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THE USE OF SOCIAL POLICY IN JUDICIAL DECISION-MAKING

Richard A. Daynard†

The nature and extent of the use of social policy in judicial decision-making is interesting from several perspectives. One is that of the practicing lawyer, eager to know the grounds on which his cases will be decided so that he can argue them more effectively, and anxious lest sporadic judicial resort to amorphous social policies make the counseling of his clients more hazardous. A second perspective is that of the judge, wishing to decide cases "according to law," but uncertain whether the spirit of "sociological jurisprudence" embodied in such cases as *Brown v. Board of Education*¹ means that vaguely (or at least not authoritatively) defined social policies are part of the law that he must attempt to apply. Still another perspective is that of the social critic concerned with the responsiveness of the judiciary to demands for change not yet embodied in legislation.

In an effort to determine how much, and how, social policy is used in judicial decision-making, I have examined a sample of contemporary American judicial decisions consisting of 300 recent cases decided by three appellate courts. Classifying the cases by court, subject matter, the political sympathies of the author of the court's opinion, the political tendency of the result, and whether the decision engendered dissent among the panel deciding the case, I have measured the relationship of these factors to the decision-making method used. Where that relationship appears significant, I have reported and analyzed whether the social policy in question was supported by some authority, and have tried to assess qualitatively the significance that the reference to social policy appears to have had to the result reached.

I chose for study courts intermediate in the hierarchy between trial courts and the United States Supreme Court, in the hope that their decision-making techniques would represent a middle range between the fact-oriented and rule-bound approach typical at the trial court level and the more general and innovative approach presumably characteristic of the Supreme Court. By seeking to discover a middle range within the total spectrum of techniques used by the American judiciary, I hoped not only to cast light on the methods used by inter-

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¹ 347 U.S. 483 (1954).

mediate level courts but also to develop a criterion for judging distinctiveness of the methods used by courts at the extremes of the hierarchy.

In order to approximate a cross section of intermediate level courts, I chose three well-known courts with differing caseload compositions: the United States Courts of Appeals for the Second and the District of Columbia Circuits,² and the New York Court of Appeals. For each of these courts I selected at random³ 100 from among the most recent decisions for which complete reports were available.⁴

I

CLASSIFICATION OF DECISION-MAKING METHODS AND RESULTS

I distinguished six principal methods of decision-making in the cases studied, and classified them accordingly.

The first one, which I shall call the "particularistic," reaches a decision by reevaluating the trial court's determination of the facts or its exercise of discretion in deciding what remedy is appropriate on the facts. This method involves no serious questioning of the principles of law that the trial court purported to apply, nor does it involve any but the most brief consideration of the effects of the decision on future cases or out-of-court behavior. It merely entails the proper application of settled law to the facts (whatever the proper scope of the court's

² The caseload of the United States Court of Appeals for the District of Columbia Circuit is a hybrid between that of a typical court of appeals (primarily federal questions, federal crimes, and appeals from federal administrative agencies) and that of a typical state supreme court, in that 50% of its business involves non-federal civil actions and ordinary felonies originally tried in District of Columbia courts. The percentage breakdown of the caseload is computed from Tables B-1, B-3, and B-7 of the ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 176-89 (1968), which is based on appeals commenced and decided in the federal courts of appeals in fiscal year 1968.

³ The only exceptions are (1) I was careful not to select a disproportionate number of cases decided during any one month to avoid possible bunching of certain types of cases during particular seasons (e.g., criminal cases before the Second Circuit in the late spring); (2) in the case of the two federal courts I excluded opinions that merely stated the judgment (generally those dismissing the appeal for lack of jurisdiction, as opposed to affirming the court below); and (3) in the case of the New York Court of Appeals I omitted its "memoranda," which give a very sketchy statement of facts, proceedings below, and arguments before the Court of Appeals, followed only by a statement of the result and occasionally the citation of a case or two to justify it.

⁴ For the Second Circuit I drew from the decisions for February 1968 through January 1969; for the District of Columbia Circuit I drew from the cases decided between May 1967 and May 1968; and for the New York Court of Appeals I drew from the cases decided November 1967 through July 1968.

reviewing powers on such "questions of fact"), or else the question whether the trial court "abused its discretion" on a matter committed to the trial court in the first instance.

The second method, the "statutory" one, is most concerned with what is proper interpretation of a particular statute, constitutional provision, treaty, administrative regulation, or rule of court. The court treats this question as determinative and as decidable either on the basis of the "plain meaning" of the words of the statute (or "quasi-statutory" authority), combined with the accepted maxims for interpreting ambiguous language with the aid of other provisions of the enactment, or on the basis of these plus the "legislative history" of the provision.⁵

The third, or "precedential," method involves working out the implications of previous authoritative decisions that may arguably be controlling in the case at hand under the doctrine of *stare decisis*. Included in this category are opinions distinguishing the instant case from the existing precedents as well as opinions stating either that the court is bound to follow the asserted precedents or that it can see no strong reason not to follow them, and hence will.

The fourth method, which Llewellyn calls the "Grand Style,"⁶ is similar to the statutory and precedential methods to the extent that it plays down its innovative nature by stressing continuity with the past, but differs sharply from them in admitting that the authorities (chiefly statutes and cases in related areas) that it cites as the roots of the present decision are merely persuasive and indicative of the "spirit" or trend of the law. A celebrated example of this method is Judge Cardozo's opinion in *MacPherson v. Buick Motor Co.*,⁷ where the precedents were analyzed to show that the reasoning implicit within them, though not necessarily their language, permitted and suggested the result reached, lower court cases were cited as helping to show the trend of judicial thought, and analogies to different but related areas of the law were drawn. The court claimed to be faithful not only to the canons of judicial craftsmanship but to the essence of the prior substantive law as well: "The principle that the danger must be imminent does not change, but the things subject to the principle do change.

⁵ This method does not extend, however, to cases where the court, though deciding a statutory cause of action or defense, reaches its decision by working out the implications of a previous decision authoritatively interpreting the statute, rather than by going directly to the statute itself or the purposes behind it; such cases are classified under the "precedential" method.

⁶ K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 35-45 (1960).

⁷ 217 N.Y. 382, 111 N.E. 1050 (1916).

They are whatever the needs of life in a developing civilization require them to be."⁸ As Llewellyn describes the Grand Style:

It is a way of on-going renovation of doctrine, but touch with the past is too close, the mood is too craft-conscious, the need for the clean line is too great, for the renovation to smell of revolution or, indeed, of campaigning reform.⁹

This method is similar to the "social policy derived" method, discussed below, in that it frequently supports its conclusion—that the "principle" of the authorities cited points in the direction taken—with a careful analysis of the consequences for future cases and out-of-court behavior, as well as for the litigants at bar, of a decision either way. Thus, Chief Justice Warren argued in *Brown* that separating Negro children attending public schools "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹⁰ The Grand Style differs from the social policy methods, however, in that the court does not explicitly look for its value premises beyond cases, statutes (and their histories), the norm of rationality, and the (presumably permanent) meaning of justice—that is, beyond the corpus of pre-existing substantive law and the accepted techniques of explicating, harmonizing, and applying it. Although a decision in the Grand Style occasionally speaks of "policy," it uses the term only to refer to the consequences of authoritatively binding decisions reached at an earlier time by political and legal processes.¹¹

Only the fifth and sixth methods—the two social policy methods—involve the explicit insertion of new principles into the corpus of pre-existing substantive law. The fifth, or "social policy asserted," method begins reasoning with a statement of the relevant social policy, proceeding from there to draw the implications for the case at hand. The sixth method, "social policy derived," justifies its use of a particular social policy by locating that policy in government spending programs, statements of government officials, comments of social critics, and other facts and documents that arguably indicate the content of the existing

⁸ *Id.* at 391, 111 N.E. at 1053.

⁹ K. LLEWELLYN, *supra* note 6, at 36.

¹⁰ 347 U.S. at 494.

¹¹ The provisions of the statutes and ordinances of this State requiring competitive bidding in the letting of public contracts evince a strong public policy of fostering honest competition in order to obtain the best work or supplies at the lowest possible price.

Jered Contracting Corp. v. New York City Transit Authority, 22 N.Y.2d 187, 192-93, 239 N.E.2d 197, 200, 292 N.Y.S.2d 98, 102 (1968).

or developing local or national consensus as to the meaning of justice and the direction of needed social change. Thus, although the *Brown* case is in part an example of the social policy derived method, this is not because of its citation to social science material in its famous footnote 11,¹² which was used merely to help demonstrate the *fact* that "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal education opportunities . . ."¹³ Rather, social policy considerations of "the importance of education to our democratic society"¹⁴ were introduced to justify establishing the *norm* of "equal education opportunity" as a specification of the admittedly ambiguous constitutional mandate that citizens shall not be denied "the equal protection of the laws."¹⁵

As to the political tendency of the result, I classified a case as "liberal" if the court could with some substantial justification have come out the other way, *and* if the decision broadened the rights of criminal defendants, gave a relatively expansive interpretation to provisions of the Bill of Rights, preferred the interests of employees, whether individually or collectively, to those of employers, helped plaintiffs in personal injury actions, favored consumers over business, or, in general, the relatively helpless over the relatively powerful. Conversely, I classified a case as "conservative" if it leaned in the opposite direction along any of these dimensions, again provided that a decision the other way could have been reached with some substantial justification.

II

COMPARISON OF DECISION-MAKING STYLES

The breakdown in Table I for the three courts combined shows that somewhat more than half of the cases were decided on the basis of authority, statutory (including quasi-statutory) or precedential. This does not mean that in many of these cases a plausible argument from

¹² 347 U.S. at 494-95 n.11.

¹³ *Id.* at 493. See Cahn, *Jurisprudence*, 30 N.Y.U.L. Rev. 150 (1955).

¹⁴ 347 U.S. at 493.

¹⁵ Where an opinion made substantial use of two or more of these methods, I classified the case under whichever of the methods was used by the court in resolving what it considered to be the most critical non-factual issue in the case, and where two or more methods were used in resolving that issue, I chose the one that first appears in the following list: social policy derived, social policy asserted, Grand Style, statutory, precedential, particularistic.

TABLE 1
USE OF DIFFERENT METHODS BY COURTS

| Court | Particularistic | Statutory | Precedential | Grand Style | Social Policy Asserted | Social Policy Derived | Total |
|------------------------------|-----------------|------------|--------------|-------------|------------------------|-----------------------|-----------|
| District of Columbia Circuit | 29% | 25% | 21% | 20% | 2% | 3% | 100%(100) |
| Second Circuit | 26 | 23 | 34 | 17 | 0 | 0 | 100 (100) |
| New York Court of Appeals | 16 | 19 | 42 | 17 | 1 | 5 | 100 (100) |
| Combined | 24 (71) | 22 (67) | 32 (97) | 18 (54) | 1 (3) | 3 (8) | 100 (300) |

authority could not have been developed for the opposite result, but merely that the court claimed to be reasoning from premises authoritatively established by sources cited in the opinion. Another quarter of the cases were decided on a highly particularistic basis. Most of the remainder were decisions in the Grand Style. Only four percent of the cases were decided by reference to social policy, asserted or derived.

The statistical breakdown by courts suggests significant differences among them in characteristic decision-making techniques. The much lower frequency of the particularistic method in the New York court than in the two federal courts may be explained on two grounds. First, the scope of review of factual questions allowed the court is greatly limited by statute: full review of such questions is authorized only at the intermediate appellate level.¹⁶ Second, the New York court may control its docket by refusing permission for a party to appeal where appeal is not of right. This enables the court to select for full consideration those cases that promise to raise questions of law whose resolution will provide guidance to the lower courts in future cases and to other officials and private citizens in future out-of-court conduct; if after full consideration the case seems quite obvious on either the facts or the law, the court can deal with it in a memorandum. The federal courts, on the other hand, must hear appeals from all "final orders" in the district courts below.¹⁷

The New York court is, again, significantly below the federal courts in its use of the statutory method. This can to some extent be

¹⁶ N.Y. CIV. PRAC. LAW §§ 5501(b)-(c) (McKinney 1963).

¹⁷ The difference may also be to some extent a result of my method of choosing cases, wherein the memorandum opinions of the New York court were excluded but the short per curiam opinions of the federal courts were not. But this would not account for the entire difference, since cases dealt with by memoranda are generally analogous to the cases that the federal courts would have affirmed from the bench, a procedure that results in no opinion at all and hence prevented such cases from coming within my study.

accounted for by the New York court's handling of very few labor cases (only two in this sample, as opposed to an average of 13.5 for the federal courts) or securities cases (none here, as opposed to an average of 4.5 for the other courts); since each of these areas is pervaded by comprehensive statutory schema, an unusually high percentage of these cases (34% and 33% respectively) are decided by the statutory method.

At first glance the higher incidence of the precedential method in the New York Court of Appeals than in either of the federal courts seems explainable by the New York court's active engagement in the exposition and development of the common law, and hence its readiness to permit appeals primarily involving questions of the applicability of common law precedents. The federal courts, on the other hand, decide questions of common law only in diversity cases, which constitute a small fraction of federal appeals, and in the much rarer cases of "federal common law." But, although the New York court is more concerned with traditional common law areas than the two federal courts,¹⁸ it actually applied the precedential method less frequently, and the statutory method more frequently, in these areas than in others. Moreover, further statistical analysis shows that the District of Columbia Circuit's extraordinarily infrequent use of the precedential method cannot be accounted for by any hypothesis of differential caseload composition.

TABLE 2
USE OF DIFFERENT METHODS BY POLITICAL TENDENCY OF RESULTS

| Political Tendency | Particularistic | Statutory | Precedential | Grand Style | Social Policy Asserted | Social Policy Derived | Total ¹⁹ |
|-------------------------------|-----------------|-----------|--------------|-------------|------------------------|-----------------------|---------------------|
| Neutral | 28% (58) | 24% (50) | 31% (66) | 16% (33) | 0% (1) | 1% (2) | 100% (210) |
| Conservative | 6 (1) | 12 (2) | 59 (10) | 18 (3) | 0 (0) | 6 (1) | 101 (17) |
| Liberal | 16 (12) | 21 (15) | 29 (21) | 25 (18) | 3 (2) | 7 (5) | 101 (73) |
| Net Liberalness ²⁰ | .15(71) | .19(67) | .11(97) | .28(54) | .67(3) | .50(8) | .19(300) |

Another attractive hypothesis to explain the low District of Columbia Circuit and high New York court utilization of the precedential method is suggested by Table 2. Since the precedential method has a

¹⁸ In the sample taken, 30 of the New York cases were in the traditional common law areas—contracts, torts, property, estates and trusts, and family law—whereas only nine of the Second Circuit cases were in these areas; the District of Columbia Circuit, a hybrid between a common law court and a standard federal court, appropriately comes just in between, with 19 of its cases sampled falling in these areas.

¹⁹ Differences from 100% are due to rounding.

²⁰ Computed by dividing the difference between the number of liberal-tending and the number of conservative-tending cases decided using the method, by the total number of cases decided using the method; the latter number is given in parentheses.

TABLE 3
POLITICAL TENDENCY OF RESULTS BY COURTS

| Court | Neutral | Conservative | Liberal | Net Liberalness |
|------------------------------|-----------|--------------|----------|-----------------|
| District of Columbia Circuit | 55% (55) | 11% (11) | 34% (84) | .23 (100) |
| Second Circuit | 78 (78) | 1 (1) | 21 (21) | .20 (100) |
| New York Court of Appeals | 77 (77) | 5 (5) | 18 (18) | .13 (100) |
| Average | 70 (210) | 6 (17) | 24 (73) | .19 (300) |

net liberalness of .11, or fifty-eight percent of that sample as a whole (.19), perhaps the different use of the method by the three courts is a reflection of differences in the liberalness of their members. This hypothesis seems plausible, since a liberal judge eager to change the law in favor of the relatively powerless would not want to follow precedents, which generally support the existing balance of power, any more than necessary whereas a more conservative judge might well content himself with the legitimacy provided by the precedential method. Indeed, Table 3 seems to confirm this hypothesis, since the ranking of the three courts on the basis of the percentage of their decisions that were in a liberal direction is the inverse of their ranking on the basis of their use of the precedential method (Table 1). But this hypothesis is not borne out, either. Of the thirty-four liberal District of Columbia Circuit decisions, seven (or 21%) used the precedential method, whereas only fourteen (again 21%) of the sixty-six non-liberal opinions used that method.

Yet the low liberalness of the technique might conceivably account for its popularity among the judges of the relatively conservative New York Court of Appeals. To test that hypothesis I ranked the judges in order of net liberalness, based both on the opinions they wrote for the court and on their dissents (Table 4). In the order of decreasing net liberalness (with their percentage use of the precedential method in parentheses) they were Fuld (42%), Bergan (38%), Van Voorhis (67%), Burke (33%), Keating (48%), Breitel (40%), Scileppi (50%), and Jasen (28%), where forty-two percent (Table 1) was the average use of the method for the court as a whole. Contrary to the hypothesis, the judges of the New York court do not make increasing use of the precedential method with decreasing net liberalness. Similar results were reached for the Second Circuit and, importantly, for the highly polarized District of Columbia Circuit, as can be seen in Table 4. Hence, although Table 2 demonstrates that in terms of the results it

TABLE 4
LIBERALISM AND USE OF DIFFERENT METHODS BY JUDGES

| (Court) Judge ²¹ | Net Liberal- ness ²² | Particu- laristic | Statutory | Prece- dential | Grand Style | Social Policy Asserted | Social Policy Derived | Total ²³ |
|---|---------------------------------------|----------------------|-----------|-------------------|----------------|------------------------------|-----------------------------|---------------------|
| <i>(District of Columbia Circuit)</i> | | | | | | | | |
| Bazelon | .66(6) | 50% | 0% | 25% | 25% | 0% | 0% | 100%(4) |
| Wright | .66(9) | 0 | 50 | 17 | 17 | 0 | 17 | 101 (6) |
| McGowan | .50(8) | 13 | 63 | 13 | 13 | 0 | 0 | 102 (8) |
| Leventhal | .48(13) | 25 | 25 | 17 | 17 | 8 | 8 | 100 (12) |
| Burger | — .33(18) | 11 | 22 | 0 | 67 | 0 | 0 | 100 (9) |
| Danaher | — .40(10) | 40 | 10 | 50 | 0 | 0 | 0 | 100 (10) |
| Tamm | — .45(11) | 14 | 28 | 14 | 14 | 14 | 14 | 98 (7) |
| <i>(Second Circuit)</i> | | | | | | | | |
| Smith | .42(7) | 28% | 43% | 14% | 14% | 0% | 0% | 99%(7) |
| Feinberg | .40(10) | 10 | 20 | 40 | 30 | 0 | 0 | 100 (10) |
| Kaufman | .33(9) | 0 | 22 | 44 | 33 | 0 | 0 | 99 (9) |
| Anderson | .11(9) | 25 | 25 | 25 | 25 | 0 | 0 | 100 (8) |
| Waterman | .08(12) | 17 | 42 | 33 | 8 | 0 | 0 | 100 (12) |
| Friendly | .00(11) | 10 | 10 | 20 | 60 | 0 | 0 | 100 (10) |
| Hays | — .20(10) | 13 | 38 | 50 | 0 | 0 | 0 | 101 (8) |
| Lumbard | — .22(9) | 33 | 17 | 50 | 0 | 0 | 0 | 100 (6) |
| Moore | — .33(6) | 25 | 25 | 50 | 0 | 0 | 0 | 100 (4) |
| <i>(New York Court of Appeals)</i> | | | | | | | | |
| Fuld | .40(20) | 0% | 16% | 42% | 26% | 0% | 16% | 100%(19) |
| Bergan | .18(11) | 50 | 13 | 38 | 0 | 0 | 0 | 101 (8) |
| Van Voorhis | .14(7) | 17 | 17 | 67 | 0 | 0 | 0 | 101 (6) |
| Burke | .07(12) | 33 | 33 | 33 | 0 | 0 | 0 | 99 (9) |
| Keating | .00(27) | 12 | 16 | 48 | 16 | 0 | 8 | 100 (25) |
| Breitell | — .12(17) | 13 | 13 | 40 | 33 | 0 | 0 | 99 (15) |
| Sclieppi | — .17(12) | 20 | 20 | 50 | 10 | 0 | 0 | 100 (10) |
| Jasen | — .22(9) | 14 | 43 | 28 | 14 | 0 | 0 | 99 (7) |

yields, the precedential method is quite conservative, it appears to be neither the *bête noire* of liberal judges nor the standard technique of conservative ones.²⁴

²¹ The judges of each court are listed in order of decreasing net liberalness, except for Judge Robinson of the District of Columbia Circuit who is not included in the list since only one of his opinions was sampled.

²² A judge's "net liberalness" was computed by taking the sum of the liberal cases for which he wrote the opinion for the court plus the conservative cases in which he wrote a dissent, subtracting from that the sum of conservative cases in which he wrote the opinion for the court plus the liberal cases in which he wrote a dissent, and dividing this difference by the sum (given in parentheses) of the total number of cases in which he wrote the opinion for the court plus the number of liberal and conservative cases in which he wrote a dissent. Concurring opinions were not included in the formula; the tendency of concurrences to focus only on areas of disagreement with the majority precluded accurate categorization.

Since net liberalness is derived solely from the written opinions of each judge, and *votes* unsupported by opinion are excluded, this factor should not be taken as necessarily indicative of a judge's actual political tendency.

²³ Differences from 100% are due to rounding. The total number of cases in which a judge wrote the opinion of the court is given in parentheses.

²⁴ The District of Columbia Circuit's infrequent use of the precedential method may

Since the incidence of the precedential method differs sharply between the New York court and the two federal courts, but is a function of neither the type of case involved nor the liberalness of the author of the court's opinion, we appear to be left with the hypothesis that the difference in court is itself the cause of the difference in the characteristic techniques used by its members. That is, it may reasonably be inferred that the three courts have developed distinctive styles of decision-making within the broader range of styles considered permissible in American jurisprudence.²⁵

III

THE "SOCIAL POLICY" CASES

A. *Social Policy Asserted*

*Red Lion Broadcasting Co. v. FCC*²⁶ presented the first court challenge to the constitutionality of the FCC's "fairness doctrine." The action challenged a radio station's refusal to comply with the Commission's requirement that one personally attacked in a program broadcast by that station be given free air time to respond to the charges made against him.²⁷ After discussing at great length the history of the fairness doctrine in the Commission and in Congress, and concluding that the doctrine had been promulgated and applied by the Commission under authority properly delegated to it by Congress, Judge Tamm reviewed cases establishing the principle that "regulatory action by the Commission . . . does not per se violate the first amendment."²⁸ He

result from the sharp polarization of that court (Table 4). This polarization has engendered a high rate of dissent, making it perilous for a judge to rely on the precedential method to justify his decision since the dissent is likely to argue that other authorities or social policy make precedent an unreasonably narrow basis for decision. This hypothesis is supported to the extent that the dissent rate in the cases examined (25%) is twice that of the Second Circuit (12%); moreover, the Second Circuit uses the precedential method almost twice as frequently as the District of Columbia Circuit. But the New York court, which has a 44% dissent rate, has the highest (rather than lowest) rate of use of the precedential method.

²⁵ The approximately equal utilization of the Grand Style by the three courts, and its use in one-sixth to one-fifth of the cases, indicate that after a long period of almost total eclipse by the "Formal Style" in the last half of the nineteenth century and the beginning of the twentieth, this method has become firmly established in American jurisprudence as a very important decision-making technique. K. LLEWELLYN, *supra* note 6. The possible effects of this, and of other methods, on the responsiveness of courts in making legal changes that correspond to widely felt needs for social change will be considered in the following section.

²⁶ 381 F.2d 908 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

²⁷ FCC, *Applicability of the Fairness Doctrine in the Handling of Issues of Public Importance*, 29 Fed. Reg. 10415, 10420-21 (1964).

²⁸ 381 F.2d at 923.

stated for the court that there was no first amendment violation in this application of the Commission's fairness doctrine.

In keeping with the public interest, I agree with the Commission that:

"It would be inconsistent . . . to assert that, while it is the purpose of the act to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless persons who are granted limited rights to be licensees of radio stations, upon a finding under . . . [the] act that the public interest, convenience, or necessity would be served thereby, *may themselves make radio unavailable as a medium of free speech.*"²⁹

Judge Tamm was apparently asserting that "the public interest" which is served by the requirement of free time for a reply to a personal attack is more important than the traditional free speech right to decide which expressions one will or will not propagate, a right Judge Tamm assumed was available to broadcasters.³⁰ Respectable arguments against this assertion, which the Supreme Court took quite seriously on review,³¹ maintained that the person attacked had access to other media in which to respond, and that the rule tends to discourage stations from broadcasting important controversial material by increasing the cost of doing so. Although Judge Tamm could have made strong arguments for the public interest in discouraging irresponsible personal attacks and in permitting persons publicly attacked the broadest possible audience for their attempt to defend their reputations, what is significant in terms of styles of judicial reasoning is that he did not do so, but contented himself with an assertion of what the public interest was, supported only by a passage begging the relevant questions.

In *Pea v. United States*,³² the full District of Columbia Circuit held that "a judicial determination that a confession is admissible cannot be made unless the judge is satisfied beyond a reasonable doubt that the confession was voluntary,"³³ thereby overruling *Clifton v. United States*,³⁴ which held in part that the trial judge need merely be

²⁹ *Id.* at 924, quoting Report of the Commission in the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1248 (1949) (emphasis in original).

³⁰ The Supreme Court, in affirming the decision, cast considerable doubt on this assumption. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390-92 (1969).

³¹ *See id.* at 392-95. It is apparent that Judge Tamm was aware of these arguments since they were discussed in the letter of Red Lion Broadcasting Company to the Commission and in the Commission's reply, both of which were set out in his opinion. 381 F.2d at 913-17.

³² 397 F.2d 627 (D.C. Cir. 1967).

³³ *Id.* at 637 (footnote omitted).

³⁴ 371 F.2d 354 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 995 (1967).

"satisfied" that the confession is voluntary. Judge Leventhal referred to his concurring opinion in *Clifton* and to two decisions from other courts for "the reasons which support our adoption of this rule," and confined himself in *Pea* to arguing that although this rule departed from the normal reluctance of appellate courts to impose "upon trial judges the burden of applying quantitative standards in determining whether proffered evidence is admissible," there was precedent from other courts requiring trial judges "to determine voluntariness of a confession beyond a reasonable doubt as a necessary aspect of determining admissibility in evidence."³⁵ The court believed that the stricter rule was "a sound implementation of the public interest in preventing involuntary confessions from playing any part in a jury's determination of guilt."³⁶

Without the aid of the *Clifton* concurrence we have no explanation of why the public interest requires the court to take extraordinary measures to prevent involuntary confessions from playing *any* part in a jury's determination of guilt. Nor is that conclusion obvious, particularly in view of Judge Burger's opinions for the majority in *Clifton* and for the three dissenters in *Pea*, in which he argued in effect that the constitutional establishment of the jury system at least creates a presumption that the jury is capable of assessing the voluntariness of a confession as well as any other fact, and that experience under the former rule had not indicated that the jury could not be entrusted with that role.³⁷ The *Clifton* concurrence adds the considerations that the determination of voluntariness "relates to a matter which is usually the key item in the proof of guilt, and certainly one of overpowering weight with the jury."³⁸ This argument assumes that someone in the place of a juror could not be expected to follow the instruction to ignore a confession if he concluded it was involuntary. Perhaps, given that a legally "involuntary" confession may be a highly probative one (as apparently was the confession in *Pea* itself), this conclusion is correct. Or perhaps the "public interest" that justifies this rule is an interest in completely discouraging police from attempting to coerce confessions. But even in *Clifton* Judge Leventhal did not explain, much less justify, these assumptions, and certainly the mere allusion to the "public interest" in *Pea* does nothing to inform us why Judge Burger, who obviously saw no such interest, was mistaken.

³⁵ 397 F.2d at 638 (footnote omitted).

³⁶ *Id.* (footnote omitted).

³⁷ 371 F.2d at 357-58; 397 F.2d at 638-40.

³⁸ 371 F.2d at 362.

In *Weicker v. Weicker*,³⁹ plaintiff, whose husband had obtained a unilateral Mexican divorce from her and subsequently remarried, was suing him and his new "wife" for (1) compensatory and punitive damages for the intentional or reckless infliction of mental suffering, and (2) injunctive relief restraining both defendants from holding themselves out as husband and wife and restraining defendant "wife" from assuming or using defendant husband's name. The New York Court of Appeals asserted, per curiam, that:

Assuming that New York law now permits "recovery for the intentional infliction of mental distress without proof of the breach of any duty other than the duty to refrain from inflicting it" . . . , strong policy considerations militate against judicially applying these recent developments in this area of the law to the factual context of a dispute arising out of matrimonial differences. To sustain the claim for damages would result in a revival of evils not unlike those which prompted the Legislature in 1935 to outlaw actions for alienation of affections and criminal conversation⁴⁰

The court held that these policy reasons, as well as practical limitations on the ability of equity to enforce such decrees, barred the request for injunctive relief.

Although the practical limitations alluded to are clear, the "evils" in question, and hence the "strong policy considerations," are not, nor are they discussed anywhere else in this one-page opinion, nor is reference made to where a discussion of them might be found. Perhaps what was thought evil about the actions outlawed in 1935 was that they caused people the acute embarrassment of having their most personal relations discussed in court when this was not justified by the need to ascertain facts on which a divorce or separation might be granted, but was merely for the purpose of awarding nominal damages to a vindictive spouse. The plaintiff here, however, whose husband was apparently not only living openly with another woman but, by living with her under color of divorce from plaintiff, was also denying plaintiff's status as a wife, may have had a much stronger claim for judicial relief. On the other hand, the court may have used the phrase "evils not unlike those which prompted the Legislature" to suggest that there may be additional, if somewhat different, evils involved in allowing such an action. They might have believed that if defendants had set themselves up as husband and wife under color of a divorce (however illegal), and perhaps had had children, the best policy was to leave

³⁹ 22 N.Y.2d 8, 237 N.E.2d 876, 290 N.Y.S.2d 732 (1968).

⁴⁰ *Id.* at 11, 237 N.E.2d at 876-77, 290 N.Y.S.2d at 733-34, quoting *Halio v. Lurie*, 15 App. Div. 2d 62, 66, 222 N.Y.S.2d 759, 763 (2d Dep't 1961).

them alone and to limit the wife's rights to her claim for support. But this comes very close to condoning "easy" divorces or even bigamy, which surely would not correspond to the legislatively established policy of the state. Perhaps this is why the court contented itself with vague references to "strong policy considerations."

My criticism of *Red Lion*, *Pea* and *Weicker* does not stem from disagreement with the results reached. On the contrary, agreeing with these results and convinced that justifications for them can be found in the needs of American society as they are generally perceived today, I was struck by the paucity of reasoning that the opinions brought to bear on their behalf. Perhaps the explanation is that the court in each instance was faced with a situation in which a thorough examination of the relevant authorities would have revealed a substantial body of legal doctrine that seemed to go in the other direction—in *Red Lion*, the first amendment, in *Pea*, the notion that in a jury trial the judge should have no occasion to apply a "reasonable doubt" standard, and in *Weicker*, the divorce and bigamy laws. Lacking the resources to confront those doctrines squarely and demonstrate why they were not controlling in the case at hand, the courts slighted both the doctrines and the reasons for distinguishing them by settling for conclusory statements that the "public interest" or "strong policy considerations" dictated the results.

B. *Social Policy Derived*

*Hardy v. United States*⁴¹ involved a collateral attack, under a federal statute, on a narcotics conviction that had been affirmed on appeal,⁴² but prior to another decision of the court setting standards for what constitutes an unreasonable delay in making an arrest.⁴³ These standards, if applied to Hardy and his fellow appellant, might arguably have required that they be granted a new trial. Judge Tamm wrote an opinion which, citing many cases, held "that issues disposed of on appeal from the original judgment of conviction will not be reviewed again under [the federal provision]."⁴⁴ Then, responding to Chief Judge Bazelon's dissent on this point (which was concurred in by Judge Fahy), Judge Tamm briefly discussed the case on the merits and

⁴¹ 381 F.2d 941 (D.C. Cir. 1967). In *Hardy*, relief was sought under 28 U.S.C. § 2255 (1964).

⁴² *Hardy v. United States*, 343 F.2d 233 (D.C. Cir. 1964), cert. denied, 380 U.S. 984 (1966).

⁴³ *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965). In *Ross*, the court explicitly distinguished *Hardy*. *Id.* at 215.

⁴⁴ 381 F.2d at 943.

concluded that "the jury's on-the-scene evaluation of the credibility of the police officer and the informer"⁴⁵ should be determinative. Finally, perhaps in an effort to persuade Judge Fahy to concur in the result—affirming the denial of relief—despite his disagreement on the merits, Judge Tamm argued:

Were this panel to ignore all judicial precedent and overrule not one but two prior panels of the court, it would, in effect, be by judicial fiat extending the ever-lengthening processes which constitute Perpetual Appeals. It is popular now to publicly decry the huge backlog of criminal cases awaiting trial in our District Court, and yet the procedure proposed in the dissenting opinion would add to the burden of our trial court the necessity for conducting further hearings in this case and, I suppose, similar cases. . . . It does not require the services of efficiency experts, management surveys, or administrative studies to discover that in a case such as this a court is figuratively spinning its wheels by making no forward progress in dealing with the Judiciary's serious problems of congestion.⁴⁶

This response to public demand for speedier criminal justice was used to justify a refusal to give an expansive interpretation to "this court's basic responsibility . . . from time to time to remand individual cases to the District Court for further proceedings."⁴⁷ It was made in the face of an eloquent argument by the Chief Judge, concurred in by the remaining judge, that an injustice might possibly have been done to appellants which could be corrected by a new trial.⁴⁸ Whatever the merits of the balance reached in this particular case, the social policy argument made is the appropriate one to juxtapose against the argument implicit in the dissent that any possibility of injustice during a trial, however remote,⁴⁹ is sufficient reason to upset a conviction.

In *Wise v. United States*,⁵⁰ the District of Columbia Circuit held that Federal Rule of Criminal Procedure 5(a), which prohibits unnecessary delay in presenting the accused to a magistrate, "does not prohibit delay for a reasonable time after arrest in order to provide identification of the suspect. And this principle already established in this circuit for sight identification, also applies to voice identifications."⁵¹ To justify this extension (or application) of the principle, Judge Leventhal argued that one of the "legitimate police concerns"

⁴⁵ *Id.* at 944.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 951.

⁴⁹ The dissent conceded that "Hardy's story seems incredible." *Id.* at 949.

⁵⁰ 383 F.2d 206 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 964 (1968).

⁵¹ *Id.* at 208 (footnote omitted).

was to "provide additional and reliable proof against the suspect."⁵² The court stated:

It is not without relevance that the Supreme Court has recently held—in another context, but involving rights of privacy that stand on high constitutional ground—that the rights of a suspect are subject to limitations arising out of society's interest in police activity (searches) undertaken to "aid in the identification of the culprit" and to obtain evidence "which would aid in apprehending and convicting criminals."⁵³

The court concluded that "we do not consider a prompt identification of a suspect . . . to diverge from the rudiments of fair play that govern the due balance of pertinent interests that suspects be treated fairly while the state pursues its responsibility of apprehending criminals."⁵⁴

Although this case might have been decided by the precedential method since the court argued that there was no material difference between sight and voice identification, Judge Leventhal thought that society's interest in this kind of police activity needed to be stated, and that citation of the Supreme Court's recognition of this interest in another context would lend support to the statement, particularly in light of the impression (not only among laymen) that recent Supreme Court decisions have tended to deny the importance of that interest. The question is close and the analytical distinction unsure, but the context suggests that the Supreme Court was cited not as a statement of law in a related area with which this decision could properly be harmonized, but rather as an indication of a national consensus as to what constitutes "legitimate police concerns."

By contrast, *Edwards v. Habib*⁵⁵ is a paradigm of the use of the social policy derived method. Habib had given his month-to-month tenant, Mrs. Edwards, a thirty-day statutory notice to vacate and had brought an action to recover possession sometime after the District of Columbia's Department of Licenses and Inspections had ordered him to correct the more than forty sanitary code violations it had discovered during an inspection instituted upon Mrs. Edwards's complaint. Mrs. Edwards contested the eviction on the ground that it was undertaken from retaliatory motives and hence was improper. The only authorities directly in point were two statutory schemes. In one, urged by Habib, Congress established the traditional property remedies for summary eviction of tenants from month to month, the only stated

⁵² *Id.* at 209 (footnote omitted).

⁵³ *Id.* at 209 n.7, quoting *Warden v. Hayden*, 387 U.S. 294, 306-07 (1967).

⁵⁴ *Id.* at 210.

⁵⁵ 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

requirement of which was that the landlord give the tenant thirty days' notice, which Habib had done.⁵⁶ In the other, urged by Mrs. Edwards, Congress authorized and directed the Commissioners of the District of Columbia "to make and enforce such building regulations for the said District as they deem advisable," where "[s]uch rules and regulations . . . have the same force and effect within the District of Columbia as if enacted by Congress."⁵⁷ Extensive housing regulations had been promulgated by the District Commissioners pursuant to this grant of authority.

Judge Wright began his opinion by developing at length the argument that the courts, and perhaps Habib himself, are prevented from taking action to evict Mrs. Edwards because of her constitutional rights to petition the government and to report violations of law. But in the third part of his opinion, the only part for which he obtained the necessary concurrence of Judge McGowan, Judge Wright announced that he would and could refrain from deciding the merits of the constitutional arguments he had developed since, "[a]s a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted."⁵⁸ His justification for this conclusion contains so many illustrations of how social policy can be utilized in judicial decision-making that it is worth quoting at length:

The housing and sanitary codes, especially in light of Congress' explicit direction for their enactment, indicate a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live. Effective implementation and enforcement of the codes obviously depend in part on private initiative in the reporting of violations. Though there is no official procedure for the filing of such complaints, the bureaucratic structure of the Department of Licenses and Inspections establishes such a procedure, and for fiscal year 1966 nearly a third of the cases handled by the Department arose from private complaints. To permit retaliatory evictions, then, would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington.

As judges, "we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." . . . In trying to effect the will of Congress and as a court of equity we have the responsibility to consider the social context in which our decisions will have operational effect. In light of the appalling condition and shortage of housing in Washington,

⁵⁶ D.C. CODE ANN. §§ 45-902, 45-910 (1967).

⁵⁷ *Id.* § 1-228.

⁵⁸ 397 F.2d at 699 (footnote omitted).

the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated. There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence.⁵⁹

Confronted by "controlling" statutory authority but a clear absence of conscious congressional intent on the issue, the court did not pretend to the contrary, but clearly confronted the necessity of "reconciling and harmonizing two federal statutes so as to best effectuate the purposes of each."⁶⁰ It stated:

When Congress enacted 45 D.C. CODE §§ 902 and 910, it did not have in mind their possible use in effectuating retaliatory evictions. Indeed, when they were enacted there was no housing code at all. And in all probability Congress did not attend to the problem of retaliatory evictions when it directed the enactment of the housing code. Our task is to determine what Congress would have done, in light of the purpose and language of the statute, had it confronted the question now before the court.⁶¹

To answer that question, the social problems to which the housing code was a response had to be examined, and the social policies consistent with the spirit of the congressional directive to the District Commissioners to develop a housing code had to be discovered. As to the social problems Judge Wright quoted the 1956 statement of purpose in the Housing Regulations of the District of Columbia,⁶² which described existing and impending conditions of overcrowding, dilapidation, and inadequate facilities prevalent in housing in various areas of the District. As evidence that these conditions still existed—and hence that the interpretation of the statutes in question was accurate—he quoted almost identical findings a decade later from a report on housing conditions in the District: "[M]ore than 100,000 children are growing up in Washington now under one or more housing conditions which create psychological, social, and medical impairments, and make satisfactory home life difficult or a practical impossibility."⁶³ Supreme Court descriptions of the effects of substandard housing are quoted:

⁵⁹ *Id.* at 700-01 (footnotes omitted), quoting *Ho Ah Kow v. Hunan*, 12 F. Cas. 252, 255 (No. 6546) (C.C.D. Cal. 1879).

⁶⁰ *Id.* at 702 (footnote omitted).

⁶¹ *Id.* at 702 n.50.

⁶² *Id.* at 700 n.40.

⁶³ *Id.* at 701 n.47, quoting REPORT OF THE NATIONAL CAPITAL PLANNING COMMISSION: PROBLEMS OF HOUSING PEOPLE IN WASHINGTON, D.C. 5-6 (1966).

"Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river." . . . "The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government."⁶⁴

The last quotation, and to a lesser extent the previous two, contain implicit statements of social policy—*i.e.*, that we must do something reasonably calculated to alleviate these problems. Judge Wright pointed to more explicit indications of social policy in statutory provisions for enforcing housing codes and standards in federally financed housing units, and law review articles discussing possible ways for making housing codes more effective. Finally, to demonstrate the practical importance of a private complaints procedure to the enforcement of housing codes, he cited the finding of a subcommittee of the Senate Committee on the District of Columbia that "[o]f 47,701 cases handled, almost 15,000 were initiated by private complaint."⁶⁵ Thus, to support his understanding of the social policy considerations relevant to the proper interpretation of the applicable statutes, Judge Wright referred to at least eight sources of information apart from the statutes involved, their legislative history, and their subsequent interpretation. These included: (1) other legislation addressed to similar problems; (2) the District Commissioners' statement of purpose for developing a housing code; (3) relevant dicta of the Supreme Court; (4) a report by the National Capital Planning Commission on the problems of housing; (5) administrative procedures established by the Department of Licenses and Inspections; (6) published statistics demonstrating the importance of these procedures; (7) law review articles; and (8) matters of public notoriety.

In *Egan v. Kollsman Instrument Corp.*,⁶⁶ the New York Court of Appeals had to decide whether the content and form of plaintiff's decedent's contract with an air carrier was such as to invoke the

⁶⁴ *Id.*, quoting *Berman v. Parker*, 348 U.S. 26, 32-33 (1954), and *Frank v. Maryland*, 359 U.S. 360, 371 (1959).

⁶⁵ *Id.* at 700 n.43.

⁶⁶ 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

Warsaw Convention's drastic limitation on the liability of air carriers for the wrongful death of passengers engaged in "international transportation";⁶⁷ as of 1959, when the accident occurred, this limit was below \$10,000. Chief Judge Fuld first discussed whether the leg of the international trip in which the fatal crash occurred should be considered "international transportation" when that leg was entirely domestic and was not on a carrier named in the passenger's original ticket; the terms of the contract and the Convention clearly indicated that it should be so considered, and the court decided accordingly. The much more difficult question hinged on the requirement of Article 3 of the Convention that an airline passenger ticket contain a "statement that the transportation is subject to the rules relating to liability established by this convention."⁶⁸ The court began by pointing out that "[t]he ticket before us did contain, in footnotes on the several coupons, such a statement . . . but, as is apparent from inspection, it is in such exceedingly small and fine print as almost to defy reading."⁶⁹ Therefore the question was whether this "statement" should be held to satisfy Article 3. Judge Fuld noted that

the Civil Aeronautics Board in 1963 adopted a regulation requiring (1) that the statement as to limitation of liability follow the far more clear and specific language specified by the board; (2) that it "be printed in type at least as large as ten point modern type [as contrasted with the 4½ point type in this case] and in ink contrasting with the stock"; and (3) that a similar statement be placed at all ticket counters in letters at least one fourth of an inch high⁷⁰

He then referred to inaction by the Senate and action by the State Department which tended to support the notification policy.

The language of the statement which was mandated by the CAB was similar to that provided for in the amendment to article 3 appearing in the so-called Hague Protocol to the Convention executed in 1955. . . . This protocol was never ratified by the Senate, apparently because its most significant feature, increasing the maximum liability to \$16,000, was considered inadequate. It is of more than passing interest that in 1965 our Government in a Notice of Denunciation declared that it opposed the Convention's low limits on liability and indicated an intention to withdraw from the Con-

⁶⁷ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 22, para. 1, 49 Stat. 3019 (1936), T.S. No. 876 (effective Oct. 29, 1934).

⁶⁸ *Id.* art. 3, para. 1(e), 49 Stat. 3015.

⁶⁹ 21 N.Y.2d at 168-69, 234 N.E.2d at 202-03, 287 N.Y.S.2d at 19 (footnote omitted).

⁷⁰ *Id.* at 171, 234 N.E.2d at 204, 287 N.Y.S.2d at 21 [footnote omitted], quoting 14 C.F.R. § 221.175 (1971).

vention unless an agreement were reached (among the world's international air carriers) to raise the limit to \$75,000 and that in May of 1966 such an agreement was executed.⁷¹

Judge Fuld concluded that:

These decisions and regulations are suggestive of a national policy requiring that air carriers give passengers clear and conspicuous notice before they will be permitted to limit their liability for injuries caused by their negligence. . . . [T]he carrier's failure to give the requisite notice prevents it from asserting a limitation of liability.⁷²

Thus, the New York Court of Appeals, without dissent, interpreted a 1929 treaty on the basis of current social policies to require, despite almost fifty years of uncontested practice to the contrary, that airlines provide not only a "statement" of the limitation of liability, but a "clear and conspicuous notice." This use of social policy in treaty interpretation is a highly avant-garde technique—a Second Circuit case that decided the same issue the same way for substantially the same reasons caused the Supreme Court to split four-to-four on review only three months after *Egan*.⁷³

*Simpson v. Loehmann*⁷⁴ is not so much a case of "social policy derived" as of "suggested social policy considered and rejected." However, just as a case that examined and rejected the claim that a particular statute had overruled otherwise applicable prior precedents would be classified under the statutory rather than precedential method, so *Simpson*, in which the New York Court of Appeals refused to overrule a year-old precedent either on social policy or constitutional grounds, is properly seen as an example of the social policy derived method. The precedent involved in *Simpson* was *Seider v. Roth*,⁷⁵ which held for the first time (in any state) that the victim of an automobile accident could sue the party allegedly responsible in a New York court, without obtaining personal jurisdiction over the defendant, if the defendant's insurance carrier does business in the state. Jurisdiction in *Seider* was based on the New York "situs" of the insurance carrier's "debt" to defend the insured to the limits of the policy; this "debt," if attached, serves as a res whose possession is then disputed

71 *Id.* at 171 n.6, 234 N.E.2d at 204 n.6, 287 N.Y.S.2d at 21 n.6.

72 *Id.* at 171-72, 234 N.E.2d at 204, 287 N.Y.S.2d at 21-22.

73 *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1967), *aff'd by an equally divided Court*, 390 U.S. 455 (1968).

74 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

75 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

between the plaintiff and the defendant (or more realistically, the defendant's insurer).

The *Seider* court, speaking through then Chief Judge Desmond, had treated the problem primarily as one of construing the New York statutes that permit attachment of a debt. In *Simpson*, Chief Judge Fuld first discussed the constitutional due process question, concluding on the basis of precedent that

we perceive no denial of due process since the presence of that debt in this State . . . —contingent or inchoate though it may be—represents sufficient of a property right in the defendant to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him.⁷⁶

The only indication up to this point that the case could not be decided on the basis of the meaning of "debt," as that meaning had been elaborated in earlier decisions, is Judge Desmond's statement, quoted by Judge Fuld, that " 'there is no policy reason against requiring the insurer to come in to New York and defend as to an accident which occurred [outside the state] injuring New York residents' " ⁷⁷ This statement ignores at least one obvious reason. Since in most of these actions the defendant will be a resident of the state in which the accident occurred, such actions would ordinarily be brought in that state, the forum most convenient to witnesses, whereas granting *Seider*-type jurisdiction may mean that in many actions testimony essential to establishing what occurred may be available in deposition form only. But Judge Fuld, doubtless acutely aware of the storm of criticism aroused by *Seider*,⁷⁸ added:

[I]t may prove helpful to have in mind some of the considerations upon which that decision was predicated.

The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. . . . Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power. Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it

⁷⁶ 21 N.Y.2d at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636.

⁷⁷ *Id.*, quoting *Seider v. Roth*, 17 N.Y.2d 111, 114-15, 216 N.E.2d 312, 314-15, 269 N.Y.S.2d 99, 102 (1966).

⁷⁸ Some of which is cited in *Minichiello v. Rosenberg*, 410 F.2d 106, 119 (2d Cir.), cert. denied, 396 U.S. 844 (1969), where Judge Friendly, on behalf of a divided panel, held that the *Seider* rule did not violate due process rights.

makes all procedural decisions in connection with the litigation. . . . Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large.⁷⁹

This passage demonstrates Judge Fuld's understanding that in deciding this case, whether on statutory, constitutional, or "public policy" grounds, the crucial issues to be resolved were questions not of linguistic usage but of social reality—how cases are actually handled, and who has which powers and which responsibilities. But the passage itself is an example of social policy asserted rather than derived, since although it points first to the freedom of the court to devise a policy, then to some of the facts that a court devising such policy should take into account, it concludes not with an indication of the values to be served or the social goals to be achieved by adopting one policy over another, but merely with facts further supporting the conclusion that it is free to devise the policy that it asserted. The failure of the passage to qualify as social policy derived is of more than formal significance; it indicates that Judge Fuld failed to state the social purpose, the rationale, underlying the revolutionary *Seider* decision and the decision to follow it. The social purpose involved would seem to be that compensation in automobile cases should be facilitated and not impeded by jurisdictional rules. If this was the court's purpose, it is understandable that it did not state it plainly in either opinion.

Although Judge Fuld was deliberately vague in specifying the public policy adopted in *Seider*, he was precise in rejecting alternative policies.

The position taken by some who disagree with *Seider* would require that, as a matter of State policy, insurance be explicitly eliminated as the basis for the exercise of our in rem jurisdiction but this represents a judgment requiring data and information with respect to the practical effect of the *Seider* decision not presently available to this court.

Almost half a century ago, Chief Judge CARDOZO [wrote] . . . that "The courts are not helped as they could and ought to be in the adaptation of law to justice". Some time thereafter, the New York Legislature created a Law Revision Commission and, more recently, the State's Judicial Conference appointed an Advisory Commission on Practice and Procedure to make studies and recommend changes in the rules and statutes governing our law. Revision of the

⁷⁹ 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.

bases for in personam jurisdiction has been the subject of recent major legislative changes. The bases for the exercise of in rem jurisdiction, however, have been carried over into the CPLR from the Civil Practice Act with little change. Under the circumstances, it would be both useful and desirable for the Law Revision Commission and the Advisory Committee of the Judicial Conference, jointly or separately, to conduct studies in depth and make recommendations with respect to the impact of in rem jurisdiction on not only litigants in personal injury cases and the insurance industry but also our citizenry generally. In the course of such studies, consideration will undoubtedly be given to the relationship *inter se*, of in rem jurisdiction, in personam jurisdiction and *forum non conveniens*. Absent new data suggesting the desirability of a departure from the general principles underlying in rem jurisdiction, as reflected in *Seider*, we find neither basis nor jurisdiction for departing from our holding in that case.⁸⁰

Judge Fuld made two points here: first, that it was too early for anyone to know the practical effect of the *Seider* decision, and second, that the court, with its case-by-case approach and its limited research staff, was not in a position to consider a whole area of the law in depth and to make empirical studies of the impact of the law on out-of-court conduct. The first point is well taken if we concede that *Seider* is worth a try; the only problem is that the court did not indicate what it was trying to do or what might be counted as success. The second point follows logically from the first, again taking *Seider* as given. And perhaps the court, having fended off a constitutional challenge to *Seider* in the first part of the *Simpson* opinion, would have been justified in giving it the *stare decisis* presumption of correctness in the second. It is clear, however, that Judge Fuld was not relying on that presumption. His reference to "the general principles underlying in rem jurisdiction, as reflected in *Seider*" indicates that he was urging the correctness of *Seider* on the (incorrect) ground that it merely reflected generally accepted principles. If *Seider* was still at issue, and if we accept what the court pretended to deny but no one else even questions—that *Seider* was a departure in the law—then the second point of this passage, that the court was incapable of making a reasonably based departure in this area of the law, is a very strong argument against *Seider*. But if the real rationale of *Seider* was to increase the likelihood of people injured in automobile accidents recovering their damages, then it would not take the services of the Law Revision Commission to conclude with certainty that the rule in *Seider* would contribute to this. Of course,

⁸⁰ *Id.* at 311-12, 234 N.E.2d at 672-73, 287 N.Y.S.2d at 638-39, quoting Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).

if the Law Revision Commission came up with well-documented findings that *Seider* was being used primarily by people with false or unusually inflated claims to obtain windfalls from insurance companies, the court might be inclined to reconsider.

*Udell v. Haas*⁸¹ involved the validity of a village ordinance amending its zoning map in such a way as to prevent plaintiff from building a proposed bowling alley and supermarket or discount house. The New York Court of Appeals held the rezoning invalid as discriminatory and not in accordance with the village's "comprehensive plan." Although the mandate that zoning be "in accordance with a comprehensive plan" is contained in New York's enabling statute,⁸² Judge Keating approached the problem of determining the meaning and effect that should be given that phrase by closely examining the continuing policies that support and mold the institution of zoning rather than the relevant legislative history or the cases applying the standard.

Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we apply the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.

This fundamental conception of zoning has been present from its inception. The almost universal statutory requirement that zoning conform to a "well-considered plan" or "comprehensive plan" is a reflection of that view. . . . The thought behind the requirement is that consideration must be given to the needs of the community as a whole. In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community. . . . Thus, the mandate of the Village Law (§177) is not a mere technicality which serves only as an obstacle course for public officials to overcome in carrying out their duties. Rather, the comprehensive plan is the essence of zoning.⁸³

Judge Keating next quoted Professor Haar's argument for placing increased weight on this requirement in the judicial review of zoning regulations.

"With the heavy presumption of constitutional validity that attaches to legislation purportedly under the police power, and the difficulty in judicially applying a 'reasonableness' standard, there is

⁸¹ 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

⁸² N.Y. VILLAGE LAW § 177 (McKinney 1966).

⁸³ 21 N.Y.2d at 469, 235 N.E.2d at 900, 288 N.Y.S.2d at 894.

danger that zoning, considered as a self-contained activity rather than as a means to a broader end, may tyrannize individual property owners. Exercise of the legislative power to zone should be governed by rules and standards as clearly defined as possible, so that it cannot be operated in an arbitrary and discriminatory fashion, and will actually be directed to the health, safety, welfare and morals of the community."⁸⁴

He concluded that to assure zoning did not "degenerate into a talismanic word . . . to excuse all sorts of arbitrary infringements on the property rights of the landowner. . . . [O]ur courts must require local zoning authorities to pay more than mock obeisance to the statutory mandate that zoning be 'in accordance with a comprehensive plan'."⁸⁵ The court proceeded to do just that, holding that the ordinance

not only did not conform to the village's general "developmental policy", but . . . was also inconsistent with what had been the fundamental rationale of the village's zoning law and map. The amendment was not the result of a deliberate change in community policy and was enacted without sufficient forethought or planning.⁸⁶

Judge Keating quoted Professor Haar's finding that the courts were substituting such verbal formulae as "broad geographical coverage, 'policy' of the planning or zoning commission, the zoning ordinance itself, the rational basis underlying the ordinance"⁸⁷ for the plain meaning of the statutory phrase. In this case instead of attempting to devise its own formula, which like those cited by Haar would have reduced the phrase "in accordance with a comprehensive plan" to requiring merely that "zoning be 'reasonable,' and impartial in treatment,"⁸⁸ the court searched for the basic social policies affecting zoning. It thus became aware of the potentiality of the phrase as a standard for judicial review permitting communities to obtain the full legitimate benefits of zoning while protecting individuals from the abuse of majority power.

*Dobkin v. Chapman*⁸⁹ was a consolidated appeal of three cases arising from New York automobile accidents. Plaintiff in each case, not being able to locate the defendant allegedly responsible for his injuries, received permission from a trial court to serve the defendant

⁸⁴ *Id.* at 469-70, 235 N.E.2d at 901, 288 N.Y.S.2d at 894, quoting Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157-58 (1955).

⁸⁵ *Id.* at 470, 235 N.E.2d at 901, 288 N.Y.S.2d at 894.

⁸⁶ *Id.* at 475, 235 N.E.2d at 904, 288 N.Y.S.2d at 899.

⁸⁷ *Id.* at 471, 235 N.E.2d at 902, 288 N.Y.S.2d at 895, quoting Haar, *supra* note 84, at 1173.

⁸⁸ *Id.*

⁸⁹ 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

at his last known address by ordinary mail, even though it was likely that the defendant would not thereby receive actual notice of the action against him. In two cases the appellant was the Motor Vehicle Accident Indemnification Corporation (MVAIC), a state agency designed to provide the innocent victim of an uninsured motorist with a source of recovery; in the third the defendant's insurer sought reversal. Chief Judge Fuld first discussed whether this manner of service was authorized by the New York statute,⁹⁰ and concluded on the basis of "the language of the statute, its context and its history"⁹¹ that it was. Reaching then the constitutional question of whether this method of service afforded the defendants sufficient notice and opportunity to be heard, he observed once again that due process "has come to represent a realistic and reasonable evaluation of the respective interests of plaintiffs, defendants and the state under the circumstances of the particular case,"⁹² citing for this proposition the same cases that he had cited in *Simpson*. However, in *Dobkin*, unlike *Simpson*, Judge Fuld was able to support his solicitude for the plaintiffs' interests.

[T]he State's interest and concern has been evidenced by its policy of ameliorating the difficulties that often beset motor vehicle accident victims in collecting damages for their injuries. Examples of this policy are the requirements for a showing of financial responsibility as a condition to obtaining registration of a motor vehicle . . . ; the creation of the MVAIC . . . to provide a source of recovery for victims of uninsured or unknown motorists . . . ; and the [liberal] provisions for service of process found in the Vehicle and Traffic Law⁹³

Although these statutes did not provide direct authority for the action taken in *Dobkin*, they were offered as evidence of a strong state policy of protecting injured parties against the irresponsible motorist. The latter *could* have assured himself of notice

by complying with the requirements of his State's licensing authorities that he keep them informed of his changes of address . . . ; he can keep in touch with his insurance carrier; and he can keep in touch with the victim of the accident until he is reasonably assured that no claim will be asserted against him.

. . . Indeed, in an automobile case, no defendant need be without notice unless he chooses and wants to be; many an injured plaintiff, however, will go without recompense if, in a proper case, the standards of informative notice may not be relaxed.⁹⁴

⁹⁰ Presently N.Y. CIV. PRAC. LAW § 308(5) (McKinney Supp. 1970).

⁹¹ 21 N.Y.2d at 500, 236 N.E.2d at 456, 289 N.Y.S.2d at 169.

⁹² *Id.* at 502, 236 N.E.2d at 458, 289 N.Y.S.2d at 170.

⁹³ *Id.* at 503-04, 236 N.E.2d at 459, 289 N.Y.S.2d at 172.

⁹⁴ *Id.* at 504, 236 N.E.2d at 459, 289 N.Y.S.2d at 172-73.

Here, unlike *Simpson*, the court knew before the case went to trial that the defendant had done something irresponsible—disappeared without a trace after being involved in a serious accident. Nor did any other state have a significant interest in protecting the defendants. Thus, Judge Fuld could openly champion the interests of the plaintiffs on grounds of public policy.

Finally, in *Toth v. Community Hospital*,⁹⁵ plaintiffs were twins who had been born prematurely. While at the hospital they were given oxygen for more than thirty days, and they were blinded as a result. In 1953, when they were born, some doctors still believed (erroneously, it became clear shortly thereafter) that the mortality rate of premature babies could be reduced by administering oxygen to them; however, the dangers of blindness from excessive use of oxygen may have been generally known at the time the twins were born. In any event, the pediatrician prescribed oxygen at the rate of six liters per minute for the first twelve hours, and thereafter at the rate of four liters per minute. There was evidence in the case that the oxygen had been administered at the six liter rate for the entire period, as well as evidence that if the doctor's orders had been followed the blindness might have been prevented or reduced.

Judge Keating first discussed the trial court's failure to charge the jury that if they found that the hospital's nursing staff had deviated from the doctor's orders, that the doctor should have discovered this, and that he should have known that this deviation would unnecessarily increase the likelihood of the children's blindness, then they could find the doctor guilty of negligence. He concluded that the jury should have been so charged. He then considered the propriety of the trial court's dismissal of the complaint against the hospital.

The primary duty of a hospital's nursing staff is to follow the physician's orders, and a hospital is normally protected from tort liability if its staff follows the orders. Nevertheless, if the doctor's orders are to be a hospital's shield from tort liability, it cannot at the same time maintain that a deviation which causes injury cannot be a basis for tort liability because other physicians or medical institutions might consider the treatment actually given as acceptable. More important than the question of logical consistency is the issue of social policy. There is every reason to encourage the hospital staff to carry out diligently the doctor's orders while there are no countervailing considerations which would justify relieving the hospital from tort liability for failing to do so.⁹⁶

⁹⁵ 22 N.Y.2d 255, 239 N.E.2d 368, 292 N.Y.S.2d 440 (1968).

⁹⁶ *Id.* at 265, 239 N.E.2d at 374, 292 N.Y.S.2d at 449-50 (footnote omitted).

It should be apparent that this is a very simple and non-controversial use of social policy and that the social policy in question—that of not permitting nurses to overrule (or, more likely, neglect) doctors' orders—is so generally acceptable that it would be superfluous to cite authority for it. The result should not obscure the possibility that the policy could have been ignored in the face of an argument that the hospital should not be liable if there was substantial support in the medical profession for what the nurses actually did. This is a marginal case, however, since several of the Grand Style cases may have made this much use of social policy without venturing, or troubling, to label it as such.

CONCLUSION

We are now in a position to begin to answer the questions of the lawyer, the judge, and the social critic as to the extent and manner of the use of social policy in judicial decision-making.

The lawyer was interested to know the likelihood that cases will be decided on the basis of social policy, whether there is any way to predict the cases that will be decided on this basis, and the social policies that will be considered. Table 1 indicates that, depending on the court in question, the likelihood could range from zero to five or six percent. The cases in the sample that were decided on the basis of social policy were in six areas: personal injury (four, two of which were in a jurisdictional context), criminal procedure (three), communications (one), housing (one), zoning (one), and family (one); such areas are therefore amenable to this type of decision-making. But examination of the cases indicates that the applicability of the social policy method is not restricted to these areas. Of course there had to "be" a social policy in the area for the application of this method to make sense. But all that is required for a social policy to "be" is that the law not be settled as to some question and that the needs of society, as they are perceived by the judge and some other influential members of society, indicate a preference for one resolution over another. These requirements are met, to a greater or lesser extent, in nearly every case worth appealing, as well as in the great majority of cases included in this sample.

Where social policies are used, however, Table 2 indicates that it is twice as likely that such policies will favor those categories of people who are relatively powerless (seven cases) than that they will be neutral in this respect (three cases), and about seven times more likely that the

policies will favor the relatively powerless than that they will favor the relatively powerful. The former point is particularly significant since it is three times as likely that decisions that do not use social policy will be neutral (207 cases) than that they will favor the relatively powerless (sixty-six cases). This does not mean, however, that a lawyer would be wasting his time urging social policies that support the status quo; the efficacy of such arguments in convincing a court to adhere to precedent may be considerable. Since, however, a court deciding for reasons of social policy to reach a result that can be supported by more orthodox methods is likely to write an opinion reflecting those methods, the results of arguing social policy on behalf of the status quo will only rarely be detected by the method used in this study. Similarly, the four percent rate for the use of the social policy technique (Table 1) may significantly understate the efficacy of social policy arguments on behalf of change, since a judge who does not like to decide cases on the basis of social policy may yet be sufficiently impressed by social policy arguments to look hard and long for some more traditional basis on which to rest a decision consistent with these arguments. Thus, the significantly higher-than-average net (and gross) liberalness of the Grand Style (Table 2) may well reflect the influence of social policy arguments on highly craft-conscious judges.

As to the lawyer's fear that the sporadic acceptance by courts of social policy arguments will make planning and counseling on the basis of established doctrine particularly treacherous, it is significant that in none of the social policy cases sampled was social policy the sole method used to reach the result; rather, in each case the court took care to attack the foundations of the arguments for the contrary result, to distinguish any adverse precedents, and frequently to cite some legal authorities as advocating the result to be reached, *before* discussing the social policy considerations that supported its decision. Even in the two cases overruling established usage of precedent, *Pea* and *Egan*, the court stated that earlier decisions had foreshadowed its result. Thus, the careful lawyer always had some warning, based on the vulnerability of his arguments "on the law," that resort by the court to social policy considerations was a significant possibility.

We are now also in a position to reassure the judge who is worried that social policies, apart from those embodied in "legal" authorities traditionally considered binding, have now become a source of law that he must consider in making his judicial decisions. Whether or not he takes such policies into account in reaching decisions, it is up

to his discretion whether to discuss them in his opinions. As we see from Table 4, the eleven majority opinions that drew on social policy were decided by only five judges, four of whom decided more than one of the cases sampled (Judge Wright is the exception). The other nineteen judges never drew extensively upon social policy, and those who drew on it to the extent that Judge Keating did in *Toth* did not trouble to label it as such. It is likely, however, that the seventeen to twenty percent rate of use of the flexible and eclectic Grand Style by the three courts, and the high net liberalness of the results of its use, indicate that their receptiveness and responsiveness to social policy arguments (whether or not referred to as such) is considerably greater than would be suggested by the four percent average use of the social policy methods in their opinions.

The social critic, interested in the extent to which the courts are responsive to demands for social change on behalf of those whose interests are not completely served by the existing formal law (precedential or statutory), should probably be more concerned about the liberalness of the results reached—a direct measure of this responsiveness—than about the methods used to reach (or justify) those results. Table 2 indicates that twenty-four percent (seventy-three of 300) of the cases decided reached a “liberal” result, whereas only six percent (seventeen of 300) reached a “conservative” result. Since many of the “neutral” cases did not involve issues in which a liberal or conservative result was possible, this is impressive evidence that courts are responding, consciously or otherwise, to a social policy favoring an equalization of power among all members of society. That sixty-four percent (seven of eleven) of the cases using the social policy methods reached a liberal result, and that ten percent (seven of seventy-three) of the liberal cases, as opposed to four percent (eleven of 300) of all cases, used the social policy methods, only makes the obvious point that in an era when the dominant theme of social policy is a liberal one, the explicit use of social policy in judicial decision-making is highly correlated with liberalness of results.

If we were to adopt *arguendo* the liberal position as that has been defined herein, would any social policy be suggested as to the proper use of social policy in judicial decision-making? Obviously, a judge who does not at any level of consciousness measure the claims of a liberal social policy against those of the more conservative established legal authorities will by default decide the case in accordance with the latter. Thus, the lawyer whose case is “weak on the law” should present the relevant social policy in the fullest, best-documented argument

possible; but the rareness of acknowledged use of social policy by the courts suggests that such arguments may be most acceptable if they can be given in the form of reasons for following or elaborating upon some existing authority.

Further, although the findings here do not indicate the direction of causality between explicit use of social policy and liberalness of results reached, it is reasonable to assume that a canon of judicial opinion writing requiring judges to set forth the relevant social policy considerations in all cases in which they conceivably exist, whether the direction indicated by these considerations is taken or not, would encourage judges who would be willing to base their decisions (actual and written) on social policy to do so. The prevalence of the Grand Style indicates that the canons of judicial craftsmanship no longer require that the appearance of mechanically measuring the case against the applicable authorities be maintained; there is no reason, then, for the courts to stop at the Grand Style stage, in which they admit to extrapolating from landmarks but still deny that they are doing so for the purpose of getting somewhere. As the analysis of the social policy derived cases in the sample demonstrates, the use of this method does not permit the judge to follow his own prejudices without having to consider the desires of the people in whose name he ultimately speaks. To the contrary, this method requires that a judge tie his value-commitments to the needs of society and expose this alleged tie to public scrutiny.