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The Scientific Method in Legal Thought: Legal Realism and the Fourteen Principles of Justice.

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**THE SCIENTIFIC METHOD IN LEGAL THOUGHT: LEGAL
REALISM AND THE FOURTEEN PRINCIPLES OF JUSTICE**

C. KAUFMAN*

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I. INTRODUCTION

Legal realists have long believed that judges make an instinctive decision about the just result in a case, and then invent law (manipulate the precedents) to justify their conclusions.¹ In this article I intend to show that not only is this what judges do in fact, but moreover, this is exactly what judges *should* do. To do this it is necessary to show that the true purpose of the law is to achieve justice. To do this it is necessary to show how we can tell what purposes of the law are. To do this it is necessary to explain how legal realists use the scientific method. Part II of this article ad-

1. Karl Llewellyn tries to demonstrate this in Chapter IV of *The Bramble Bush*. See K. LLEWELLYN, *THE BRAMBLE BUSH* 56-70 (2d ed. 1951); cf. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *CORNELL L.Q.* 274, 287-88 (1929) ("judicial intuitions, and the opinions lighted and warmed by the feeling which produced them . . . not only give justice in the cause, but like a great white way, make plain in the wilderness the way of the Lord for judicial feet to follow").

dresses these problems and explains how to derive the principles of justice which underlie all our rules of law. Part III then ranks these principles in a rough descending order of importance in deciding actual cases. Part IV explains the significance and proper usage of principles of justice in the development of rules of law.

II. USING THE SCIENTIFIC METHOD

The most important premise of the scientific method is that a theory's validity is tested by its congruence with reality.² One of the few things realists have always agreed on is "an insistence on results as the single test of the validity of a proposition."³ In that sense legal realism has always accepted the validity of the scientific premise.

Realists accept as "reality" what courts and legislatures actually do. Their recorded decisions are an external and independent collection of data not subject to the will of legal theorists.⁴ As Holmes, the father of legal realism, put it, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."⁵ In that sense any theory of law is valid only to the extent it can predict what courts and legislatures will actually do when faced with a particular conflict in society. The insistence that rules explain cases before they could be accepted as rules of "law" led to the realist technique of challenging traditional rules with "case law undergrounds"—groups of cases outside the neat boxes of traditional theory, but consistent in trying to reach a just result.

Certainly this realist technique has had dramatic results in the past. Grant Gilmore argues in *The Death of Contract*⁶ that the reason why *Corbin on Contracts*⁷ made such a small ripple upon

2. See F. BEUTEL, EXPERIMENTAL JURISPRUDENCE AND THE SCIENSTATE 55 (1975).

3. H. REUSCHLEIN, JURISPRUDENCE—ITS AMERICAN PROPHETS 203 (2d ed. 1971); cf. *id.* at 230 (similar views of Yntema); *id.* at 193-94 (similar views of Bingham); *id.* at 183 (Pound's "fidelity to the stern realities").

4. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

5. *Id.* at 460-61. For an explanation of why external data is necessary, see Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197, 200-02, 223 (1980).

6. G. GILMORE, THE DEATH OF CONTRACT 56 (1974).

7. See *id.* at 57 (describing *Corbin on Contracts* as "the greatest law book ever written").

publication was Corbin's prior success in demanding that the *Restatement of Contracts* take note of various "case law under-grounds" and include their rules.⁸ Gilmore called this the "Corbinization" of contract law,⁹ and to Corbin and Cardozo he attributed the destruction of classical contract theory.¹⁰ But it is time for us to go beyond the mere extraction of new generalizations, new "rules," from cases as they come down. We can carry the process of abstraction one step further. Just as we abstract "rules" of law from results of courts in particular cases,¹¹ so also we can abstract "principles" of justice that explain why those rules have endured.

A. *The Realist Assertion*

Realists have long accused formalist judges of concealing the true basis of their decisions by pretending the results they reached were inevitable.¹² Realists have always insisted on the existence of judicial discretion to reach a result favoring either side in the typical case.¹³ In fact, realists typically claim that eliminating judicial discretion is impossible,¹⁴ and even if it were possible, it would be a bad idea since discretion is needed to allow judges to achieve justice.¹⁵ What the realist sees as necessary is giving the judge the wisdom and understanding of his job which enables him to use his discretion properly.¹⁶

8. *See id.* at 57-70.

9. *Id.* at 70-71.

10. *Id.* at 57.

11. Milsom, in his review of *The Death of Contract*, calls this insistence on drawing rules "the compulsion to intellectualize." Milsom, Book Review, 84 *YALE L.J.* 1585, 1587 (1975). But I shall consider it a perfectly sensible and legitimate action by courts and writers, required by the ninth principle of justice—"Justice demands that like cases be treated alike, i.e., that there be rules."

12. *See* J. FRANK, *LAW AND THE MODERN MIND* 142 (1930) ("the judicial genius must do his work on the sly"). I use the word "accused" because there is often an element of intemperateness in these attacks; no doubt emotions ran high on both sides.

13. H. REUSCHLEIN, *JURISPRUDENCE—ITS AMERICAN PROPHETS* 194 (2d ed. 1971) (quoting Bingham: "No court is bound by precedent or by previous generalization").

14. *See* a recent discussion of this in Weder, *Discretion: The Unacknowledged Side of the Law*, 25 *TORONTO L.J.* 120 (1975).

15. *See* J. FRANK, *LAW AND THE MODERN MIND* 139-42 (1930) (concluding that "the law is at its best when the judges are wisely and consciously exercising their discretion, their power to individualize cases").

16. For example, the present writer has commented on the proper theory of the "parol evidence" rule (Rule against Contradicting Integrated Writings) as useful solely to give

The problem with the realist description of the judge as having discretion to do what he pleased was that it appeared to license the judge to do what he pleased. Realists meant that judges practically speaking have the *power* to do what they please, not that they have the *right* to do so. But some judges thought the realist analysis might be applied to justify dispensing with their obligation, in deciding particular cases, to make law in the way that the community expects law to be made.¹⁷ In fact, the legal community tolerates a wide degree of judicial discretion because it relies on judges to make decisions in the manner expected of them. And what is expected of them is that they try to achieve just results.

When judges violate their obligation to conform to the expectations of the legal community, as happened in the famous example of *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*,¹⁸ the resulting criticism contains all the bitterness of betrayed trust.¹⁹ Although the statute interpreted was not a model of clarity,²⁰ its underlying purposes

judges discretion in avoiding having juries decide issues of fact. See CORBIN ON CONTRACTS § 595(A) (C. Kaufman Supp. 1980).

17. I am reminded of the following anecdote, probably apocryphal, which I picked up in law school: It was said that a legal realist was appointed to the bench, and after a few months an acquaintance had occasion to discuss his work with him. The acquaintance remarked that it must be easier for him than for other judges, knowing as he did the truth that judges have the discretion to hold for the side they choose. "Oh no," said the realist, "that description of judging works fine when you are looking at what judges do from the outside, but when you're the judge, you've got to *believe!*"

Despite a "no atheists in foxholes" quality to this story, there is something more. There is no point in being a judge if one does not believe in right and wrong, better decisions and worse decisions, justice and injustice. It would be unrealistic to assume that most judges took the job desiring to dedicate their lives to an exercise in nothingness. The only sensible assumption we can make is that most judges care about justice.

18. 297 F.2d 497 (1st Cir. 1962). In *Roto-Lith*, a "battle of the forms" case, the buying offeror was held bound by the seller's disclaimer despite section 2-207 of the Uniform Commercial Code. See *id.* at 500; U.C.C. § 2-207 (1972 version) (between merchants terms additional to those offered do not become part of the contract if they materially alter it).

19. Who can forget the pungent quotation from Bentham, "Not a grain of corn in this dunghill!" See R. SPEIDEL, R. SUMMERS & J. WHITE, *TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW* 51 (2d ed. 1974).

20. See U.C.C. § 2-207 (1972 version). Section 2-207 provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

clearly excluded any attempt to make one writing an offer and the other party's acts an acceptance.²¹ It clearly attempted to end the hope for victory by one party's boilerplate in the battle of the forms.²² When the *Roto-Lith* court, in the first significant case to interpret the statute, held that its effect was that the last form always won, dozens of critical commentaries appeared.²³ This inci-

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Id. Translated into English, section 2-207 would read as follows:

(1) This section governs oral contracts confirmed by writings, and contracts created by more than one writing. All these contracts include the terms on which the writings of the parties agree. Oral contracts confirmed by writings also include the oral terms. Additionally, between merchants all these contracts include terms that were not in the other party's writing nor the oral contract so long as they neither materially alter the deal nor are expressly objected to.

(2) A contract is made whenever both parties send writings offering, accepting, or confirming a deal:

(a) unless at least one writing says there is no deal except on its conditions, and that statement is "express," and

(b) even then, a contract is still made if both parties act like they have a contract. In that case, the contract also includes those terms ordinarily provided by the Code.

(3) "Express" or "expressly" in this section means either the statement is not standard form printing ("boilerplate"), or if it is, other circumstances in the transaction let the other party know the sender really means it.

21. See U.C.C. § 2-207, Comment 7 (1972 version). Comment 7 states in part:

In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance.

Id.

22. See U.C.C. § 2-207, Comment 6 (1972 version). Comment 6 states in part:

Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract.

Id.

23. See, e.g., J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 1-2, at 26-27 (1972) (*Roto-Lith* an "infamous" case "contrary to the draftsman's policy . . . to whittle down the counter-offer rule"); Murray, *Intention Over Terms: An Exploration of UCC 2-207 and New Section 60, Restatement of Contracts*, 37

dent shows the legal community expected the court to follow the policy of the statute regardless of its drafting and regardless of whether some technical theory could be found to evade that policy.²⁴ The court mistook its *power* to render a decision for either side as sufficient to give it a *right* to render a decision contrary to determinations of the legislative branch.

B. *The Relationship Between Law and Justice*

If people get upset when judges ignore the prevailing standard of justice in the community, as occurred in *Roto-Lith*, then this reaction may be taken as some evidence that our society expects that justice is relevant to the job of judging. Furthermore, *Roto-Lith* is not just an isolated case; rather, considerations of justice are always to be taken into account in the process of judging. In other words, I shall try here to demonstrate the proper relationship between law and justice in our society: the purpose of the law is to do justice. In a more civilized time that proposition will not seem startling; indeed, it may seem so obvious that discussion is unnecessary.

I am not the first observer to notice that rules of law do not actually decide particular cases. Karl Llewellyn discussed the "Janus-faced" concept of precedent in *The Bramble Bush*.²⁵ Holmes gave much earlier statements of this truth, however, in two famous quotations. "The life of the law has not been logic: it has been experience," he said.²⁶ Even more clearly, he said "General propositions do not decide concrete cases."²⁷ But if rules of law do not decide cases, then something else must; if actions speak louder

FORDHAM L. REV. 317, 330 (1969) (*Roto-Lith* court came to a "savage conclusion"); Corman, *The Law of Sales Under the Uniform Commercial Code*, 17 RUTGERS L. REV. 14, 25 (1962) ("an intelligent reading of the statute leads to a result diametrically opposed to that of the court"). *But see* Comment, *A Look at a Strict Construction of Section 2-207 of the Uniform Commercial Code From the Seller's Point of View or What's So Bad About Roto-Lith?*, 8 AKRON L. REV. 111, 120-23 (1974).

24. This is why great judges often must make different decisions depending on whether they judge in Kansas or New York, Texas or Massachusetts. This does not happen because they make policy any differently, but because their respective state legislatures have arrived at different balances of policy while deciding for one group or another in the clash of society's interests.

25. See K. LLEWELLYN, *THE BRAMBLE BUSH* 64-69 (2d ed. 1951).

26. O. HOLMES, *THE COMMON LAW* 5 (1881).

27. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

than words, something must explain those actions. In fact, that "something" is justice.

Applying the concept of "actions speak louder than words" to judicial decisions creates the distinction between "holding" and "dictum." Llewellyn claimed that the words used in a prior opinion had no value as holding or dictum until a subsequent court decided whether they were welcome or unwelcome. If unwelcome, the later court would distinguish the language as "dictum" if it could, which need not be followed. If the court welcomed the language, the distinction between "holding" and "dictum" was unnecessary; the court could cite and follow the language regardless of whether it was a "holding" the court was obligated to respect.²⁸

This realist insight has important consequences for the law student, the lawyer, and the judge. For the law student, it makes possible his understanding how the law evolves. For the lawyer, it implies that his task in every litigated case is twofold: first he must find a way to persuade the court that justice is on his side; then he must find a way the court can use procedurally to render a decision for his side without looking foolish.²⁹ Of course, it may be possible to dispense with one of the two elements on occasion. If a hometown judge is asked to render a decision against a hometown football team, he may have an initial feeling before he even hears the case as for which side he would like to find the justice.³⁰ By similar token the procedural path may be equally clear.³¹

So far I have said this is the way the system really works, a proposition of interest chiefly to the student and the lawyer, rather than the judge. But I want to go one step beyond earlier legal realists, and assert that this is also the way things *ought* to be.

No doubt the relationship between "ought" and "is" could be debated endlessly by philosophers. Lacking the time and space (if

28. See K. LLEWELLYN, *THE BRAMBLE BUSH* 66-69 (2d ed. 1951).

29. I have been teaching this insight to my students for some years now. One of them mentioned this theory to a lawyer in a job interview. The lawyer was unimpressed: "Around here we just call that giving the judge something to hang his hat on." Ever since hearing this I have remembered this insight as the "judicial hat-rack" method of winning cases.

30. See *Diamond v. University of Southern California*, 89 Cal. Rptr. 302, 305 (Ct. App. 1970) (breach of option to purchase Rose Bowl tickets offered to season ticket holders), cited in, CORBIN ON CONTRACTS § 692 (C. Kaufman Supp. 1980).

31. Hopefully, if *both* the justice and the method of arriving at the just result were clear, lawyers on both sides would be competent enough to see it, and the case would be settled.

not the interest) to do so here, I assume that "oughtness" has three different sources: (1) something "ought" to be done because it is prescribed by an authoritative source;³² (2) something "ought" to be done because it is what people want;³³ and, (3) something "ought" to be done because it is what is good for people.³⁴ Formalist legal theory claimed to believe in authoritative sources: judges "ought" to do things because that is what it said in the precedents. Once it is shown that the "precedents" do not really bind, that judges are free, then this method of proving "oughtness" is unworkable.

In Western society, the law has always followed the second or third method. The great legal thinkers always followed the second method, but there was a time when the intellectual arrogance of those wishing to impose their own vision of what is "good" on society forced the better view into dissent.³⁵ Western society has evolved a more or less workable method (or two) of determining what people want; we have delegated the power to determine disputes about what people really want to the legislature.³⁶ Judges are

32. Beutel says this is how religious systems get their lists of "oughts"; he calls this method of deriving them "dogmatism." I prefer not to use this term because it connotes a writing or doctrine ("dogma"). But the same obedience to authority can be seen where persons are elevated to infallibility, as in the case of Hitler, the Rev. Jim Jones, who died with his followers at Jonestown, Guyana, or even our own Supreme Court in the New Deal era. A special case of this method is the proposition, "this 'ought' to be, because it is what I want."

33. A variation on this theme is the proposition, "this may not be what people really want, but it would be if they thought about it properly." John Rawls sets up as an "original position," which he claims meets this test of being so structured, what people would want if they thought about it right. See J. RAWLS, *A THEORY OF JUSTICE* 41-45 (1971). I do not believe it is possible to be sure what all hypothetical people would hypothesize if placed in a hypothetical situation and asked to think about something. This method of proceeding is just a way of ignoring what other people want in favor of justifying what the writer wants. See Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197, 223 (1980).

34. This is, of course, the methodology of Marxism, utilitarianism, capitalism, elitism, and a great many other "isms," none of which has any necessary or particular relationship to law. The difficulty with this method of supplying "oughts" is not so much in calculating the truth of the proposition, "this is good for people." Theorists of this sort usually give some definition of "good" that people can theoretically use to try to measure the truth of their propositions. The real philosophical problem is in their claim that their conception of what is "good" is so superior to yours or mine or Joe Doakes that we ought to be bound by it. See *id.* at 224.

35. So in *Lochner v. New York*, 198 U.S. 45 (1905), Mr. Justice Holmes was forced to say in dissent, "The 14th Amendment does not enact Mr. Herbert Spencer's *Social Statics*." *Id.* at 75 (Holmes, J., dissenting).

36. Some also say the jury is a mechanism for determining what the community really

to be bound by the legislative resolution of these disputes; but when the legislature has resolved nothing, judges are not so bound. Judges should not be considered at sea in such a case, helpless to figure out what rule should be applied to resolve the dispute.³⁷ Rather, they should suppose that the relevant principles of justice are not in dispute, and the legislature is entitled to expect that judges will make the best decision (most in accordance with what is just) they can.

It can be argued that if "this ought to be because I want it so" is not a position worthy of respect, neither is the position "this ought to be because society wants it so." This argument falls into the error economists call the "fallacy of scale," the assumption that the actions of the mass are no different from the actions of the individual.³⁸ If one person's view of what is just is to prevail, he can control the outcome to favor his own interests or skew the results in favor of his own particular biases. If the common or shared views of what is just control, a basis for justice exists independent of the will, integrity, or limitations of any particular person.³⁹

Others have argued that in fact our legal system reflects our society's understanding that the government exists, with certain fundamental exceptions known as "constitutional rights," for the purpose of guaranteeing that what society in general wants badly enough will get done.⁴⁰ But I will not rely on the opinions of

wants. Others, like Frank, bitterly disagree. See J. FRANK, *LAW AND THE MODERN MIND* 176-77 note (1930) (quoting Holmes). But that is outside the scope of this article.

37. See my criticism of the "Myth of the All-Seeing and Indefatigable Legislature" in CORBIN ON CONTRACTS § 724(A)(1) (C. Kaufman Supp. 1980). I borrowed this idea from Dean Albert Sacks and the late Professor Henry Hart of Harvard.

38. To illustrate, consider the spectator in the football stadium—if one spectator stands up, he improves his view of the action, but if everyone stands, spectators generally do not improve their view.

39. I am reminded here of the "Kung Fu" doctrine of *stare decisis*, named from a passage in the television series *Kung Fu*, which went something like this: "What is as soft as a drop of water, Grasshopper? Or as weak as the gentle breeze? Yet, when many drops of water and many breezes come together, Grasshopper, they form the mighty hurricane which nothing on earth can defeat." This was how I used to explain to students that courts can legitimately ignore one critical law review article, but a unanimous storm of legal criticism obligates them to follow the general understanding of the legal profession.

40. Taking a more realistic view, which doubts the real strength of the exception, is Learned Hand: "Liberty is so much latitude as the powerful choose to accord to the weak. . . . [T]olerance ends where faith begins." See L. HAND, *THE SPIRIT OF LIBERTY* 55-56 (1930). To be sure, Hand was talking of the world as it is, not as it should be; he meant this passage in criticism of others, for he himself thought the constitutional guarantees to mean

others; I will rely on the scientific method.

The scientific method demands looking at the data and drawing a hypothesis to explain it.⁴¹ In law we have objective data available to all in the recorded decisions of courts and legislatures.⁴² If we discover principles of justice running consistently through these recorded decisions, we, as scientists, are obliged to infer this is not pure coincidence. We are obliged to infer that there is a reason why decisions of courts and legislatures reflect principles of justice. The scientist may infer, and I do infer, that this reason is probably that our society believes reflecting justice is a legitimate function of law.⁴³ This inference is strengthened by examples of criticism of judges who do not follow accepted standards of justice, as discussed in connection with *Roto-Lith*. This inference is strengthened further when we consider the alternatives. If we do not want judges to decide between two different possible decisions (either of which can be justified under accepted rules of law), on the basis of which decision will most advance justice, on what ground do we want judges to decide? We do not glory in the biases of individual judges in this society, nor do we accept the concept of judges taking bribes and rendering judgment for the highest bidder. We do not even accept judgment by roll of the dice.⁴⁴ In short, I challenge

something to the willing eye. *See id.* at 56-57.

41. For the argument that the scientific method demands inductive reasoning, as the superior and more accurate method of thinking than deductive reasoning, see Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197, 201 (1980).

42. Frank appears to believe this recorded data is invalid because it has been filtered through the biases and thought processes of judges. *See* J. FRANK, *LAW AND THE MODERN MIND* 268 note (1930). But all human actions have been filtered through someone's biases and thought processes. It is senseless to complain of the data when it is the only data you have and the best that can be obtained. A more sensible view is taken by Llewellyn, who advises reading cases "as an historian would read a document—looking for evidence of bias, of omission, of distortion." *See* K. LLEWELLYN, *THE BRAMBLE BUSH* 58 (2d ed. 1951). In other words, you can be skeptical of your data, but you cannot refuse to consider it at all; otherwise your own biases come through instead of those of dozens of judges—and your own are much more subject to manipulation and abuse, consisting as they do of the views of only one person.

43. We are not obliged to find that all these decisions reflect principles of justice. We are permitted to believe that some judges, say Mr. Justice Holmes, are juster than other judges, say the Nixon Court. The same is true of legislatures; some can be bribed. *See* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) (Marshall, C.J.) (sustaining demurrer to allegations that state legislature was bribed to pass a statute).

44. *See* J. FRANK, *LAW AND THE MODERN MIND* 145 (1930) (discussing Hutcheson's first encounter with the "judicial hunch," to which the judge resorted because he could not legiti-

anyone to tell us what else judges should use to decide between two legitimate alternatives which would better explain what we want judges to do, other than the inference that we want judges to do justice.⁴⁵

It may be objected that I have failed thus far to define "justice." So I have. That is not by accident; I believe that "justice" is more accurately understood when one does not start from a pre-conceived notion of what it should be, and then look for supporting data in the cases and statutes. Instead, one should begin with the data and try to discover what just explanation there could be for different lines of cases or statutes. Over time, one will hammer out principles of justice from which one can induce what the essential

mately use dice). It should go without saying that I believe very often the "judicial hunch" consists of the perception of the judge's subconscious that a decision, for one side or the other, will advance justice to a greater extent than one for the other. The aim of this article is to take justice out of the realm of the subconscious hunch and into the open where lawyers may argue about it. This will allow judges a sense of justice to be refined and improved by the arguments of counsel.

45. One alternative to the "Do justice" formulation of the duties of judges I have come across before is the quotation attributed to Mr. Justice Holmes, "Do justice? That is not my job; my job is to play the game according to the rules." See Kaufman, *Bringing Chaos Out of Order: Truth in Lending in the Courts*, 10 GA. L. REV. 937, 943 (1976). I do not believe this article opposes the great judge. I understand Holmes to mean here that a judge cannot avoid carrying out a legislative intent even if he thinks that intent to be unjust according to his own lights. But I assume in deriving the principles of justice a duty of judges to let legislatures make the decisions entrusted to their sphere of competence. See text accompanying notes 36-37 *supra*. I understand Holmes to mean here that justice can be found in the rules of law which exist, and that it is dangerous to license judges to give only the unguided instinct of their unchecked consciences as grounds for decision in particular cases. Llewellyn would agree with this; he points out that good judges can always find a way to manipulate precedents to derive new and just rules; lesser judges are much more bound by the balance of justice struck by the past. See K. LLEWELLYN, *THE BRAMBLE BUSH* 68 (2d ed. 1951). I have said that the decisions of the mass of judges and legislators are much more accurate in measuring society's understanding of what is just than any single decision of any particular judge. See text accompanying notes 37-39, *supra*. Cf. Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197, 205-06 n.39 (1980) (discussing "Solomonic justice" and noting Pound's view that "only a saint" may be trusted with non-rule-oriented style of decision-making); Kaufman, *Bringing Chaos Out of Order: Truth in Lending in the Courts*, 10 GA. L. REV. 937, 944 n.25 (1976) (complaining of tendency for error when relatively experienced judges are reviewed by relatively inexperienced ones).

On the other hand, I wonder whether judges might not play the game better if the rules were understood as existing for a reason, because they reflect justice. When judges then "play the game according to the rules," they would understand that when the reason for the rule ceases, the rule also ceases. See Part III, Rule 10 *infra*. The rules would be better tailored and would better reflect justice, and judges would then do a better job.

nature of justice is.

III. THE FOURTEEN PRINCIPLES OF JUSTICE

There is nothing inevitable about the number fourteen. At one point I had more than twenty principles of justice, before boiling them down to eleven. I discovered that when principles of justice get too specific, they begin to operate like rules of law which only explain a specific line or two of cases, and are not useful in deciding new situations. I have also tried reducing these principles into one great central concept. In that attempt I was successful in part; I could classify all the principles of justice into two categories: procedural justice and substantive justice. Substantive justice is just because of the substantive values of society. Procedural justice includes those rules necessary if any decision-making procedure is to be fair. At one time I thought procedural justice inherently more fundamental than substantive justice.⁴⁶ I still think that, as an abstract matter, but in practice I have ranked a rule of substantive justice as the most important in deciding cases in our society.⁴⁷

John Rawls claims it is impossible to rank principles of justice in an absolute "lexical order."⁴⁸ And I do not mean to do so here. An actual fact pattern may arise wherein judgment for one side would serve the first principle of justice while the second, fourth, and fifth principles would be served by a decision for the other side; the court might decide for the latter as having the weight of justice. A contrary decision upholding the first principle would upset the overall *scheme* of justice. I am not hoping for mathematical certainty, but simple recognition that a rough guide to the relative importance of competing principles is better than nothing.

Rule 1: Justice Demands that No One Should Profit by His Own Wrong (i.e., by Defeating the Reasonable Expectations of Others).

While working on the 1980 supplement to *Corbin on Contracts*, I

46. See Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197, 215 (1980).

47. I have found it necessary to stick with statements of intermediate generality. The two basic categories (sources) of principles of justice were too vague and abstract, too disconnected from reality, to be of use in deciding whether a judge was right or wrong in deciding a particular case.

48. J. RAWLS, A THEORY OF JUSTICE 43 (1971).

happened upon Mr. Justice Cardozo's explanation that waiver and estoppel are specific examples of a more basic general principle that nobody should profit by his own wrong.⁴⁹ I was impressed by this insight, and wondered if there might not be two or three other principles of justice out of which our specific legal rules have been crystallized. Thereafter, whenever a court announced a principle of law in a case I was noting for the supplement to *Corbin*, I asked myself whether that principle of law achieved justice (and if it did not seem to in the particular case, whether I could conceive of other cases where it would, or whether possibly it did at the time and under the circumstances in which the rule evolved). That inquiry led to these fourteen principles of justice.⁵⁰

The problem with Mr. Justice Cardozo's formulation is its failure to explain what a "wrong" is. In that sense it could not decide concrete cases since a judge who wished to avoid the principle would refuse to call particular conduct a "wrong," and a judge who wished to invoke the principle would be permitted to call even innocent conduct a "wrong." Fortunately, I had before me at the time Professor Corbin's explanation of what is a wrong when contract law is involved. In section one of *Corbin on Contracts* he explained that contract law is to protect the reasonable expectations of parties induced by promises.⁵¹ In contract law then, a wrong is a breach of a party's promise-induced reasonable expectations. I saw no reason why deletion of the contract law limitation would not produce a suitable explanation of a "wrong" generally. I tried the formulation, "Justice demands that no one profit by defeating the reasonable expectations of others." While it is more accurate, the phraseology is less familiar; most of the courts which have stated this principle have said that "no man should profit by his own wrong."⁵²

I rejected the idea that a wrong is what the legislature says it is.

49. See *Imperator Realty Co. v. Tull*, 127 N.E. 263, 266 (N.Y. 1920) (Cardozo, J., concurring). Holmes claimed the alternative formulation of this first principle of justice, that we have a duty not to defeat the reasonable expectations of others, is the true explanation behind the doctrine of "adverse possession" in the law of property. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897).

50. Since I have been studying contract law almost exclusively while deriving these principles, they could very well be seriously incomplete.

51. See CORBIN ON CONTRACTS § 1, at 1-2 (1963).

52. See *Simonson v. Sinsheimer*, 95 F. 948, 952 (6th Cir. 1899) (Taft, J.). See also the formulation in note 125 *infra*.

First, I noticed this definition of a "wrong" was being applied in "illegal contract" decisions. The traditional formulation of illegal contract rules was that since the state had outlawed particular kinds of contracts, both parties had committed a wrong in making such a contract; therefore, neither party would be allowed to sue to enforce it, since they would be permitted to profit from the making of the contract.⁵³ But the state's idea of a wrong and the reasonable expectations of the parties may be two different things; I noticed that courts were reluctant to apply the rule when the parties were in good faith and in conformity with the changing mores of the times.⁵⁴ I then had the insight that the existence of a statute or other state judgment concerning conduct is only relevant in determining whether the expectations which do exist are *reasonable*; it cannot insure that people will actually have certain expectations. Or, in another case, I noticed that there are statutes making money legal tender, but this cannot be conclusive on the question whether contracting parties actually expected to pay in legal tender.⁵⁵ The Uniform Commercial Code, on the contrary, recognizes that very often it would greatly defeat the reasonable expectations of a contracting party for someone else to insist on payment by legal tender instead of by check, bankwire, or whatever.⁵⁶ If a legal tender statute cannot supply an expectation of payment in legal tender, nor a statute against fornication or cohabitation supply an

53. See CORBIN ON CONTRACTS §§ 1476 (consideration of sexual intercourse), 1478 (wagering contests) (1962).

54. See *Cougl v. Fackler*, 510 S.W.2d 16, 18 (Ky. 1974) (contract between prostitute and alleged customer not necessarily invalid because of illegal relationship); *Tyranski v. Piggins*, 205 N.W.2d 595, 596 (Mich. Ct. App. 1973) (contract between cohabitating parties enforceable if independent of illicit relationship); *Latham v. Latham*, 547 P.2d 144, 145 (Or. 1976) (contract in consideration of providing "amenities of married life" held enforceable in light of state repealing law against cohabitation); cf. *Green v. Richmond*, 337 N.E.2d 691, 698 (Mass. 1975) (contract price admissible in quantum meruit action where decedent had promised to leave plaintiff his estate if she would "stay" with him, but died without devising property to her).

55. Cf. 31 U.S.C. § 459 (1976) (silver coins denominated less than one dollar legal tender for payments not exceeding ten dollars); *id.* § 460 (minor coins legal tender for payments not exceeding twenty-five cents).

56. See U.C.C. § 2-511(2) (1972 version). Subsection (2) provides that "Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it." *Id.* The official comments note that "The essence of the principle involved . . . is avoidance of commercial surprise at the time of performance." *Id.* § 2-511, Comment 3.

expectation of wrongdoing by couples who live together, then it is apparent that the state can only limit expectations, not supply them.

If the parties did not reasonably expect their contract to be unenforceable because of their wrongdoing, the principle that "no one should profit by his own wrong" does not apply. The contract may still be unenforceable, but that is because of the state's judgment that such contracts need to be deterred, and making them unenforceable is the most appropriate means of deterring them. There may in fact be some other, more appropriate means of deterrence. If the contract has been performed in part and both parties were in good faith (*i.e.*, both had honest states of mind),⁵⁷ then very probably some party is going to profit by the contract. In that case, the court cannot choose *whether* someone will profit, it can only choose *who* will profit. If that is the choice available, the principle of justice does not tell the court how to decide the case. The court must find some other just basis of decision, probably the third principle of justice discussed later.

One might also ask why the principle that no one should profit by his own wrong is ranked first. I might have cited Corbin's judgment that this is the basic principle. But it is also true that I would come to the same conclusion independently. While working on the rules on "good faith," I was forced to consider whether Professor Summers was right in saying that "good faith" has no inherent content, it is only a lack of specific kinds of "bad faith."⁵⁸ When I concluded that good faith is a motive to adhere to the spirit of the bargain, rather than the form, to live up to the reasonable expectations of others rather than the letter of one's obligations, then I decided that "good faith" is just another specific rule of law that reflects the basic principle of justice that persons should not profit by defeating the reasonable expectations of others. Since good faith is one of the most important of the "universal solvents,"⁵⁹ I concluded that this principle of justice must

57. See generally CORBIN ON CONTRACTS §§ 654A-654I (C. Kaufman Supp. 1980).

58. See Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 199-207 (1968). Looking at Summers' data, I came to a different conclusion; to be sure, courts found many different motives to be "bad faith," but all of them were motives to act in ways calculated to defeat the other party's reasonable expectations.

59. A "universal solvent" is a realist concept. If, as discussed in Part II, judges first

indeed be fundamental.

decide where the justice is and then look for a legal theory to hold for that side, then a "universal solvent" is a legal theory that will almost always be available, regardless of the particular facts, as a means the court can use to hold for a particular side in some class of cases. I mentioned "good faith" in contract cases. See U.C.C. § 1-203 (1972 version). "Negligence" is the counterpart in torts; it also seems to be concerned with the standard of conduct that others may reasonably expect. "Inadvertence" is the universal alternative to "negligence"; it reflects the sixth principle of justice that "people don't have to be perfect." The Uniform Commercial Code also makes "reasonableness" a universal solvent in Code cases. See U.C.C. § 1-102(3) (1972 version) ("obligations of . . . reasonableness . . . may not be disclaimed"). I suspect what the drafters had in mind is similar to what I call "fairness" in adhesion contract theory. See CORBIN ON CONTRACTS §§ 554A-554I (C. Kaufman Supp. 1980).

For most criminal lawyers, "reasonable doubt" is the universal solvent. But I believe there is another one, which I call the Zenger principle, after the famous trial of a New York printer for seditious libel in 1735, reported in the most famous pamphlet of pre-revolutionary America, J. ALEXANDER'S, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (S. Katz 2d ed. 1972). Zenger had run a newspaper critical of the royal governor. After the chief justice (appointed by the governor) disbarred Alexander and another, Zenger's original counsel, he was forced to import Alexander Hamilton from Philadelphia (the origin of the myth of the "Philadelphia lawyer"). Although truth was *not* a defense to seditious libel under the law, Hamilton's argument was that the jury had the power to acquit in the interests of justice if it believed Zenger ought not be punished for printing the truth. See *id.* at 23-24.

The Zenger principle, then, amounts to the principle that the jury may always acquit, if it feels justice would be served. I have been asked if this principle is something counsel could get an instruction on. Although I know of no precedents on the issue, I see no reason why not. In 1770, the Sons of Liberty arranged for the "Brief Narrative" to be reprinted when one of their leaders was indicted for libel for criticizing the New York Assembly. See *id.* at 30. Until the debunkers of modern times, historians saw this trial as an important precedent for freedom of the press, explaining why our founders felt necessary for maintaining trial by jury. See *id.* at 5. Certainly, the case must have been in the minds of the leaders of the American Revolution.

The problem with a jury instruction is the Zenger principle is not a plea of innocence, but a plea that society would be better served if no conviction were returned. In that sense, it is an appeal to those factors usually taken into account on sentencing. If the jury is to be told it may acquit despite guilt under the right circumstances, justice demands that the prosecution must have its chance to prove the circumstances are otherwise. So, if the defendant claims it is so unwise to convict ordinary potsmokers that the jury should acquit him of possession of marijuana, the prosecution needs the opportunity to assert this defendant is not an ordinary potsmoker, but a major cocaine importer. It is thus only just that the condition of granting the instruction be that the prosecution can put in its sentencing evidence at the conviction phase of the jury trial. If that is true, the Zenger principle is a universal solvent only for first offenders, and similar relatively appealing defendants—though I suppose nothing would prevent a defendant from forgetting the instruction and relying only on oral argument.

Rule 2: It Is Just that a Man Be Allowed To Do as He Pleases, So Long as He Does Not Upset His Neighbors.

Unlike the first principle, which was substantive,⁶⁰ this principle of justice is procedural.⁶¹ In contract law this principle can be seen

60. One demanded by the values of society. I once read a science fiction story about a con man who bought a valuable product from a planet by passing counterfeit currency. The planet so valued cleverness and successful trickery that it gave him a monopoly on the product's export as a reward for his superior conmanship, on the condition, however, that he only pay in counterfeit currency. When he got back home, his own government threatened to jail him if he passed any more counterfeits of its currency. So when he went back to the planet, he passed off genuine bills as counterfeits and became an even greater planetary hero. Obviously such a society would never accept this first principle of justice; nor would the African Ik tribe, discussed in C. TURNBULL, *THE MOUNTAIN PEOPLE* 135 (1972) and Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197, 203 n.28 (1980) (world's "ickiest" society noted for neglecting its children).

61. Although doubtless the distinction between "substantive" and "procedural" means something to most lawyers, perhaps the following example adds clarity: suppose that the United States decided Iran had jacked the price of oil above OPEC guidelines and was charging an unconscionably high price. That would be a question of substantive justice. Then suppose that the United States decided that the proper way to adjudicate whether Iran charged too much for its oil was to kidnap the Ayatollah Khomeini and forty-nine other Iranian government officials and employees and hold them hostage until Iran agreed to lower oil prices. This would be a question of procedural justice. I do not mean to imply that this division between "substantive" and "procedural" is a necessary one, just one that works satisfactorily for purposes of legal analysis. Actually, I know of three (and, so far, only three) ways of convincing someone of the truth of any proposition. One can appeal to *shared* (identical) values: "You and I both belong to OPEC; let's raise the price of oil and we will improve our position in the world." Or, one can appeal to *reciprocal* (different) values: "You produce oil and I produce food; why don't I trade you some food for some of your oil, and then we will both be better off." Or, again, one can appeal to *comparable* (analogous) values: "You wouldn't be willing to bargain with us if we kidnapped the Ayatollah Khomeini and forty-nine other people associated with the Iranian government, so you can't expect us to bargain with you when you hold fifty of our government's employees hostage." In law, the distinction between "shared" and "reciprocal" values usually is not crucial; a decision based on either kind of analysis would be a "substantive" question of justice. In economics, however, the distinction is crucial. Obviously, reasoning by analogy always raises questions of procedural justice. Our society values procedural justice ("Is this the right way to go about deciding?" or "Would it be fair to the Shah to deliver him to the Iranian government for trial?") more highly than substantive justice ("Is this the right decision?" or "Is the Shah really a criminal against humanity under the standards established at Nuremberg?") because it does not generally believe it is possible for anyone to have a monopoly on the truth. Cf. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press"). Thus, people can always disagree with any substantive judicial result in our society. Compare the Iranian concept of the "imam" (a living saint supposed to be incapable of error). Obviously if one believes an "imam" is deciding on the merits (and apparently many Iranians believe the Ayatollah Khomeini is an "imam"), it is easier to ignore questions of rightness and wrongness in *how* he proceeds in deciding things. Of course this ignores cause

at work in the old rules of "freedom of contract"⁶² and in the requirement of "consideration."⁶³ Very likely a great deal of injustice has been done in the past in the name of this principle. Usually this has occurred because courts failed to notice that the right to do what one pleases is only the second (subordinate in value to the first) principle of justice and has inherent limitations. Those limitations are powerfully put in the American folk saying, "The freedom to swing your arm ends where the other fellow's nose begins." More and more courts are beginning to understand that "freedom of contract" only applies when no wrong is being done to one of the contracting parties. Modern courts are, therefore, developing adhesion contract theory to insure that the public's reasonable expectations of fair treatment at the hands of businesses are not defeated by unfair and one-sided forms.

Learned Hand made a good case for the proposition that, considered in the abstract, the principle should actually read, "it is just that a man be allowed to do what he pleases, so long as he does not *harm* his neighbors."⁶⁴ Unfortunately, he agreed that this is not the principle of justice societies actually use. Society has always felt "harmed" by conduct that upsets it sufficiently; witness the Prohibition experiment. Further, Judge Hand pointed out that "if a community decides that some conduct is prejudicial to itself, and so decides by numbers sufficient to impose its will on dissenters, I know of no principle which can stay its hand."⁶⁵ Still, this principle of justice can be used to show that our society is more just than that of Russia.⁶⁶

I have tried to show elsewhere that the question when people should have a "liberty" is always inherently a question of

and effect; scientifically, one cannot presuppose that somebody is an "imam" and then define everything he says as being truth and justice. Instead, the would-be "imam" demonstrates his adherence to the standards of conduct required by always proceeding in a just manner. If one falls short of the standards of justice in procedure, he cannot be an "imam," and nobody can be expected to believe his decision on the substantive merits of the case (*i.e.*, "the Shah is a war criminal") either.

62. See generally CORBIN ON CONTRACTS §§ 559A-559L (C. Kaufman Supp. 1980).

63. See generally Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929 (1958).

64. See L. HAND, *THE SPIRIT OF LIBERTY* 55-56 (1952).

65. *Id.* at 55-56.

66. See Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197, 217 (1980).

procedural justice.⁶⁷ Therefore, I will not go deeply into the question of which "liberty" is procedural justice here. Suffice it to say this definition of "justice" is only procedural because the question when a society is sufficiently "upset" is defined out, and permitted to be varied from society to society. The question, "How much liberty does this society believe in before it will get upset by particular conduct" is a substantive question, but I cannot believe any useful purpose will be served by trying to answer that question for our society in this article.

Rule 3: Other Things Being Equal, Justice Is What Serves the Needs of Society (i.e., the Needs of Commerce).

The alternative formulation—equating the needs of commerce with the needs of society—is one that seems obvious in Western society, but one that probably would be rejected in a thoroughly Marxist society. This principle can be detected in some of the "public policy" cases,⁶⁸ as well as an occasional commercial case where the court argues that "the wheels of commerce would grind to a halt" if it held the other way.⁶⁹

Rule 4: It Is Just To Place Loss on a Party to the Extent He Could Have Prevented Loss, But if No One Could Avoid Loss, Loss Lies Where It Falls.

This appears to be the basic principle of justice at work in the law of torts. The common law's insistence on "fault" (i.e., "negligence") as a prerequisite to recovery for unintentional torts (before "strict liability" developed) is probably traceable to this principle of justice and its insistence on ability to avoid harm being the basis

67. See *id.* at 197 (first and second things a ruler would agree to in a proper "original position"); Kaufman, *The Resurrection of Contract*, 17 WASHBURN L.J. 38, 59-60 (1977) (five procedural superiorities of a regime of liberty over a regime of prescription).

68. See, e.g., *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *In re Gulf & Midlands Barge Line, Inc.*, 509 F.2d 713, 722-23 (5th Cir. 1975); *Ferguson v. Phoenix Assurance Co.*, 370 P.2d 379, 387 (Kan. 1962).

69. See *Bowling Green, Inc. v. State St. Bank & Trust Co.*, 425 F.2d 81, 85 (1st Cir. 1970); *Park State Bank v. Arena Auto Auction, Inc.*, 207 N.E.2d 158, 160 (Ill. App. Ct. 1965) (Petersen, J.) ("bring those wheels of the banking business to an astounding and abrupt halt"); cf. *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257, 260 (10th Cir. 1964) (holding otherwise "would cast a burden upon commercial transactions which they can ill afford").

of liability. In *The Resurrection of Contract*,⁷⁰ I first identified this principle of the common law, and argued that a more accurate explanation of the rise of "strict liability" was a more sophisticated understanding that a manufacturer often could have avoided harm even in cases when he was not negligent.⁷¹

When writing *The Resurrection of Contract* I thought this principle of justice (not then part of any general theory of the relationship between law and justice) was probably the most fundamental. I have repented of that view. I have not changed my opinion that the "holder in due course" doctrine⁷² is directly derived from this principle of justice.⁷³ Two or three hundred years ago, it was thought that the maker or drawer of a negotiable instrument by creating it and "setting it afloat upon a sea of strangers"⁷⁴ was chiefly the person who created the risk that someone must bear loss because he had personal defenses against the original payee. However, in those days promissory notes effectively functioned as currency, and a single negotiable instrument might circulate to as many as two hundred persons before being retired from circulation.⁷⁵ In modern times, it seems that the existence of a finance company willing to discount consumer paper for a crook creates

70. Kaufman, *The Resurrection of Contract*, 17 WASHBURN L.J. 38 (1977).

71. *See id.* at 63-65. I do not agree with the alternative formulation some students keep trying out on me: that it is just to place loss on the party who could "best bear it." That is just the "deep pocket" doctrine ("soak the rich") in another guise. The actions of legislatures in blood hepatitis cases seem to demonstrate that strict liability is based on this legitimate understanding of the justice involved, not on the "deep pocket" doctrine. *See id.* at 64 n.93.

72. The Uniform Commercial Code defines a holder in due course as "a holder who takes a negotiable instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." *See* U.C.C. § 3-302(1) (1972 version). For a detailed discussion of the origin and development of the doctrine, see *Succession of Baker*, 55 So. 714, 719 (La. 1911) ("the maxim . . . is especially true of rules grown up in jurisprudence. These rules are binding by authority of reason, rather than by reason of authority").

73. *Accord*, *Burchett v. Allied Concord Financial Corp.*, 396 P.2d 186, 190 (N.M. 1964). In *Burchett* the makers of promissory notes, procured through false representations, were denied cancellation of the notes in the hands of a holder in due course. *See id.* at 187, 191-92. Although fraud in the inducement generally may be raised against a holder in due course, it may not be raised if there was reasonable opportunity to discover the character of the representations inducing the execution of the contract. *Id.* at 190; *see* U.C.C. § 3-305(2) (1972 version).

74. U.C.C. § 3-406, Comment 2 (1972 version).

75. *Cf.* E. WOOD, ENGLISH THEORIES OF CENTRAL BANKING CONTROL 17 n.44 (1939) (minimum of 20 endorsements required to treat bill of exchange as money).

the risk of loss through crooked and deceptive practices being practiced on members of the public.⁷⁶ Today, promissory notes do not circulate to "a sea of strangers"; they usually circulate only once, to a single assignee who is usually better able to discover and prevent wrongdoing by the person with whom he deals than those members of the public whose obligations are being assigned. To be sure, some negotiable instruments are still used as a commercial medium of payment,⁷⁷ but none of these are promissory notes. For instruments that function as money, the holder in due course doctrine is appropriate and valuable, placing loss on the party who could best have prevented it; but this is not true of those "negotiable" instruments no longer serving as money in commercial practice.

A concept which seems very similar to this principle of justice on the prevention of loss is this: *As between competing interests, it is just that gain go to the party that contributed the most to its production.* This seems to be the principle behind the provisions of article nine of the Uniform Commercial Code allowing priority to purchase money security interests.⁷⁸ Again, this seems to have been the idea behind allowing priority to current year financers of farmers' crops over financers who advanced money in prior years.⁷⁹ Again, possibly this is the principle that has persuaded legislatures to give mechanics' and materialmen's liens priority over competing security interests.

I have not treated this as a separate principle of justice because I am convinced it is merely a corollary of the main principle. Both this and the main formulation seem to be expressions of some deeper concept of the relationship between means and ends, of proportionality between cause and effect; a relationship that I can picture clearly but have difficulty trying to describe verbally.

76. See Rohner, *Holder in Due Course in Consumer Transactions: Requiem, Revival, or Reformation?*, 60 CORNELL L. REV. 503, 530 (1975).

77. Checks and international bills of exchange still function as money, as well as some trade acceptances such as that involved in *Newark Steel Drum Co. v. Penn Crest Oil & Grease Corp.*, 4 U.C.C. Rep. 316, 319 (N.Y. Sup. Ct. 1967).

78. See U.C.C. §§ 9-107, 9-312 (1972 version).

79. See *id.* § 9-312(2).

Rule 5: Justice Will Hold a Man at Least to the Minimum Obligation He Consciously Assumed.

This principle of justice probably explains the rise of the “meeting of the minds” theory of contract law.⁸⁰ The theory began to die when legal theorists began questioning whether it was not also just to hold people to something more—to the obligation they induced others to reasonably believe was assumed (objective theory).⁸¹ Still, the principle has a pull and a continued vitality. I recall hearing an operetta, *The Frog Prince*, when I was about four years old: “If you make a promise keep it/That’s the only thing to do./If you say you will,/Your promises fulfill.”

The rule *Pacta sunt servanda*⁸² and the idea of enforcing only the “dickered terms”⁸³ demonstrate the survival of this principle. Again, “fraud in the inducement” and “mistake” are doctrines reflecting society’s understanding that it is the conscious understanding of people that justifies holding them liable on their promises.⁸⁴ The concept of “minority” likewise follows from this and the perception that understanding takes a while to develop.⁸⁵ The principle is also applied in cases refusing to allow a person out of a contractual obligation on the ground that his *own* obligation was illusory.⁸⁶ Again, the principle supports refusing to impose liability in quasi-contract or unjust enrichment for benefits he was not aware anyone might expect him to pay for.⁸⁷

80. See generally Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921).

81. See *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D. N.Y. 1911) (L. Hand, J.) (“A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties”).

82. “Agreements must be observed.” See generally Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783 (1941).

83. See K. LLEWELLYN, *THE COMMON LAW TRADITION* 370-71 (1960); Kaufman, *The Resurrection of Contract*, 17 WASHBURN L.J. 38, 42-46 (1977); cf. CORBIN ON CONTRACTS § 64(B) (C. Kaufman Supp. 1980) (discussion of “quasi-offer” cases).

84. See CORBIN ON CONTRACTS §§ 597-612 (1960); cf. *Raffles v. Wichelhaus*, 159 Eng. Rep. 375, 375 (Ex. 1864) (the ships “Peerless”) (no contract where parties contemplated two different delivery ships by same name). See the discussion of possible error in “Peerless” in CORBIN ON CONTRACTS § 536(D) (C. Kaufman Supp. 1980).

85. See generally Navin, *The Contracts of Minors Viewed from the Perspective of Fair Exchange*, 50 N.C. L. REV. 517 (1972).

86. See CORBIN ON CONTRACTS §§ 145(B)(1), 152(B)(4) (C. Kaufman Supp. 1980).

87. See *id.* § 19(B)(4).

Rule 6: Justice Does Not Make a Man Give Something for Nothing.

This principle can be reformulated as "Requiring windfalls is not just." This principle also supports the doctrine of "consideration" in contract law,⁸⁸ and supports allowing people to revoke contracts to make gifts even when a technical consideration is present.⁸⁹ This principle sometimes appears as "freedom from contract"; it is why people are permitted to refuse to perform their promises when the other party has only an illusory obligation.⁹⁰

Rule 7: People Don't Have to Be Perfect.

The classic example of this principle of justice is the rule *De minimis non curat lex*.⁹¹ The requirement of a "material breach" of contract and the doctrine of "substantial performance"⁹² reflect this principle of justice in contract law. In torts, the concept of "inadvertence" serves this function (meaning by inadvertence, a failure to be perfect which, since typical and understandable, is not negligent, even though harm to someone else resulted).⁹³

Rule 8: Justice Is Served When the Powerful Must Treat the Weak as Equals.

This principle is particularly apparent in fiduciary duty cases.⁹⁴ Although similar to the first principle of justice in supporting the trend of the courts to require fairness from the drafters of adhesion contracts, the principle is yet distinct. Unlike its more powerful older relative, it applies even where the weak never had any reason to expect fair treatment. On the other hand, where the

88. See generally Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929 (1958).

89. See *Fischer v. Union Trust Co.*, 101 N.W. 852, 855 (Mich. 1904).

90. See, e.g., *Zeyher v. S.S. & S. Mfg. Co.*, 319 F.2d 606, 607 (7th Cir. 1968); *Mobil Oil Corp. v. Wroten*, 303 A.2d 698, 701 (Del. Ch. 1973); *Graphic Arts Finishers, Inc. v. Boston Redev. Auth.*, 255 N.E.2d 793, 796 (Mass. 1970). See generally CORBIN ON CONTRACTS § 145 (1963).

91. "The law does not concern itself with trifles."

92. See *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (Cardozo, C.J.).

93. See discussion of "inadvertance" as a universal solvent in note 59 *supra*.

94. See, e.g., *Borden v. Sinskey*, 530 F.2d 478, 489-90 (3d Cir. 1976); *Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464, 471-74, 81 Cal. Rptr. 592, 599-602 (1969) (Traynor, C.J.); *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 515-18 (Mass. 1975).

weak bargained for and had a right to expect special treatment, a remedy under this principle of justice would give them less than their reasonable expectations. Briefly, the reason why the rule in fiduciary duty cases is "equality" is that the relationship is such that more specific terms cannot be induced; while in good faith cases, the "spirit of the bargain" allows much more accurate approximation of what the parties really expected.⁹⁵

Rule 9: Justice Demands that Like Cases Be Treated Alike (i.e., that There Be Rules).

This principle of justice supports the doctrine of *stare decisis*, and can also be detected in other doctrines, such as that of the "law of the case," *res judicata*, and collateral estoppel.⁹⁶ This principle also supports the elevation of the substance of a transaction over its form.⁹⁷ Since courts are continually elevating form over substance whenever they feel the ends of commerce are being served, as in the development of the "time-price" doctrine when usury laws were unduly restrictive,⁹⁸ it seems apparent that this principle of justice ranks well below the third one.

Rule 10: Justice Demands that Different Cases Be Treated Differently (i.e., that When the Reason for the Rule Ceases, the Rule also Ceases).

This principle can be traced back to Coke. In *Heydon's Case*⁹⁹ he discussed statutory construction, stating the substance of this and the preceding principle of justice. Blackstone lifted the Latin phrasing, *Cessante ratione legis, cessat et ipsa lex*, from Coke on

95. For further discussion of the distinction between the concept of "fiduciary duty" and the contract obligations of "good faith," see CORBIN ON CONTRACTS § 654A(B) (C. Kaufman Supp. 1980).

96. An explanation of "Solomonic justice," or circumstances when the alternative formulation ("that there be rules") does not obtain can be found in Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197, 205-06 n.39 (1980).

97. See *Rippe v. Doran*, 486 P.2d 107, 109 (Wash. App. 1971), discussed in CORBIN ON CONTRACTS § 1326(A)(1) (C. Kaufman Supp. 1980) (breach of covenant not to compete "in the City of Vancouver" found where seller opened competitive business three miles away, but outside city limits).

98. See CORBIN ON CONTRACTS § 1500 (1962); *id.* § 1011(A)(1) (C. Kaufman Supp. 1980).

99. 77 Eng. Rep. 1150 (1613).

Littleton.¹⁰⁰ Although the alternative formulation can be found directly in case law,¹⁰¹ doubtless from Blackstone, very few people are familiar with this principle today. The chief distinction between a lawyer and a bureaucrat is that the lawyer understands this concept and the bureaucrat does not.¹⁰² Because of its obscurity, I have found it more useful in the practice of law and the prediction of cases than any other.

This concept can be discovered in the rules concerning use of precedent, the concept of legislative purpose, the distinction between dictum and holding, and the rules followed in statutory interpretation cases. The use of this concept is also found in adhesion contract analysis.¹⁰³

This principle and the preceding principle of justice might well have been combined, but I resisted the temptation to do so for several reasons. Chiefly, this principle of justice seems to be universal, a procedural principle that any decision-maker must follow in order to think clearly. The preceding principle is not. Many societies do not accept the ninth principle; even some modern, mass societies might dispense with it.¹⁰⁴ Secondarily, though my two reformulations of these principles ("Like cases should be treated alike" and "Different cases should be treated differently") make the connection between them seem clear enough, in their traditional formulations, the connection is much less obvious. And the separate evolution of these two principles also supports separate treatment.

Rule 11: It Is Unjust to Place a Person in a Double Bind.

The concept of the "double bind" can be found in Eric Berne's *Games People Play*.¹⁰⁵ An example is when a son gets two ties from his parents for Christmas. The next morning he comes down to breakfast wearing one. His parents ask, "What's the matter,

100. See BLACKSTONE'S COMMENTARIES 390-91 (American ed. 1847); COKE ON LITTLETON 70b (1628).

101. See *Tavares v. Horstman*, 542 P.2d 1275, 1279 n.4 (Wyo. 1975); *Chicago & N.W. Ry. v. City of Riverton*, 247 P.2d 660, 660-61 (Wyo. 1952).

102. See CORBIN ON CONTRACTS § 865(B)(2) (C. Kaufman Supp. 1980).

103. *Id.* § 559G.

104. See Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197, 205-06 n.39 (1980).

105. E. BERNE, *GAMES PEOPLE PLAY* 93 (1964).

didn't you like the other one?"¹⁰⁶ In law the double bind most typically encountered is the situation where the law requires someone to do something, and then the other party seeks to impose liability on the acting party because of it. I encountered a couple of examples of this in doing the 1980 supplement to *Corbin on Contracts*.¹⁰⁷

This principle of justice has traditionally been found as the reason for judicial and official immunity. In fact, that is the chief justification advanced by Learned Hand for these doctrines in *Gregoire v. Biddle*,¹⁰⁸ where he said, "Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to satisfy a jury of his good faith."¹⁰⁹

Rule 12: Justice Requires Tailored Remedies Which Deter Only Socially Harmful Conduct (i.e., the Law Should Not Penalize Courtesy, Decency, and Common Humanity).

This rule is often found in cases where the courts refuse to find that leniency and decency on the part of one party is a waiver or estoppel.¹¹⁰ Actually, I seem to find more instances to complain of a violation of this principle of justice, than I find cases of compliance with it. The state of mind which occasionally leads courts to violate this principle is one I call "bleeding heartism." This particular "ism" is characterized by an excess of sympathy for the poor and the downtrodden, accompanied by a lack of understanding that they are capable of doing evil things to the same extent as

106. See *id.* at 93.

107. See *Skagway City School Bd. v. Davis*, 543 P.2d 218, 226 (Alaska 1975) (damages for loss of reputation denied where teacher fired for incompetence). Alaskan teachers are protected by a statute requiring that they can only be fired for "cause"; it would be unjust to penalize the school board for complying. CORBIN ON CONTRACTS § 1007(B)(2) (C. Kaufman Supp. 1980). See also *id.* § 1039A(B).

108. 177 F.2d 579 (2d Cir. 1949).

109. *Id.* at 581; cf. Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1976) ("discretionary function" exception). See generally H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1216-17 (1953); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271-72 (1937).

110. See, e.g., *Four Sons Bakery, Inc. v. Dulman*, 542 F.2d 829, 832 (10th Cir. 1976); *Frontier Mobile Home Sales, Inc. v. Tringleth*, 505 S.W.2d 516, 517-18 (Ark. 1974); *Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611, 613-14 (Tex. Civ. App.—Dallas 1973, no writ). See also CORBIN ON CONTRACTS § 1011(A)(1) (C. Kaufman Supp. 1980).

more advantaged groups in society.¹¹¹ While in this state of mind, they make rulings in favor of the poor and downtrodden which, given the inevitable workings of human nature and the reactions of those who will have to deal with the poor and downtrodden, make the poor and downtrodden even worse off than they were before.¹¹² This occurs because when courts fail to realize that their rulings against those who tried to treat the poor and downtrodden fairly put a premium on treating the poor and downtrodden badly. Only a saint will try to treat the poor fairly if he is going to be penalized for it. Most litigants involved in commercial and contract law today are not saints. We have sufficiently little reserves of good will, tolerance, courtesy, humanity, and the like that courts should be especially careful of rulings that discourage them.

A typical example of bleeding heartism is the majority rule followed in this country today on the evasion or refusal of notice of sale of collateral by debtors who are aware that the secured party is required to give them notice in order to obtain a deficiency judgment.¹¹³ In the early days of the U.C.C., it was common practice for security agreements to provide for certified mail notice to debtors of the resale of their collateral. Then a long series of decisions held secured parties to be in violation of their notice obligation if the debtor evaded or refused to sign.¹¹⁴ This, coupled with decisions allowing secured parties to give oral notice of resale,¹¹⁵ persuaded secured parties they had better change their ways. Instead of proving to the court their good faith in trying to give debtors

111. Or, as Levy puts it, "Last guys don't finish nice." Levy, *Levy's Nine Laws for the Disillusionment of the True Liberal*, 54 AIR FORCE MAGAZINE 64 (Aug. 1971). I do not mean by this citation to imply that I am either illusioned or disillusioned (I have never beaten my wife, thank you); I have always considered a realist philosophy sufficient antidote to either extreme.

112. Another formulation of this concept has been called the "Crazy Eddie" doctrine. See generally L. NIVEN & J. POURNELL, *THE MOTE IN GOD'S EYE* (1975).

113. See generally Annot., 59 A.L.R.3d 401 (1974).

114. See, e.g., *In re Carter*, 511 F.2d 1203, 1205 (9th Cir. 1975); *Commercial Credit Corp. v. Lloyd*, 12 U.C.C. Rep. 15, 17-18 (D.C. Super., Small Claims 1973); *Geohagan v. Commercial Credit Corp.*, 204 S.E.2d 784, 786 (Ga. Ct. App. 1974). But see, e.g., *United States v. Pirnie*, 472 F.2d 712, 713 (8th Cir. 1973); *Hudspeth Motors, Inc. v. Wilkinson*, 382 S.W.2d 191, 192 (Ark. 1964); *Texas Real Estate Comm'n v. Howard*, 538 S.W.2d 429, 431-32 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.). See generally U.C.C. § 9-504(3) (1972 version).

115. See *Page v. Camper City & Mobile Home Sales*, 297 So. 2d 810, 811 (Ala. 1974); *Crest Inv. Trust, Inc. v. Alatzas*, 287 A.2d 261, 264 (Md. 1972).

notice, they adopted the position that what debtors could not prove could not hurt them, and deleted the provisions for certified mail notice from their security agreements. Thus, in order to protect a few deadbeats who refused notice, the courts lessened the protections against perjury and mistake afforded the honest debtors under the security agreements then current. This is the typical result from failure to recognize that creditor actions which help debtors in general should not be seized upon as grounds for visiting a penalty on a creditor in a particular case. Secured parties are notorious for their superior ability to gain access to lawyers compared to debtors; courts should assume that enough lawyers are competent that sooner or later some are going to see to it that provisions in a security agreement which penalize their clients are going to be deleted. When they do, even incompetent lawyers are capable of following that lead, if for no other ground, than on the time-honored principle of legal drafting, "Monkey see, monkey do."¹¹⁶

Rule 13: Justice Values the Fundamental Interests of One Party More Highly than the Incidental Interests of Another Party.

I first found an example of this principle of justice in White and Summers *Uniform Commercial Code*,¹¹⁷ wherein they discuss the "main course" doctrine of Uniform Commercial Code security interests.¹¹⁸ This is a substantive principle of justice in this sense: our society accepts it because we do not believe one class in society is inherently superior to any other. Other societies, such as medieval Japan (samurai) or Communist societies (proletariat) may believe in the superiority of one class, whose weaker interests might be found more important than another's fundamental interests.^{118.1}

116. Cf. Kaufman, *Whodunit: Farm Products Collateral Under the Code*, 16 WASHBURN L.J. 250, 258 n.24 (1977) ("copying . . . in the grand old boilerplate style").

117. J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 25-17 (2d ed. 1980).

118. See *id.* § 25-17. See also CORBIN ON CONTRACTS §§ 901, 1391A(A) (C. Kaufman Supp. 1980). This is their explanation why U.C.C. § 9-308 (1972 version) subordinates claims of secured parties claiming chattel paper "merely as proceeds of inventory subject to a security interest" to the claims of buyers of that paper: "Presumably, the later party is favored on the assumption that chattel paper is his main course but merely the frosting, on the cake for the mere proceeds claimant." J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 25-17 (2d ed. 1980).

Rule 14: Courts Should Assume that Legislatures Expect Them To Do Justice Until Legislatures Demonstrate Otherwise.

This rule applies chiefly in "partial codification" cases, or other situations where legislatures overrule stupid court decisions and courts are obliged to consider whether the legislative overruling should be taken as destroying any possibility of further judicial evolution in the area. This principle of justice was first suggested by "The Case of the Spoiled Heir," in *The Legal Process* materials of Dean Albert Sacks and the late Professor Henry Hart of Harvard.¹¹⁹ The basic problem analyzed in the case is what to do about someone who commits murder in order to inherit. Some courts, ignoring a statute or two on their books expressing a clear legislative policy against the commission of murder in their states, stupidly thought that nothing could be done to prevent the murderer from inheriting. Whenever this happened, the legislature always eventually got around to correcting this stupidity by passing a special statute on inheritance by murderers. Then the problem presented itself whether a murderer under facts or circumstances that did not exactly fit the statute could still inherit—courts unaware of this principle of justice would hold the murderer could.¹²⁰ Whenever I have referred to the "Myth of the All-Seeing and Indefatigable Legislature,"¹²¹ I have in mind this principle of justice.¹²²

118.1 See the discussion of J. CLAVELL, SHOGUN (1976), in Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197, 216 n.65 (1980), where I claim that this principle can also be derived as just procedure and, therefore, ought to be followed regardless of the contrary substantive conceptions of other particular societies.

119. H. Hart & A. Sacks, *The Legal Process* 75-110 (Harv. Law School Mimeograph 1958).

120. See *Oleff v. Hodapp*, 195 N.E. 838, 841 (Ohio 1935) (first case allowed murderer to take under statute of descent and distribution; statute forbade murderers to take from their victims by descent and distribution; so next murderer claimed right to take by survival on a joint tenancy savings account providing for right of survivorship; majority held that since legislature had not foreseen all the possible ways the courts could be stupid enough to allow murderers incentives to go out and kill people, nothing could be done but allow the murderer to profit by his wrong here, the public policy of Ohio being only to forbid murderers taking by descent and distribution, and not against murder itself, or the existence of financial incentives for its commission).

121. Cf. CORBIN ON CONTRACTS § 724(A)(1) (C. Kaufman Supp. 1980) (legislators not "clones of Sir Galahad"). See generally H. Hart & A. Sacks, *The Legal Process* (Harv. Law

A possible explanation for the failure of courts to achieve a result that the legislature would have wanted is the pre-Holmesian belief of many courts that courts could not "make law," only legislatures could do that. This idea was a leftover from the "brooding omnipresence" theory of jurisprudence, by which judges claimed only to "discover" rules which were inherent, not to make law themselves.¹²³ Hart and Sacks demonstrate the inherent intellectual fallacy of this view. Since judges must decide every case that comes before them, they cannot avoid making "law" by deciding any particular case one way instead of another.¹²⁴ They can only choose which kind of law they are going to make, obsolete and unjust law by which murderers can kill others and legally get their money, or modern and just law by which no killer who is thinking about the money he will be getting can ever take because of the death of the person he killed.¹²⁵

A much wiser result was reached by the court in *Bank of Marin v. England*.¹²⁶ Here the technicalities of the bankruptcy law seemed to require that a bank be liable to a trustee in bankruptcy

School mimeograph 1958). Dean Sacks tells the story of discussing *Whiteley v. Chappell*, with a noted English legal scholar. See *Whiteley v. Chappell*, 4 Q.B. 147, 148-49 (1868) (no crime to fraudulently impersonate one recently deceased since crime was to impersonate "a person entitled to vote" and dead man no longer a "person"). Responding to the observation that the opinion looked only to the letter of the statute without considering whether it should be construed to advance underlying legislative purpose, said the Englishman: "Of course! That is exactly how we want our judges to act." The numerous judicial exceptions and avoidances of the Statute of Frauds show that the English did not always subscribe to this view. The change in the English philosophy is caused by—or helped create—the fact that its society is now so bureaucratic. The English have come to accept the idea that regular intervention of Parliament is a wise thing. In America the treatment of the judicial branch as co-equal with the legislative branch has supported continuing the old tradition that legislatures leave the process of judging alone as much as possible. Americans also tend to believe that governmental action (particularly legislative and administrative action) is inherently evil, if at times, necessary.

122. See CORBIN ON CONTRACTS §§ 551(B)(1), 901(B), 1039A(C) (C. Kaufman Supp. 1980).

123. See J. FRANK, *LAW AND THE MODERN MIND* 55 (1930) ("brooding omnipresence" described as "Holmes' derisive phrase").

124. H. Hart & A. Sacks, *The Legal Process* 515-40 (Harv. Law School Mimeograph 1958).

125. Note that the Ohio court violated the first principle of justice by allowing the killer to profit by his own wrong in *Oleff*. See Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 715 (1936) (*Nullus commodum capere potest de injuria sua propria* or "No one can obtain an advantage by his own wrong").

126. 385 U.S. 99 (1966).

for all checks honored between the time a voluntary petition was filed and the time it was notified of its customer's bankruptcy.¹²⁷ Mr. Justice Douglas refused to hold this on the ground that a bankruptcy court is a court of equity, and it would be inequitable to hold the bank liable for losses that it had no ability to prevent.¹²⁸ Mr. Justice Douglas' superior wisdom in reading the legislative intent to achieve only fair results is demonstrated by the subsequent codification of the *Bank of Marin* decision in the 1978 revision of the bankruptcy law.¹²⁹

This principle can also be derived from the constitutional theory of separation of powers among co-equal branches of government.^{129.1} If the legislature is a co-equal branch, then the judiciary has the duty to treat it with respect, the same respect it gives to other courts.^{129.2} Even if judges were privately convinced that the legislature was filled with drunks, incompetents and thieves, nevertheless, their duty of legislative respect requires them as courts to treat legislatures as being interested in justice until the legislature proves the contrary.

In this principle of justice, I argue that courts ought generally to take the attitude that they are courts of equity,¹³⁰ and legislatures generally pass statutes with this understanding in mind, expecting that courts will try to carry out their just and fair intent even if the language of the statute might occasionally be inadequately narrow or overconfidently overbroad. A great many cases of this attitude by courts can in fact be found.¹³¹

127. See *id.* at 101.

128. See *id.* at 102-03. Note that this reasoning appears to be the fifth rule, previously discussed.

129. See Bankruptcy Reform Act, Pub. L. No. 95-598, § 101, 92 Stat. 2595, 11 U.S.C.A. § 542 (West Supp. 1979); H.R. REP. No. 595, 95th Cong., 1st Sess. 369 (1977).

129.1. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 49, 68-70 (1803) (constitution controls any legislative act repugnant to it).

129.2. See, e.g., *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 272-73 (1935); *Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440-41 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); *Allis v. Allis*, 378 F.2d 721, 726 (5th Cir. 1967).

130. See CORBIN ON CONTRACTS § 961(A)(1) (C. Kaufman Supp. 1980).

131. See *McClure v. First Nat'l Bank*, 497 F.2d 490, 493-94 (5th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975); *Lehigh Valley v. Central Nat'l Bank*, 409 F.2d 989, 992 (5th Cir. 1975). See generally Hammett, *Any Promissory Note: The Obscene Security A Search for the Non-Commercial Investment*, 7 TEX. TECH. L. REV. 25 (1975); Comment, *Bank Loan Participations as Securities: Notes, Investments Contracts, and The Commercial Investment/Dichotomy*, 15 DUQUESNE L. REV. 261 (1977).

IV. CONCLUSION

Since we have seen it demonstrated how we can distill principles of justice from rules of law, this question legitimately arises: what is the proper use of principles of justice in a society that believes in the rule of law? Occasionally some of my students have assumed that principles of justice will replace the rule of law as the chief mechanism by which cases are decided. But I do not believe this will happen.

A traditional justification for the rule of law is the need for standards against which the conduct of individual judges can be measured. As Mr. Justice Cardozo said, "A jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of degenerating into what the Germans call 'Die Gefühlsjurisprudenz,' a jurisprudence of mere sentiment or feeling."¹³² While principles of justice also constitute an external standard, they would bind a judge to a much smaller extent than do rules of law, because there would be no check on the judicial decision in those cases where principles of justice conflict. It is not to be supposed that these conflicts are rare; probably they appear in most litigated cases. Few competent lawyers would refuse to settle a case when their client had not a shred of justice on his side. Rules of law are more predictable in the case of conflict; they codify not only a principle of justice, but often a judgment as to the proper balance of the weight of justice in situations when principles conflict.

For example, in one of the first cases I tried,¹³³ the conflict was between Pathfinder, a consignor of merchandise, a secured party (a bank and the SBA, which had guaranteed the bank's loan), and myself, the trustee in bankruptcy (who represented unsecured creditors).¹³⁴ The balance of justice in the case was obscure. Pathfinder had not filed a financing statement, as all consignors now know to be the only safe method of proceeding;¹³⁵ the bank had, but was aware that it was not supposed to be getting Pathfinder's property as collateral. Pathfinder's argument basically was that no-

132. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 106 (1921). For a more detailed discussion of this point, see note 45 *supra*.

133. *In re Webb*, 13 U.C.C. Rep. 394 (S.D. Tex. 1973).

134. *See id.* at 395.

135. *See* U.C.C. § 2-326(3)(c).

body was hurt, so that under Rule 2, what it did was okay, and under Rule 6, taking its property was unfair. The bank's argument was basically the corollary to Rule 5, that it had undertaken the loan that made it possible for Webb to go into the oil field equipment business; since it was a chief contributor to the creation of Webb's assets, it was fair to allow the bank any assets that could meet the description in its security agreement. My argument as trustee amounted to the contention that Pathfinder should lose under Rule 5, since it had the power to prevent the loss by filing a financing statement, and the bank should lose under Rule 1, since it would defeat everyone else's reasonable expectations for the bank to get property as collateral which it allowed others to believe it was not claiming, and under Rule 6, since the bank was trying to get a windfall at the expense of unsecured creditors. A court which had only justice, and no rules, to bind it could be excused for flipping a coin, or what is more likely, for making a decision based on other factors, such as which party or which lawyer it liked best, or some other basis not accepted as proper in our society. Fortunately for my case, the rules of law seemed to embody a resolution of the conflicts in favor of the position I advanced. The court did not have to apply the justice directly to the facts; it understood that the drafters of the Uniform Commercial Code had to have contemplated that the interests of consignors, secured parties, and unsecured creditors might conflict. To the extent the court believed the drafters of the Code had actually weighed the competing interests, it had guidance as to the preferable (most just) result.

This kind of problem raises the eternal, and possibly insoluble, problem of the proper balance between the mass and the individual, the need for rules and the need for individualized treatment, the concept of law and the concept of equity. Or to put it another way, this raises the question how much discretion we want judges to have. I must confess that I am greatly taken with Llewellyn's view it is a good thing for judges to believe strongly in the obligation to follow precedent, because precedent binds weaker judges much less than great judges.¹³⁶ That is the ideal situation. Though we trust no judges sufficiently to exempt them from the obligation to follow the rules of law embodied in precedent,¹³⁷ we understand

136. See K. LLEWELLYN, *THE BRAMBLE BUSH* 68 (2d ed. 1951).

137. This probably explains why, though Llewellyn felt closer to "natural law" theory

that for the law to survive it must evolve, it must adapt to the changes which occur in the society it serves. It is better that great judges make those adaptations than the weak. This article is not intended to change this system. It is intended to make more great judges, thereby making the same old system work better.

These principles of justice have such an attraction to me because they are necessary for clear thinking, not because they are just. They are tools of thought that can be used in any intellectual endeavor. They can be used to think about economics, about morals, about nuclear physics. They are rules about the proper relationship between means and ends. If in law, they happen to be rules about justice, that is because (I have argued) justice is the end to which rules of law are the means.

Most of these "principles of justice" are just basic postulates of any theory of categorization. Rule 3 amounts to the assertion that the means should serve your ends. Rule 11 amounts to the assertion that you should not discourage what you want to encourage. Rule 12 is the same. Rule 13 amounts to the statement that what is important is more important than what is unimportant. At this level of simplicity, these rules become mere truisms, definitional statements of how we think, or a computer or anything else would have to think. I do not reduce the fourteen principles to this level of simplicity because they lose their usefulness in judging, their relevance to the rules of law used in deciding actual cases. But it is perhaps worth bearing in mind that these principles can be reduced to so basic a level; they are sufficiently fundamental that no judge who cannot think about competing rules of law in this way can aspire to go down in history for his greatness in judging. This is not to deny that judges can do a perfectly adequate job "feeling" what is just, we do believe that "intuition outruns articulation."¹³⁸ But it seems likely that he will do a better job if he also under-

than any other competing explanation of how law is made, he could never reduce legal realism to natural law. He would never have been willing to license judges in general to reason from abstract principles to particular results, ignoring particular doctrines and precedents as "contrary to natural law." He would have agreed with me, I think, in saying that judges in general, as a mass, are to be trusted; their natural leaders (great judges) are to be trusted even more than most; but not all judges individually are to be trusted. The only protection against the untrustworthy individual is to require a certain amount of herd instinct, to deny judges the license to ignore what other judges are doing.

138. See Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197, 204 n.33 (1980).

stands why any particular result is just. Certainly it is to be expected that lawyers will do a better job if they can reach that sense of justice of the judge, if they can understand why the judge rejected their line of cases and accepted the precedents of their opponent, if they can understand why it is necessary to make a judge feel, in a doubtful case, the justice of their position as well as the law of it, and if they can understand what principles of justice always exist to be appealed to when the judge is in doubt.