup> or carrying an unwanted child to term and rearing it thereafter, often alone. The problem had been aggravated by increased sexual permissiveness especially among teenagers; even the more liberal statutes afforded no help in most cases of voluntary intercourse, unless the girl was so young as to have been a victim of "statutory rape." As Justice Marshall was later to say in his eloquent dissent in *Beal v. Doe*, the abortion statutes "brutally coerce poor women to bear children whom society will scorn for every day of their lives."<sup>60</sup> Justice Blackmun must have been fully aware of all this, as witness the final paragraph of his subsequent dissent in *Beal*<sup>61</sup> where he condemns the majority for refusing to recognize the realities of poverty. A detailed presentation of these considerations of social policy would, to my mind, have furnished a much more persuasive basis for judicial innovation than the opinion's lengthy discussion of the Hippocratic Oath<sup>62</sup> and the abortion practices of the ancient world or debate concerning the precise moment when a fetus becomes a person.<sup>63</sup>

Ultimately, however, one must face the question of how a case of such overwhelming social import could be translated into a principle of constitutional law, particularly in the face of what we now know to be deeply felt contrary views.<sup>64</sup> While the opinion rather

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59. Emphasis on the serious injuries and deaths due to illegal abortions, which is only glancingly mentioned in *Roe, id.* at 150, would have been a useful complement to the comparison of the relative risks of legal abortion and normal childbirth on which the Court relied to answer the "protection of the life and health of the mother" argument. *See id.* at 149.

60. 432 U.S. 438, 456 (1977) (Marshall, J., dissenting).

61. *Id.* at 463 (Blackmun, J., dissenting). The point was also made in several amicus briefs in *Roe*.

62. *Roe v. Wade*, 410 U.S. 113, 130-32 (1973).

63. *Id.* at 159-62.

64. Some have doubted whether it is possible to find any acceptable articulable principle for the decision. *See Cox, supra* note 56, at 113-14. Still, the search for a principled rationale in *Roe* continues. A student commentator thought he found a possible approach in passages suggesting that the state lacks power to adopt "one theory" of life in light of the "wide divergence of thinking" on the subject. Note, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 145 n.41 (1977) (citing *Roe v. Wade*, 410 U.S. 113, 160-62). But one must ask why does a state lack power to decide this question when it can decide so many others where

convincingly demonstrated that during the first trimester the state's interest in the mother's health was an insufficient reason for prohibiting abortions, it provided no real answer to the argument that the state's interest in preserving the fetus was alone a sufficient justification for drastic limitation of abortions. The invocation of a "right of privacy" was not convincing. Not only is there nothing very private about an abortion, but the cases cited did not sustain the proposition for which they were relied upon.<sup>65</sup> Justice Brandeis' much-quoted reference to the "right to be let alone" in his *Olmstead* dissent<sup>66</sup> was in the context of a protest against wiretapping. As his law clerk of that term, I can provide direct evidence that the Justice was not thinking about abortions and had no idea that he was framing a general principle that would include them. The Court's earlier decisions protecting sexual liberty, although superficially more to the point, likewise afforded no real support. Surely there is a recognizable distinction between invading the body to compel sterilization and forbidding such an invasion for the purpose of abortion; moreover, even the decision striking down the sterilization provision in Oklahoma's Habitual Criminal Sterilization Act had been placed on grounds of equal protection rather than on the basis of due process.<sup>67</sup> The equal protection clause furnished ample basis for the decision invalidating Virginia's statute prohibiting marriages between blacks and whites,<sup>68</sup> although the Court also relied on due process as well. Moreover, that case presented no questions of state interest relating to the health of the mother and the life of the fetus. The Connecticut contraception statute had conveniently provided a real basis for invoking the right of privacy since it prohibited the use rather than the sale of contraceptives,<sup>69</sup> and thereby enabled the opinion writer to paint a lurid picture of policemen secreted in marital bedrooms. In addition, the Court's only statement with respect to the distribution of contraceptives had rested on grounds of equal protection, not due process.<sup>70</sup> Thus, there was no real precedential support for the abortion decisions, and it was a bit disingenuous to rest them on a recognized "right of privacy." Still, that does not

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thinking is equally divergent. See G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 651 (9th ed. 1975).

65. See the cases cited in *Roe v. Wade*, 410 U.S. 113, 152 (1973), which deal for the most part with issues of search and seizure and self-incrimination under the fourth and fifth amendments and issues discussed in the text accompanying notes 66-70 *infra*.

66. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

67. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

68. *Loving v. Virginia*, 388 U.S. 1 (1967).

69. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

70. *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

necessarily mean that they were wrong; indeed, I would like to believe that in their core—forbidding prohibition of abortions in the early months of pregnancy—they were right.

My problems with the decisions, in addition to the Court's failure to articulate a defensible principle, are two. One concern is the severity of the restrictions imposed on state abortion laws.<sup>71</sup> Why should it be impermissible for a state to insist that an abortion, even in the first trimester, should be performed by a gynecologist or obstetrician if one were available, rather than by any licensed physician? Why does the due process clause forbid a state from insisting that such an abortion be performed in a hospital, at least in the absence of evidence that the cost would result in unfair discrimination? Granted that most abortions in the early stages of pregnancy are relatively safe, why is it unconstitutional for a state to want to make them as safe as practicable? Why in the third trimester must the state allow an abortion if only the "health" rather than the life of the mother may be imperiled? Should not the Court, after announcing some basic principles, have allowed the states leeway, as is normally accorded, in applying these principles?<sup>72</sup> Was this not pressing social policy beyond anything demonstrated by the social data?

My other concern relates to the boundaries of the newly created constitutional right of personal autonomy—for it would be best to shed the "privacy" label and recognize that that is what it is. We now know, as we did not before the abortion cases, that a state may not require a pregnant woman to leave work too soon or return too late<sup>73</sup> and that a prohibition on the sale of contraceptives, as distinguished from a prohibition of their use, would violate due process.<sup>74</sup> We have just learned that the equal protection clause requires that any restrictions on the right to marry must be subjected to "rigorous scrutiny,"<sup>75</sup> the Supreme Court's euphemism for judicial invalidation of such restrictions. Two lower courts have recently held that the principle of the abortion cases invalidates regulations and legislation outlawing the use of laetrile.<sup>76</sup> The Supreme Court of New

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71. See *Roe v. Wade*, 410 U.S. 113, 163-66 (1973); *Doe v. Bolton*, 410 U.S. 179, 193-200 (1973).

72. Indeed, this is a field where much could have been learned in the "laboratories" of the states rather than through a uniform national solution mandated by the Court. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

73. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

74. See *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977).

75. *Zablocki v. Redhail*, 98 S. Ct. 673, 679 (1978).

76. *Rutherford v. United States*, 438 F. Supp. 1287 (W.D. Okla. 1977); *California v. Privitera*, 74 Cal. App. 3d 936, 141 Cal. Rptr. 764 (Ct. App., 4th Dist. 1977).



Jersey has recently decided that the right to privacy also includes the right of fornication.<sup>77</sup> Statutes making homosexual conduct and adultery crimes will surely be up for examination in the near future. And it will not end here.<sup>78</sup> Indeed, is there any end short of holding that the due process clause enacted John Stuart Mill's *On Liberty*?<sup>79</sup> As a citizen, I might agree that we could do without statutes such as those just mentioned, but where do the courts get the power to decide this?

In summary, I think that the Court's abortion opinions should have dealt more with the evils of today and less with history. I also think the decisions would have been more justifiable and would have been somewhat better accepted if they had been less severe and less detailed.<sup>80</sup> Finally, however unprincipled this may sound, I would have welcomed some language indicating that the decisions were limited to a social problem of the greatest moment and were not to be taken as announcing a set of rights to a liberty that had not been previously known.

However, the main lesson I wish to draw from the abortion cases relates to procedure—the use of social data offered by appellants and amici curiae for the first time in the Supreme Court itself. In the action attacking the former New York abortion statute, over which I presided, it was assumed from the outset that any social or medical facts or opinions on which the parties wished to rely, unless stipulated, should be offered in the three-judge district court and would be subject to cross-examination<sup>81</sup> or, where the author was not readily available, to rebuttal. In *Roe*, no evidence was offered at the hearing before the three-judge court except affidavits of two physicians that legal abortions were extremely safe and illegal abortions were exceedingly dangerous. In contrast, appellants' brief in the Supreme Court had a supplementary appendix characterized as being "offset reproductions of particularly relevant legal, medical

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77. *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977).

78. See G. GUNTHER, *supra* note 64, at 654-56; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 15-11, 15-14 (1978).

79. See P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 798 (1975). The reference, of course, is to Mill's statement:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of any of their number, is self-protection . . . . The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

Mill, *On Liberty*, in *ESSENTIAL WORKS OF JOHN STUART MILL* 263 (M. Lerner ed. 1965).

80. Few will disagree with Professor Cox that "neither historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe v. Wade* are part of either natural law or the Constitution." A. COX, *supra* note 56, at 114.

81. We were able to persuade the parties to do this by deposition.

and social science publications, all of which are in the public domain,"<sup>82</sup> and amici briefs favoring the appellants also contained extensive factual statements<sup>83</sup> of which the Court was asked to take judicial notice. So far as I have been able to determine, the "mass of data purporting to demonstrate that some facilities other than hospitals are entirely adequate to perform abortions," referred to in *Doe*,<sup>84</sup> was not before the trial court at all. The Court's conclusion in *Roe* that "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth"<sup>85</sup> rested entirely on materials not of record in the trial court, and that conclusion constituted the underpinning for the holding that the asserted interest of the state "in protecting the woman from an inherently hazardous procedure" during the first trimester did not exist.<sup>86</sup>

If an administrative agency, even in a rulemaking proceeding, had used similar materials without having given the parties a fair opportunity to criticize or controvert them at the hearing stage, reversal would have come swiftly and inexorably. It will not do to answer that the Court was merely following the illustrious example of the "Brandeis brief."<sup>87</sup> The Brandeis brief was used to show that legislation was rational since a respectable body of opinion upheld it. It thereby supported the presumption of constitutionality. The only factual issues concerning the materials brought before the Supreme Court in such a brief were whether they in fact existed, a circumstance almost never in dispute, and how far their authors possessed at least some competence, a fact that was rarely controverted. It is altogether different when such materials are used to show that legislation is irrational; in such a case, the materials not only must exist but must be right.<sup>88</sup> Experience has shown that economic, social, psychological and other technical studies can be seriously flawed by lack of a sufficiently large or representative sample, by other improper methodology, by drawing conclusions outrunning the empirical data and otherwise. I am not suggesting that the

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82. See Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1189-1201 (1975).

83. *Id.* at 1201-04.

84. *Doe v. Bolton*, 410 U.S. 179, 195 (1973).

85. *Roe v. Wade*, 410 U.S. 113, 149 (1973).

86. *Id.*

87. The name came from the innovative brief submitted by Louis D. Brandeis in *Muller v. Oregon*, 208 U.S. 412 (1908).

88. This distinction has been previously pointed out. See, e.g., Miller & Barron, *supra* note 82, at 1234-35 & n.121. I would reach the same conclusion in cases where strict scrutiny is applied. *But see* Goodman, *supra* note 45, at 282. A state's decision should not be invalidated simply because some experts *think* it is wrong.

articles relied on by the Court in *Roe* were in fact wrong, although one must wonder how well conclusions as to the safety of legal abortions during the first trimester correlate with the holding that the state may impose no safeguards during that period except that the woman must secure the blessing of and have the abortion performed by a licensed physician.<sup>89</sup> The Court should set an example of proper procedure and not follow a course which it would condemn if pursued by any other tribunal.

I do not wish to appear too severe. The Court was working against serious time pressures in the abortion cases. Nearly three years had passed between the date when the *Roe* action was filed and the date when it was decided after reargument. A remand for a further hearing would have required at least another year. Meanwhile, other cases on the subject were being decided differently by three-judge courts and state courts,<sup>90</sup> and many women were suffering from the delay. The ten months between argument and reargument had given the states time to answer the extra-record material if they had wished to do so. What is disturbing is the failure of the opinions even to advert to the procedural problem<sup>91</sup> and to lay down a better course to be followed in the future.

In saying that a fair opportunity must be afforded to controvert sociological, economic, psychological or scientific material offered to induce a court to hold a statute invalid, I do not mean that this must be done in a full-scale, trial-type hearing. The Federal Rules of Evidence do not restrict judicial notice of "legislative facts."<sup>92</sup> However, as Professor Kenneth Culp Davis has written, "the simplest common sense requires that when a judge is uncertain about needed

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89. 410 U.S. at 163-65. Although the former counsel to the Mayo Clinic surely does not regard physicians as fungible, these passages in the opinion, particularly the last, go to great pains to leave no room for doubt that any licensed physician will do. Earlier the opinion had recognized that the state's legitimate interest extended "to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise." *Id.* at 150. The opinion does not explain why the state may not insist on these interests in the first trimester. I have been told by physicians that although abortion during the early weeks of pregnancy is usually a safe and simple procedure, complications occasionally arise that are beyond the competence of those without special training in gynecology or obstetrics.

90. *Id.* at 154-55.

91. Only the concurring opinion of the Chief Justice in *Doe* mentioned this. He was "somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion" but did not "believe that the Court [had] exceeded the scope of judicial notice accepted in other contexts." *Id.* at 208. I agree that the materials would have been proper subjects of judicial notice if they had been offered at the trial level and the states had been afforded a fair opportunity to answer. But they were not.

92. FED. R. EVID. 201(a), Notes of Advisory Committee. See also K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 15.00-2 (1976).

legislative facts, he should let the advocates know what he contemplates and listen to—or read—what they have to say.”<sup>93</sup> My submission is only that if a court wishes to rely on evidence of the type illustrated by footnote eleven of *Brown* and footnote forty-four of *Roe* to invalidate legislation, it must give the state a fair opportunity to controvert this evidence. No such opportunity is afforded when the materials are first presented in brief to the Supreme Court because of the time and space constraints imposed by the Court’s rules with respect to briefs and argument. If the materials are essential to support invalidation of a statute, the only alternative to a remand or, when this would be more effective,<sup>94</sup> a reference to a master to hear and report, is to sustain the law without prejudice to another attack supported by a proper factual presentation. This would simply be saying that the particular challenger had not met his burden of proof.<sup>95</sup>

I had intended to say something about courts deciding issues of social policy in their review of administrative action but concluded that no extensive discussion was warranted. The instances where a court may properly substitute its judgment on social policy for that of the agency charged with responsibility, particularly in rulemaking, must be exceedingly rare. Unlike statutes that may reflect the mores of the remote past which the legislature might like to change if change were politically feasible, as has been asserted with respect to the death penalty and abortion statutes, administrative action brought to a court for immediate review reflects the current policy determination of an agency charged with the responsibility, presumably equipped with the expertise, and endowed with the staff and the information gathering procedures not possessed by any court. Moreover, at least in theory, the agency will alter a rule if experience should prove it to be unwise. An agency’s explicated policy choice, if procedurally sound and within the wide discretion permitted by its governing statute, should not be set aside as arbitrary or capricious simply because a court disagrees, even strongly. The tendency of some judges in such cases “to take charge of unruly

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93. K. DAVIS, *supra* note 92, § 15.00-3, at 364.

94. *E.g.*, when several cases have been consolidated or when the remand would be to an appellate court—a situation which the repeal of the three-judge court statute will make more frequent.

95. For a discussion of a similar problem in judicial review of rulemaking, see K. DAVIS, *supra* note 92, § 29.01-7, and cases cited therein. For a discussion of other procedural methods for the Supreme Court to deal with social and economic data, see Miller & Barron, *supra* note 82, at 1233-45. I would not favor the suggestion of the Court’s appointing a panel of resident social scientists, *see id.* at 1240-42, nor would I be sanguine that much could be accomplished by attempting to “upgrade” the Supreme Court bar, *id.* at 1242-43.

affairs and impose a solution that seems apt,"<sup>96</sup> because of a belief that they have been miraculously endowed with an omniscience denied those having direct responsibility, is to be greatly deplored. What may sometimes be useful in a doubtful case is for a court to require an agency to monitor its experience.

A final subject deserving mention is the elaborate affirmative decree. The prototype was the desegregation decree directed by *Brown II*,<sup>97</sup> at first in the South, later in the North. Some of the ire attracted by such decrees is due to the inherent ambiguities in the Supreme Court's initial decisions previously noted, which time has done little to resolve<sup>98</sup>—ambiguities that give opponents of almost any form of decree a solid basis for complaint. But, apart from this, the decrees have taken the courts into the lives of millions of people—people who have done no wrong and have no voice in shaping the decree—in a way not paralleled by anything that had gone before.<sup>99</sup> The problems encountered in the framing of school desegregation decrees will be repeated as the courts move into the area of integrated housing.<sup>100</sup> They have already surfaced in the drafting of decrees to remedy conditions in state mental hospitals<sup>101</sup> and prisons.<sup>102</sup> Apart from the difficulty in framing such decrees, the risk of confrontation between a court, generally a federal court, and a financially hard-pressed city or state is fearsome, although perhaps inescapable.<sup>103</sup>

The beginning of wisdom in performing this difficult task is for a court to recognize that its decree will "have all the qualities of social legislation"<sup>104</sup>—legislation which, to be sure, is confined by the basic decision of liability but as to which a wide range of possi-

96. A. BICKEL, *supra* note 2, at 105.

97. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

98. See Goodman, *supra* note 45; A. Cox, *supra* note 56, at 78.

99. See A. Cox, *supra* note 56, at 87.

100. See *Hills v. Gautreaux*, 425 U.S. 284 (1976).

101. *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), discussed in A. Cox, *supra* note 56, at 96-98. A companion case, *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), dealt similarly with a state institution for the mentally retarded. Both decisions were affirmed, as somewhat modified, in *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (Wisdom, J.).

102. For an example of the complex remedial problems that can arise in the prison context, see *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y.), supplemented, 377 F. Supp. 995 (S.D.N.Y.), affirmed in part, 507 F.2d 333 (2d Cir. 1974), on remand, 389 F. Supp. 964 (S.D.N.Y.), amended, 396 F. Supp. 1195 (S.D.N.Y.), aff'd, 527 F.2d 1041 (2d Cir. 1975), motion to modify denied, 432 F. Supp. 769 (S.D.N.Y. 1977). See also *Wolfish v. Levi*, Nos. 77-2035, 77-2135 (2d Cir. Jan. 24, 1978).

103. See Friendly, *The Federal Courts*, in *AMERICAN LAW: THE THIRD CENTURY* 197, 204-06 (B. Schwartz ed. 1976).

104. A. Cox, *supra* note 56, at 87.

bilities remains open. Having thus perceived its role, a court should follow models developed by other subordinate legislators. An invaluable tool is the notice and comment procedure provided for rule-making in the Administrative Procedure Act.<sup>105</sup> Notice and opportunity for comment should go well beyond the parties; it should include all who may be affected directly or indirectly by the proposed rulemaking. Indeed, the views of the parties, often being the most extreme, may be the least useful. The judge should be free to call for advice from persons who will not be affected at all; experience in other states or cities is likely to be more helpful than the programs of hired experts.<sup>106</sup> Meetings with committees may be more fruitful than formal hearings; a table and a pot of coffee are more likely to produce agreement than a witness stand and a typed transcript. Once the judge has formulated his ideas, he should get independent advice as to whether they will work as intended.<sup>107</sup> He should be certain to include in his decree provisions for continuous monitoring by a master or a magistrate.<sup>108</sup> Other devices have been discussed by Professor Abram Chayes.<sup>109</sup> Perhaps most important, a judge confronted with such a task must insist that he be given adequate time, both in the sense that he must not permit himself to be rushed and in the sense that he must be freed to some extent from other tasks. He should proceed with the caution appropriate in directing action by other branches of government and eschew undue detail; he can always order more extensive relief if this should be needed. Finally, the framer of the decree should indulge freely in the current fashion—prayer. If he has acted carefully and conscientiously, appellate judges should keep their hands off.

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105. 5 U.S.C. § 553 (1976). Professor Davis has called this "one of the greatest inventions of modern government." DAVIS, *supra* note 92, § 6.15, at 283 (Supp. 1970).

106. As has been written: "Unfortunately in many of these areas of social policy there is no clear knowledge of what the root of the problem is, though an expert can always be found who will oblige a judge with an appropriate program." Glazer, *Towards An Imperial Judiciary?*, 41 PUB. INTEREST 104, 118 (1975).

107. The judge might read with profit Horwitz's discussion, *supra* note 6, at ch. 4, of *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968); 269 F. Supp. 401 (1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), *further relief ordered*, 320 F. Supp. 409 (D.D.C. 1970); 320 F. Supp. 720 (D.D.C. 1970); 327 F. Supp. 844 (D.D.C. 1971).

Particularly enlightening is the discussion of how the District of Columbia school board complied with the direction to equalize per pupil teacher expenditures by moving special-subject teachers from the west-of-the-park to the east-of-the-park schools rather than by reallocating some of the higher cost and supposedly better teachers from the west-of-the-park schools as the judge had anticipated.

108. Such a provision might have brought many of the defects in the *Hobson* decrees, *supra* note 106, to light at a much earlier date.

109. Chayes, *supra* note 9, at 1296-1302. See generally Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

It is hoped that this *tour d'horizon*, truncated as it has had to be, will impart some validity to the propositions I announced so categorically at the outset. There is no need to panic because courts are now deciding questions of social policy; they have been doing this throughout the history of the common law. What gives concern is that courts are increasingly deciding such questions not just by overruling their own decisions or filling interstices, but differently from the way in which the questions had been decided by other branches of government having a greater claim to legitimacy. There must be a very strong affirmative showing of social policy before a court is justified in reading such policy into the broad words of the Constitution so as to invalidate legislative action. The *Brown* case has instructed us as to the inadvisability of placing such a decision on debatable grounds of social policy when traditional methods of constitutional interpretation are readily at hand. The abortion cases teach other lessons. A constitutional decision derived from the Justices' notions of good social policy will fare badly, not only with the professors but with the public, unless the public policy considerations are clearly stated and the decision embodied in some rational statement of principle. The decision should be confined to the limits truly supported by the policy. When a court relies on social science data as a basis for decision, it must employ fair procedures in using facts outside the record. It should exhibit a healthy skepticism towards the views of experts who claim ability to achieve a quick cure for ancient ills. Once liability has been determined and the court must frame an elaborate decree, it should realize that it is engaging in rulemaking and should operate as other rulemakers do and then keep close watch over what is going on.

This is a modest and debatable contribution to the large subject set for discussion. Full rights of reconsideration are reserved.