
This article is the author's evaluation of John Dewey and his leading legal disciples: Walter Wheeler Cook, Karl Llewellyn, Edwin Patterson and Mr. Justice Cardozo. Dewey's outstanding thesis is that all theories, principles and rules should be tested by observing how they work in practice. But Dewey and his followers in matters legal have observed the principles and rules in the upper and appellate courts and not in the trial courts. It is the author's opinion that these legal rules and principles for the greatest part are put to use in the trial courts, the most important and powerful part of the judicial system.

The writings of Professor Cook illustrate how the courts use legal rules in applying them to facts of specific lawsuits. But Cook has assumed that these rules work the same in both the upper and lower courts. The trial court's unique function and sovereignty is the phase fact finding or fact discretion and this is almost always outside the province of the upper court, which deals with the question of applying the legal rule to the found fact. Thus the trial court chooses which witnesses' stories are to be accepted as correct. This fact discretion is the explanation of the fewness of appeals from trial court decisions and also explains why the large number of appealed decisions are affirmed.

Cook's view is that the great majority of lawsuits fit into existing patterns without very much thought, and only where the situation is new and unusual in terms of accepted legal rules does a trial judge need to resort to reflective thinking. Decisions then can easily be predicted in any case where the sole dispute is over the existence of certain facts. The author asserts that if Cook had been a consistent pragmatist, one intent on observing actualities, he would have observed trial courts. The ascertainment of facts is not "routine" or a matter of "habit" but calls for
thinking. Cook lists two steps by which the court engages in fact finding: (1) the initial selection from the "brute raw events"; and (2) the interpretation of the "selected" matter.

These steps are accomplished with very little intellectual effort. In his criticism of these propositions the author states that the so-called selection is made by the witnesses who have observed the past events and if the witnesses disagree as to the past events then the trial court becomes the witness of the witnesses and selects. But even then a further selection may be necessary, for the trial court must select facts which are legally relevant. In addition Cook in his writing has completely ignored the unique features in trial court decisions, those unruly factors: mistakes made by witnesses either in original observation or in memory, bias and prejudices, the way in which lawyers consciously or unconsciously coach witnesses.

Professor Llewellyn, Professor Patterson and Mr. Justice Cardozo are attacked for their failure to observe pragmatically how far their theories about courts depart from much of judicial reality.

Because of a steadfast refusal to study trial courts Llewellyn's theorizing according to Dewey's precepts and his own must have a very limited value. Patterson, the man who gave Dewey much of his knowledge of matters legal, ignored the trial courts as "invaluable judicial laboratories" in which one can see for himself the way in which legal rules and principles are frequently frustrated through their application to mistakenly found facts. Mr. Justice Cardozo, who practised as an appellate lawyer and an appellate judge, in his extra-judicial writings has also disregarded the function of the trial court. The younger Deweyites, Felix Cohen and Edward Levi, are censured because of their pragmatic inconsistency in observing the way in which rules and principles are carried out in court.

It is the author's thesis that in respect of the judicial process Aristotle, because he observed at firsthand what courts actually did, was a better pragmatist than Dewey and his associates. John Dewey in his writings has done more to illuminate how lawyers reason when preparing themselves to bring about decisions favourable to their clients, but he has failed to consider the important phases of a trial court's task and he has also underestimated the difficulties of using precedents. Dewey in his writings ignored the two weakest spots in the judicial inquiry: (1) defects in the witness's direct observations; (2) defects in the trial judge's methods of determining the reliability of the witness.
Aristotle's Rhetoric illustrates how thoroughly he understood the non-rational and unrational factors which often affect judicial decisions. An examination of Aristotle's writings reveals that he did not shut his reader's eyes to human weaknesses which create obstacles to just administration of the law.

Dewey and each of his four legal disciples have made distinguished contributions to legal thinking on the upper court level. By their shunning of the trial courts these disciples have not only diminished the usefulness of their theories but in addition, because of their influence on other students of our legal system, they have blocked that intelligent observation of the trial courts operation without which much needed and long overdue reforms cannot be achieved. (SIDNEY SPIVAK)


An increasing number of charitable foundations have been established in the United States during the past few years as a result of the generous charitable deductions and exemptions afforded by the federal tax statutes. The advantage of the charitable foundation is that the creator and his family may realize charitable deductions by gifts to the foundation and still retain control of the property given away. This increasing avoidance of tax burdens by the wealthy has resulted in Congress and the Treasury investigating the whole field of tax exempt organizations with an eye to eliminating current and future abuses.

Charitable foundations are surveyed under the following five headings:

(1) **Statutes involved.** The author discusses divergences in the wording of various sections of the Internal Revenue Code relating to charitable deductions and exemptions.

(2) **Form and manner of organization.** Private charitable foundations are created in the form of a trust or non-profit corporation by a wealthy individual or family and controlled by the creator or creators, their families or appointees. The corporate form of organization is preferred by practitioners over the trust form because it is the type of organization in which flexibility and close control are easier to attain.

(3) **Membership and management.** At present neither the statutes, regulations, cases nor administrative rulings place any direct restrictions on the membership of the charitable organization or its management. The cases have upheld the payment of
reasonable salaries to the creator of the foundation and his family for services rendered to the family controlled organization. If the charitable corporation operates a business, the creator may be taxable unless he is willing to relinquish actual control or management to members of his family, to the charitable institution or to others.

(4) Sources of income. A charitable organization may derive funds for its operation from gifts, bequests, dues, tuition, the ownership of income producing property, or the operation of a business enterprise. The use of the last of these sources by educational institutions has been a problem of growing concern to Congress and the Treasury.

(5) Destination of funds. To gain an exempt status a charitable organization must devote its funds exclusively to purposes designated by the pertinent code sections. They require generally that the foundation be organized and operated only for scientific research, education, religion, social welfare and similar interests.

The author concludes by discussing proposed solutions to some of the problems generated by this special tax status of charitable foundations. The easiest solution is that presented by the first problem. If the Revenue Revision Bill now pending before Congress is adopted, the difficulty presented by the lack of uniform language in the various code sections will largely be overcome. The recent Treasury proposals have the merit of attacking problems which should be corrected. Certainly the code needs strengthening against family control of foundations.

The first Treasury proposal was to tax the income of exempt organizations derived from the operation of commercial enterprises. The second was to limit the percentage of a decedent's estate that could be left to a charitable organization. These proposals do not differentiate, however, between charitable organizations operating a business but controlled by the former owner of the business, and charitable organizations controlled by alumni, faculty or friends of a college or university. Nor do they distinguish between bequests to a family foundation and bequests to an independently established charitable institution such as a college or religious organization. These solutions necessitate, therefore, some difficult problems of defining prohibited activities of the specific type of foundation that is to be non-exempt. These difficult questions of definition would not be present in a general percentage limitation, but such legislation might seriously encroach upon the financing of some institutions which should be encouraged. (H. T. Martin)

The basic theory of the maximum rent date or "freeze" method of controlling rents is that maximum rents are fixed with relation to the rents actually charged for the particular property, or comparable property, on a given date or during a given period. This basic idea, subject to many variations and exceptions, has been employed more widely than any other method of regulating rents.

The first step in applying the maximum rent date system is the selection of a maximum rent date on which rents on the whole were reasonable and had not yet been affected by the abnormal conditions which made control necessary. The date should not be too far in the past, since the more remote the date the more difficult it becomes to ascertain what any particular rent was at that time. Whether the legislature is to set the date itself or empower the administrative agency to fix it is a matter of choice and depends largely on local conditions.

The maximum rent should be the rent actually paid on the freeze date and not what the landlord might have had the legal right to demand. The contrary view would allow a foresighted landlord to evade rent ceilings by making a lease for an inflated rent, before the freeze date, with the understanding that a lesser rent would be accepted. Either view is likely to cause hardship in particular fact situations, and liberal provisions for adjustment should be made.

A number of methods have been used in an attempt to apply the maximum rent date system to property not rented on the freeze date, nor within the prescribed period before that date, but first let thereafter. The method most widely used is for the maximum rent to be fixed by a court, commission or other agency. This is usually the rent of comparable accommodations. In the United States under the O.P.A. regulations, the landlord was permitted to rent accommodations not rented on the maximum rent date and the first rent became the maximum rent, but the administrator had the power to decrease it to the levels of rents prevailing for comparable accommodations on the maximum rent date. In Canada after December 1942 the rent was fixed by the rent control authorities ab initio, on a comparability basis.

New construction is frequently exempted altogether, but sometimes special provisions are made, such as the Canadian regulations amended in 1947 to provide that, for housing completed by
original construction or by structural alteration before January 1st, 1944, the rent should be fixed at 110% of the comparable rents on the maximum rent date (October 11th, 1941); for housing completed after January 1st, 1944, the maximum rent was to be fixed at an amount which would "yield a fair return, based on prevailing costs of land, labour and material".

Difficulty arises when changes in the accommodation or in the terms of tenancy have been or are made after the maximum rent date. In the United States under the O.P.A. regulations, the maximum rent for housing accommodations changed after the maximum rent date so as to result in an increase or decrease of the number of dwelling units in such accommodations was the first rent after the change, subject to reduction to comparable levels. Where the accommodations had been substantially changed after the maximum rent date but before the effective date of regulation, by "a major capital improvement as distinguished from ordinary repair, replacement, and maintenance", the same was true; but the making of major capital improvements after the effective date was the basis only for an adjustment of rent. In a District of Columbia case it was held that adding the use of kitchen facilities did not make an apartment a new accommodation or authorize the landlord to increase the rent without applying to the rent administrator. The common practice when accommodations have been converted from commercial to residential or vice-versa is to fix the rent on a comparability basis.

Legislators have varied in their approach to the problem of subletting. The British acts permit the tenant to make an increase of 10% of the net rent of the part sublet, but also allow the landlord to increase the rent of that part by 5%. The O.P.A. regulations treated sublettings as no different from other leases, and the rent could not be increased. If the theory of the maximum rent date method is to freeze conditions in effect on that date, the rent under the sublease should control, since it will be later in date than the original lease. Where the premises are let unfurnished and sublet furnished, there may be two maximum rents: one for the unfurnished premises and one for the same premises furnished.

Furnished accommodations are sometimes exempted from rent control. This was the case in Great Britain until a special statute was enacted in 1946. In the United States the O.P.A. made no distinction in the methods of determining the maximum rents between furnished and unfurnished accommodations. Over a long period of time, this is liable to cause trouble because furniture
depreciates more rapidly than real property, and changes in the quantity or quality of furniture supplied may easily be made.

Leases of commercial premises frequently provide for periodic increases in rent during the life of the lease. Under the O.P.A. regulations, where the lease in effect on the maximum rent date provided for a higher or lower rent at other periods during the term of the lease, the rent was frozen at the figure charged on the critical date; but the landlord or tenant could petition for an adjustment.

In a number of jurisdictions, an option to renew at an increased rent contained in a lease in effect on the maximum rent date can be exercised as in Canada under the Wartime Prices and Trade Board Order No. 315. However, the District of Columbia court has refused to give any effect to an option to renew at a higher rent. Rents frequently are affected by seasonal demand or seasonal variations. In Canada, where accommodations were customarily let for a season only, the maximum rent was that payable for the last corresponding season before the maximum rent date, but if the premises were let for year-round occupancy the first rent became the maximum rent if not higher than comparable levels. In the United States under the O.P.A., although certain seasonal or resort accommodations were exempt from control during the resort season, where the rent of a particular accommodation was frozen at a rent higher or lower than at other times of the year because of seasonal demand, the administrator could adjust it to the level generally prevailing for comparable accommodations during the year ending on the maximum rent date, or could provide for different maximum rents for different periods of the year.

This idea of congealing the rent level as of a given day has a superficial attractiveness, but the practical application of the freeze, as has been seen, raises many knotty problems, and these only increase as time goes on and other elements of the economic picture change. (H. T. Martin)


Recent decisions of the Supreme Court of the United States have aroused a new interest in the familiar motion for a directed verdict. This article is a brief examination of the antecedents of the motion and of its short but significant history.

The trial of Bushell's case (1670), 124 Eng. Rep. 1006, saw the end of one period in the history of trial by jury and the beginning
of another. The long process by which jurors had been transformed gradually from witnesses to judges of fact was nearly, if not entirely, complete. In this case Chief Justice Vaughn, of the Court of Common Pleas, was of the opinion that a judge cannot tell a jury that upon the evidence given in court “the law is for the plaintiff, or for the defendant” without first resolving “by his own judgment . . . what the fact is”. He did not question the power of a court to instruct a jury on the law, but did deny the power of a court to direct a verdict for the reason that the court could not know all the evidence on which the jury was required to act.

The final step in the transformation of the jury was taken when the courts began to hold that jurors should base their verdicts exclusively on evidence introduced in open court. In the case of Mylock v. Saladine (1764), Bl. W. 48, Lord Mansfield declared: “a juror should be as white paper, and know neither plaintiff or defendant, but judge the issue merely as an abstract proposition upon the evidence produced before him”.

At the time of Bushell’s case the practice of setting aside verdicts as against evidence was recognized but not fully developed. Thus it was not until 1738 that Lee C. J. stated, in Smith ex dem. Dormer v. Parkhurst, 95 Eng. Rep. 44, “that where the evidence was doubtful, a new trial should not be granted after a trial at Bar”, but where the verdict is against evidence the “court had the power to grant a new trial”—a power which it had exercised “for more than eighty years”.

The first step in the development of the modern directed verdict was taken when the courts began to instruct juries that they were bound to follow the law laid down by the court. From this beginning the Supreme Court of the United States, by the middle of the 19th century, approved the practice of directing a verdict where there was “literally no evidence” on which the jury might find a necessary fact. The basis of their approval was that the practice had grown up that any verdict given by a jury “against evidence” would be set aside and a new trial had. Furthermore the practice of taking cases from juries on demurrers to evidence did not deny the right, guaranteed by the Constitution, to a jury trial, for that right is not to a jury’s verdict.

A judgment, according to a solid common law authority, is a conclusion drawn from the formal record in the case. When issues of fact have been formed by pleadings in a case triable by jury, there must be a verdict (or findings if a jury is waived) entered on the record to show how the facts have been decided. Without this
showing, no judgment can be entered. When a verdict is directed, must a verdict be entered on the record, or is it enough merely to enter the judge’s order? Without a statute the order is not enough. This means there must be a verdict in all jury cases in which issues of fact have been formed by the pleadings regardless of whether there are issues for a jury to try. When a verdict is directed, the verdict merely reflects a decision of the judge. Why not let the judge make his own record? Why call on laymen to make a record for a court? Instead of requiring the jurors to assent to a decision made by someone else, the verdict should be one signed by the clerk pursuant to a direction by the judge.

The earliest directed verdict was instruction on the law, advice on the facts, or a mixture of the two. But after it became settled that jurors were bound to follow the court’s instruction on the law, verdicts returned in accordance with the court’s direction on a matter of law ceased to be reached after real deliberation. The directed verdict as now employed is a mere fiction — a useless fiction which sometimes causes embarrassment to the jurors and to the court. But now that the fictional nature of the directed verdict is fully recognized, we can safely discard it by providing that no verdict of any kind is necessary when the judge determines there is no issue for a jury to try. (R. M. MCKAY)


Professor Donnelly postulates that the democratic ideal of freedom of expression stems from faith in the essential dignity of man, in man’s eventual ability to make rational choices and in his power of artistic evaluation and enjoyment. Any progressive society must, by its very nature, desire an untrammelled access to the means of self-expression, with its correlative cultural and political advancement.

But this end can not be achieved without an adherence to what the author terms “operational” means, the first of which is a broad interpretation of “the press” within the context of the First Amendment, by emphasizing its true function rather than its mere modality. Illustrative of this need is the apparent reluctance of the American courts to extend the meaning of the word “press” to include such modern media of mass communication as moving pictures, radio and television. While recent cases exhibit a tendency of the Supreme Court to adopt the wider view, the meaning is by no means settled.
So, too, the public must have access to all incoming ideas, statements and opinions. Reference is made to the power of the postmaster-general to impose preventive censorship both by exclusion — certain types of material may arbitrarily be deemed to be non-mailable — and by virtue of the classification of mailable matter into four categories, each bearing a different postal rate; a harsh or too-rigid classification can result in any particular publication being priced out of the market, and instances of attempts to do just that are furnished.

A further essential to true freedom of expression lies in access by the public to the media of communication, upon which a modern, technological society must increasingly depend for the dissemination of thought and discoveries. The growth of newspaper chains, radio networks and moving picture monopolies militates against freedom, in that such empires tend to speak with the brazen tongue of corporate wealth and become far removed from the aims of the individual. In this field, the American government has taken positive steps to keep open the door — steps such as are embodied in the antitrust laws and in the power of the Federal Communications Commission, with the latter’s emphasis on “public convenience, interest or necessity”.

Again, there must be full disclosure of the source of all material presented to the public, so that each may judge for himself the degree of interest, bias and ability of the group or person presenting it, and may thus — and only thus — evaluate the subject-matter and its sponsor.

Finally, where there is conflict at a judicial or political level between the furtherance of freedom of expression and some other interest, any doubt should be resolved in favour of the former by virtue of its constitutional guarantee. This proposition has long been upheld by the courts, as evidenced by the doctrines of privilege and “fair comment” in defamation cases, and by the yardstick of the “clear and present danger” that must exist before communal interest in peace, order and good government will be held to take precedence over the interest in freedom of the press. The author, while apparently admitting the need for, or at least the inevitability of statutes banning obscene publications, warns against the over-indulgence of outraged morals and points to the fact that many works are now esteemed which, in their day, were denounced and censored. The application, even in this field, of the “clear and present danger” test is advocated, with its inherent charge to the judiciary to weigh the competing interests of society’s morals and that same society’s desire for the utmost freedom.
No matter how far man advances technically in the realm of communications, his inventive genius will avail him nothing without a concurrent appreciation of the proper use to be made of his achievements. All such media are but the tools, which are no better and no worse than the workmen as instruments for the preservation of freedom. (J. F. R. Taylor)


The former English practice of apportioning jurisdiction to different courts, basing the division on various distinctions, has been followed in the United States. When a case goes to court and the tribunal has no jurisdiction to hear it, the proceedings, orders and judgments in it will be absolutely void. This is so even when the litigants have gone to the court in good faith and the judge supposes he has the authority to try the matter. Mistake as to jurisdiction on anyone's part is fatal. The case is irrevocably ruined and no amendment can save it.

England, by the Judicature Acts of 1873 and 1875, precluded the possibility of such errors being fatal. By these acts all superior courts were consolidated in the Supreme Court of Judicature. A cause could then be transferred from one division to another at any stage of the proceedings and all steps, proceedings and orders made or taken before transfer would be as valid and effectual as if made or taken by the proper division.

New Jersey has an act prohibiting the dismissal of any action pending in any of the superior courts on the ground of lack of jurisdiction and requiring instead that it be transferred to the court of proper jurisdiction. Most states, however, have done nothing to ameliorate the absurd and frightful consequences flowing from want of jurisdiction of subject matter.

American courts, although not seeking to perform functions outside the constitutional scope of judicial power, are making extensive use of administrative agencies in the field of social service. This is especially striking in the courts of the larger cities.

The Circuit Court of Wayne County in Michigan has a probation department which does pre-sentence investigation, including interviews with the defendant, and after-sentence supervision, such as finding jobs and setting up family budgets.

The Recorder's Court in the city of Detroit, the seat of Wayne County, also has a probation department, which operates in four sections, each of which duplicates in some measure the
work done by the Wayne County probation department. There is also a general statute in Michigan authorizing the appointment of an officer known as the "friend of the court", whose duty it is to enforce and collect delinquent support payments and supervise the maintenance of children of divorced parents. This department also overlaps the work done by both the Recorder's Court and the Circuit Court.

In the psychiatric field the Circuit Court employs the services of psychiatrists in private practice as a part of its pre-sentence investigation, while the Recorder's Court has established a complete psychopathic clinic for such work. Further psychiatric work is done in the Clinic for Child Study maintained by the Juvenile Court. In this field there is also much duplication of facilities that might be reduced by centralization of services in an agency to which all courts could resort.

The pre-trial conference, comparatively new in the United States, is potentially the most effective method of shortening and simplifying civil litigation that has ever been devised. It is compulsory in the Detroit Circuit Court but very little use has been made of it in other circuits. The flexibility and informality of the pre-trial conference, due to the absence of procedural rules, is looked upon with suspicion by the members of the legal profession and consequently it is not accepted by them with alacrity.

The purposes of the pre-trial conference are fourfold. The first purpose is to identify and designate the true issues, which is done by one of two methods. Either the judge examines the file of the case in advance of the hearing or he has counsel for each party draw up and file a factum to be used at the conference. The second purpose is to facilitate proof of evidentiary matters, such as laying the foundation for the production of secondary evidence, the third, to offer a convenient opportunity for disposing of preliminary matters, such as summary judgment and change of venue, and the fourth is to encourage settlements.

There is a considerable difference of opinion over the degree of importance to be assigned to this last feature. Some judges hold that it is the prime purpose of the proceeding, others hold that the prime purpose is to reduce so far as possible the time, money and effort expended by both the parties and the court in preparing for the trial and carrying it through. In Detroit, 76.06% of the cases ready for trial in the year 1948 were disposed of on pre-trial hearings.

The use of juries in civil cases is both burdensome and expensive, and frequently a scandal to the court. Their use should be
reduced to a minimum, for in general the verdicts of juries and the
decisions of judges are almost identical in similar cases. This
was shown to be the case in a recent Wayne County survey of
1,656 cases. The only large discrepancy was in the amount of
time required to hear a case. Jury trials took an average time of
2.8 days while the average length of a court trial was 1.7 days,
showing a 60% excess time requirement in jury cases. The general
conclusion is that juries are not worth what they cost.

As a means for effecting improvements in the judicial system,
the judicial council has had a wide appeal in the United States.
Judicial councils make a continuous study of the organization,
jurisdiction, procedure and methods of administration of the
courts of the state. They also make recommendations to the
decision of the legislature with respect to such changes as require legislative
action and to the courts as to the changes that can be made by
rules of court. There is much diversity in the method of appoint-
ment and the character of the personnel. In some states all mem-
bers are appointed by the governor; in some, all the members are
judges; in other states all the members are practitioners; in still
others the council is composed of a mixture of law teachers,
practitioners and judges. Some judicial councils have the aid of
the research facilities of a state university, but in New York the
state has made substantial appropriations in order to set up a re-
search organization as an adjunct to the judicial council. (HUGH
W. COOPER)

King's Counsel in British Columbia

3. On the recommendation of the Attorney-General, who shall not give
his recommendation until after consultation with the Chief Justice of British
Columbia and the Chief Justice of the Supreme Court and two members of
the Law Society of British Columbia appointed by the Benchers for that
purpose, it shall be lawful for the Lieutenant-Governor in Council, by Letters
Patent under the 'Great Seal,' to appoint, from among the members of the
Bar of this Province, Provincial officers under the names of His Majesty's
Counsel learned in the law for the Province of British Columbia.

4. No appointment of His Majesty's Counsel learned in the law shall be
made by the Lieutenant-Governor in Council beyond the number of five
during any calendar year, the calendar year being deemed to commence on
the first day of January; Provided that the quota for any calendar year may
be increased by the number for which the quota for any preceeding year or
years has not been filled. (King's Counsel Act, R.S.B.C., 1948, c. 168, ss.
3 and 4, as amended by B.C. Statutes, 1950, c. 35, assented to March 30th,
1950)