JUSTICE, EXPEDIENCY, AND BEAUTY*

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INTRODUCTION

This essay proposes three theses:

(i) that the concept of justice should play a larger part in legal education, law practice, and judging than it presently does;

(ii) that justice is not merely a matter of economic efficiency, or of social expediency, or of public policy in the sense of pursuit of the greatest good for the greatest number; on the contrary, the characteristic and overriding concern of justice is fairness to the individual; and

(iii) that an important criterion of justice is aesthetic: a just decision or statute will be beautiful in that it fits, is proportionate to, or is "just right" for its setting and era.

I propose first to explain my use of the terms "justice," "expediency," and "beauty." I shall then examine implications of the thesis that justice has an aesthetic dimension. There are implications for legal education, for constitutional law, for torts, for lawyers' professional responsibility, for judges' duties and jurisdiction, for judicial review of administrative regulation, and even for reorganization of the executive branch of the government, especially the Department of Justice. Finally, I shall consider the relationship between justice and the press. The press can either educate or corrupt the public's taste in matters of justice. If, as I fear, the press often corrupts public taste in such matters, a dangerous gap opens between the will of a misinformed citizenry, on the one hand, and conscientious professional work by judges and lawyers, on the other. At some point, the legitimacy of government itself is undermined when the organs of justice are misperceived as the

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instruments of injustice.

I. DEFINITIONS

In our epoch, it has become almost embarrassing for teachers and critics of law to speak in terms of "justice."¹ Talk of justice makes many sophisticated people uncomfortable in the same way that posing an issue of "morality" seems useless, old-fashioned, or hypocritical. The terms "justice" and "morality" have become shopworn as a result of overuse, both by the powerful to legitimize their preferred position in society and by the bigoted to force their ideas on reluctant fellow citizens. The words, however, would never have lent themselves to such abuse if they did not have an enduring and powerful appeal to our minds and emotions.

I shall, accordingly, not hesitate to make justice the central concept of my jurisprudence. As will be seen below, justice is for me a complex quality of fitness, proportionateness to the situation, responsiveness to tradition as well as to the need for change, and sensitivity to both individual hardship and the general good. Admittedly, justice so defined is not precisely measurable. But many of the most important aspects of our collective and individual lives, such as love, health, and patriotism, are not quantifiable. They are not, however, on that account, less significant.

Justice is an art, not a science. A legal decision, statute, or practice must satisfy discriminating critics of the art of justice that it is beautifully fitted and proportioned to the situation with which it deals. It should be recognizably related to the traditions of the art, but transcend its clichés. If the decision, statute, or practice is to qualify as truly great art, it must arrest observers as one is arrested by commanding and magnificent painting, music, or architecture. It will seem innovative yet, once revealed, inevitable. It may be disturbing, even violently unacceptable to uneducated tastes, but unprejudiced minds will come to see it as a compelling manifestation of human creativity.

"Expediency," the second element in the title of this essay, is my unflattering reference to "public policy." The concept of expediency as a criterion of justice has dominated legal education and scholarly writing to the point where expediency and justice have been treated as the

¹ See Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40, 43-44 (Kairys ed. 1982) [hereinafter *THE POLITICS OF LAW*] (explaining that law students are taught that their initial reaction of outrage to unjust judicial results is "naive, nonlegal, [and] irrelevant").

same thing.² In this essay, I shall deprecate the equation of justice with expediency on two principal grounds: (i) the fallibility of economics and other social sciences (often combined with illusory certainty based on statistics and graphs); and (ii) the logical impossibility that a social science conclusion, however well founded, could dictate a judicial conclusion, in view of the fact that justice is a function of many values which are, and perhaps must be, ignored by the social sciences. If justice is a function of *A*, *B*, *C*, *D*, and *E* (Expediency), it is wildly improbable that *J* would equal *E*.³

In the following paragraphs, I shall discuss a few examples of the confusion of justice with expediency. In so doing, I do not necessarily indicate disagreement with the results reached, nor do I entirely exclude public policy in weighing the justice of a decision. I intend only to raise the consciousness of lawyers, law teachers, judges, and legislators: they ought to be more aware than they are of the extent to which the legal system has mistakenly assimilated justice to expediency.

The development of the law of torts provides an illustration. The rise of the doctrine of negligence was linked to notions of expediency and public policy. Useful business enterprises were not to be saddled with the cost of injuries inevitably resulting from their operation unless the business was mismanaged in some way that created more risk than necessary for operation of the business.⁴ Twentieth-century torts jurisprudence takes a strikingly different tack, but one still based on expediency. The movement is toward liability without fault if shifting the loss

² See Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW*, *supra* note 1, at 18, 36-37 (asserting that a blending of legal theory and free market economics is "perhaps the most influential attempt" at providing support for legal decisions).

³ The point has not been overlooked by philosophers or lawyers. See R. EPSTEIN, *A THEORY OF STRICT LIABILITY: TOWARD A REFORMATION OF TORT LAW* 4 (1980); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537-40 (1972); Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 SW. U.L. REV. 335, 338-40 (1981); Kalman, *Cost-Benefit Analysis: An Ethical Critique*, REG., Jan./Feb. 1981, at 33, 33-36; Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076, 1076-79 (1979); Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1219-22 (1977). Cf. Ackerman, Ackerman & Henderson, *Uncertain Search for Environmental Policy: The Costs and Benefits of Controlling Pollution Along the Delaware River*, 121 U. PA. L. REV. 1225, 1228, 1252-56 (1973) (an examination of the pitfalls of "scientific" solutions and a consideration of the "inherent limitations of the economist's analysis of the issue of environmental degradation").

⁴ See M. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 97-99 (1977); G. WHITE, *TORT LAW IN AMERICA* 92-96, 107-10 (1980); Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645, 691-697 (1983); see also Nolan & Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C.L. REV. 257, 257-261 (1987) (reviewing the initial hostile reception of American law to concepts of strict liability).

from plaintiff to defendant would promote optimal risk management within the community. Thus, the issues governing tort law are those of efficient accident avoidance, inclusion of all costs in product or activity pricing, risk distribution, and minimization of transaction costs. The justice of requiring or precluding compensation for damages inflicted by a tortfeasor rarely enters the equation.⁵

Public utility law also illustrates the distinction between justice and expediency. Typically, the law prescribes that utility rates shall be "just" as well as "reasonable."⁶ One might suppose that "reasonable" is such a comprehensive reference to all the considerations that enter into a judgment of public interest as to make separate reference to justice unnecessary.⁷ What the dual requirement seems to be saying is that, after the elements that go into a judgment of expediency have been appropriately weighed and balanced, i.e., "due process" has been in other respects satisfied, there remains a coordinate demand that the solution adequately respond to the hardship involved for affected individuals. The separate demand for justice is comparable to such specific protections of individual rights as the Constitution affords in the Bill of Rights or in the provision against the "taking" of private property without "just compensation"⁸ no matter how urgent the public policy

⁵ See G. CALABRESI, *THE COST OF ACCIDENTS* 24-31, 170 (1970); R. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 27-28 (1980); Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43-44 (1960); Nolan & Ursin, *supra* note 4, at 286-89; Ursin, *Strict Liability for Defective Business Premises [One Step Beyond Rowland and Greenman]*, 22 UCLA L. REV. 820, 829-837 (1975); *infra* notes 87-92 and accompanying text; see generally Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649 (1984) (surveying analytic and normative work in the field of law and economics).

⁶ See, e.g., Emergency Natural Gas Act of 1977, 15 U.S.C. § 717c(a) (1982) (rates for sale of gas shall be "just and reasonable"); Federal Power Act, 16 U.S.C. § 824d(a) (1982) (public utility rates for electric energy shall be "just and reasonable"). The Interstate Commerce Act formerly prescribed the "just and reasonable" standard. See Interstate Commerce Act, Pub. L. No. 76-785, part 3, ch. 722, § 305, 54 Stat. 898, 934 (1940) ("just and reasonable" rates for water carriers), *repealed by* Pub. L. No. 95-473, 92 Stat. 1337, 1468 (1978). In 1978, Congress deleted the reference to justice. See Pub. L. No. 95-473, ch. 107, § 10701(a), 92 Stat. 1337, 1371 (1978) (rates must be "reasonable") (codified as amended at 49 U.S.C. § 10701a (b)(1) (1982 & West Supp. 1987)). This change may have reflected a judgment, consistent with some judicial opinions, that "just" and "reasonable" were synonymous. See *infra* note 7. However, it is significant that such a change in centuries-old terminology was made in the context of legislation moving powerfully towards deregulation. The railroads' freedom to compete by drastic price-cutting, which might ordinarily be regarded as predatory, was not to be chilled by considerations of justice to smaller transportation firms selected as targets. See 49 U.S.C. § 10701a(c)(2) (1982 & West Supp. 1987) (creating a conclusive presumption of legality of rates that exceed variable costs).

⁷ See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("[Reasonableness] is used as a convenient summary of the dominant considerations which control in the application of legal doctrines.").

⁸ U.S. CONST. amend. V.

need for the property.

The contrast between expediency and justice is worth emphasizing. A law or a decision may be unjust despite the fact that it promotes the greatest good for the greatest number. An injustice does not lose its abhorrent character merely because it may, in the words of economists, increase the gross national product. We would instantly reject slavery as unjust even if it could be proven that all, including the slaves, would be better off in a material sense under such a system of inequality.⁹ As Justice Stevens has observed, "[I]t is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency."¹⁰

"Beauty," the third element in the title of this essay, is an example of a concept, like love or patriotism, that is essential and useful although difficult to appraise and impossible to quantify. The argument against its utility runs as follows: Beauty lies in the eye of the beholder, and is so utterly subjective that it cannot contribute to the measurement of justice. Moreover, beauty is hopelessly culture-bound. For an ancient Chinese it may include deformed feet of females resulting from binding in infancy, an utterly "inexpedient" crippling.¹¹ For some groups, beauty may reside in the distortion of head-shape, lips, or ear lobes, fantastic tattooing or scarification.¹² Victorian women sought beauty in painful compression of the waistline by means of corseting.¹³ Within the single culture of our time and country, the aesthetics of some are satisfied only by the orderliness and harmony of Bach; others must have the romantic passion of Beethoven, Tschaikovsky, or Brahms. Another audience will find ultimate satisfaction only in the strange atonality, rhythms, monotonies, and silences of Schoenberg or Cage. Painting genres as diverse as stone age drawings of cave dwellers, Renaissance "realism," Impressionist "color-songs," Post-Impressionist abstractions, and modern minimalists are all perceived as beautiful by different segments of the art audience.

Despite these difficulties, I dare say none would advocate the expulsion of the concept of beauty from our language and thought. That concept expresses an abiding aspiration for a quality that transcends utility or expediency. It is a quality that evokes in the appropriate audience a recognition of rightness, of fittingness according to a complex

Cf. J. RAWLS, *A THEORY OF JUSTICE* 248 (1971) (arguing that hereditary slavery or serfdom cannot be justified "by citing natural or historical limitations").

¹⁰ *United States v. Leon*, 468 U.S. 897, 980 (1984) (Stevens, J., dissenting) (dissenting from the 6-3 decision that good faith reliance by a police officer on a magistrate's warrant avers the exclusionary rule, even though the warrant was invalid).

¹¹ See B. RUDOLFSKY, *THE UNFASHIONABLE HUMAN BODY* 117-19 (1971).

¹² See *id.* at 97-98.

¹³ See *id.* at 101-08.

of psychological, historical, and political background shared by that audience. It will be observed how close that idea of "rightness" is to the idea of justice in law. Indeed, the aesthetic reaction to great art may be a wondering recognition that it is "just right." One is reminded of the usage of the term "just" to mean suitable or fitting.¹⁴ Keats was attuned to this relationship between beauty and justice when he wrote "Beauty is truth, truth beauty,"¹⁵ although he was obviously aware that fiction is not history and that poetry is not a catalogue of natural objects. The oft-heard reference to "poetic justice" is a similar equation of aesthetic merit and legal legitimacy. Aristotle struck the same note when he equated justice with proportionateness.¹⁶ A latter-day jurisprudent, Ronald Dworkin, speaks of "creative interpretation" as applying alike to the interpretation of literature and law.¹⁷

One difficulty with importing the concept of beauty into the legal and political field is that choices regarding the dispensation of justice cannot be left to individual taste. Doing justice is the central task of government; the system is *imposed* on different classes of persons who may have radically opposed aesthetics of justice. There is not much question about whose aesthetic will governs under tyranny or oligopoly. But in a democratic regime, the official art of dispensing justice is a product of legislative or constitutional compromise between contending interest groups. Once the interest groups have made their trade-offs and bargained to a settlement, what room is there to argue that justice is anything other than conformity to law so created?

Fortunately, several substantial possibilities remain for applying the criterion of beauty in appraising the justice of statutes and other positive law. Legislatures cannot anticipate all the novel situations that

¹⁴ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981) defines "just" as "conforming to some standard of correctness: CORRECT, PROPER, FITTING." *Id.* at 1228. Compare this definition to the usage of "justify" in the printing trade to mean "to make level and square . . . to set and fit the measure of space closely . . . so that all full lines are of equal length and flush right and left." *Id.*

¹⁵ J. KEATS, *Ode on a Grecian Urn*, l. 49, in THE POEMS OF JOHN KEATS 372, 373 1.49 (J. Stillinger ed. 1978). Cf. H. THOREAU, *Slavery in Massachusetts*, in 2 THOREAU'S COMPLETE WORKS 388, 404 (1929) ("Justice is sweet and musical; but injustice is harsh and discordant.").

¹⁶ ARISTOTLE, THE NICOMACHEAN ETHICS 141-42 (D. Rees ed. 1951) ("[T]he just is . . . a term in a proportion, and moreover in a four term proportion. . . . What is just . . . implies at least four terms: . . . the two parties, and the shares which they ought to have.").

¹⁷ R. DWORKIN, LAW'S EMPIRE 49-62, 228-275 (1986); see also B. CARDOZO, THE GROWTH OF THE LAW 88-91 (1924) (stating that justice is "consistent with symmetry and order" and that it has "a kindred phenomenon in literature" since it is a creative process); Grodin, *Justice Tobriner: Portrait of the Judge as an Artist*, 29 HASTINGS L.J. 7, 17-18 (1977) (arguing that the appreciation of wisdom, like art, may be an acquired habit that cannot be described analytically).

will arise. Statutory terms have an unavoidable penumbra of ambiguity and change their meaning in ordinary usage as years pass.¹⁸ The original interest group bargain gradually becomes obsolete as new power blocks form. There will be a search for "original intent" or for "what the Framers would have intended had they thought about it."¹⁹ In all such interpretation and reinterpretation, current ideas of the good, the fitting, and the just should and will be expressed.²⁰

Constitutional provisions, even more than statutory enactments, require the concept of justice for respectable interpretation. As in statutes, the terms employed in old formulae for mediating conflicting interests change their meaning over decades and centuries. There is thus opportunity for justices to recast the balance in the light of both current fitness and permanent values exemplified by specific constitutional provisions. The U.S. Senate's recent rejection of the nomination of Robert Bork to the Supreme Court²¹ represented, among other things, a repudiation of rigid original intent jurisprudence.

The Constitution itself rescues aesthetic justice from the reproach of being a completely subjective criterion. It identifies certain political values as superior or supreme, ordinarily invulnerable to competing claims of expediency or the public good. Such are the constitutional guarantees of freedom of speech and religion, of public trial and assistance of counsel, and of due process and equal protection of the laws. Such also is the constitutional immunity from unreasonable search and compulsory self-incrimination, from which has grown a modern concept of a constitutionally protected realm of privacy and individual autonomy.²² Through the identification of these and other fundamental values beyond the reach of legislatures, the Framers created a hierarchy of values and saved beauty from condemnation as a totally subjective criterion of justice.

There is a school of jurisprudence, however, that would reject not merely beauty, but justice itself, as a criterion of decisionmaking and lawmaking. Members of this school, known as "positivists,"²³ would

¹⁸ See R. DWORKIN, *supra* note 17, at 350-353.

¹⁹ See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 17 (1921). Cf. R. DWORKIN, *supra* note 17, at 352 (questioning the propriety of interpreting a statute by relying in part upon how the original authors would have provided for a circumstance for which they did not provide).

²⁰ Cf. R. DWORKIN, *supra* note 17, at 55 (rejecting original intent as the criterion of interpretation, in favor of a conception of interpretation as an ongoing dialogue between current judges and authoritative texts).

²¹ Walsh & Marcus, *Bork Rejected for High Court*, Wash. Post, October 24, 1987, at 1, col. 1.

²² See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 886-890, 893 (1978).

²³ See generally E. POLLAK, *JURISPRUDENCE* 521-633 (1979) (explaining the

find both concepts repellently subjective. So great a man as Justice Oliver Wendell Holmes said, perhaps in jesting response to Judge Learned Hand's admonition to "do Justice": "Young feller, that is not my job. My job is to play the game according to the rules."²⁴ One can imagine how horrified the positivists would have been by a proposal not only giving the impalpable idea of justice a larger role in teaching and administering law, but making beauty an ingredient of justice!

In debates over the insanity defense before the American Law Institute, I myself have opposed making justice the explicit standard for judging the criminal responsibility of the mentally ill. My co-Reporter for the Model Penal Code, Professor Herbert Wechsler, daunted by the difficulty of specifying the degree and kind of mental illness that should insulate a defendant from criminal liability, proposed a rule of nonresponsibility if the defendant's capacity was "so substantially impaired that he cannot justly be held responsible."²⁵ I argued that putting the matter thus to juries would not provide the requisite guidance to produce consistent results. Untrained jurors would be likely to be influenced unduly by the atrocity of the crime in deciding whether it was just to convict even a severely disturbed actor. Accordingly, my preferred alternative would have exculpated where "the prospect of conviction and punishment cannot constitute a significant restraining influence upon [the actor]."²⁶ Both alternatives were eventually rejected in favor of the main proposal that exculpates for substantial incapacity of the actor "either to appreciate the criminality . . . of his conduct or to conform his conduct to the requirements of law."²⁷

Regardless of whether justice is an appropriate issue to pose to an unguided jury, it is a workable criterion for application by professional judges in reaching plausible and consistent decisions within the range permitted by the language of statutes or controlling precedents. The constraint of justice as a control of choice within that range is derived from the fundamental structure and highest aspirations of society. That structure and those aspirations need not be explicit in a written constitution. The constitution itself may require interpretation that refers back to fundamental structure and highest aspirations.

positivists' approach to legal interpretation and offering examples of its application in American law).

²⁴ The incident is reported in R. HENSON, *THE LAW OF SALES* ix (1985), on the basis of a personal letter from Judge Hand.

²⁵ See MODEL PENAL CODE § 4.01 (alternate formulation (1)(a)) (Tent. Draft No. 4, 1955).

²⁶ *Id.* (alternate formulation (1)(b)).

²⁷ MODEL PENAL CODE § 4.01 (proposed Official Draft 1962).

II. IMPLICATIONS OF THE AESTHETIC DIMENSION OF JUSTICE

A. *Justice and Legal Education*

What difference would it make in the training of lawyers to focus on the goal of justice? An immediate answer to that question lies in the limited time available for the training of lawyers. Greater attention cannot be given to one aspect of that training without reducing attention being given to other aspects. The most notable feature of current legal education that would be deflated at the expense of increased concentration upon justice would be economics. More generally, law teachers would have to be more cautious in promoting the Benthamite notion that good law is that which is good for the community.²⁸

To my consternation, I find myself here confronting not only Bentham but also Justice Louis Brandeis, the personification of liberalism. The so-called "Brandeis brief" amasses economic and social data to prove that a statute is constitutional because it rests on a plausible judgment by the legislature or that a precedent should be abandoned because it cuts against current views of public policy.²⁹ Maybe so. Results reached by that sort of analysis may coincidentally be just. In any event, the analysis may usefully expose the superstitious premises of earlier decisions. If the Brandeis analysis means only that circumstances alter cases and that judgment should be exercised in the light of full information about facts, no one could disagree. But failure to reach beyond statistical and economic data may, as often as not, frustrate justice.

Facts do not select themselves; they are selected by advocates and judges to support positions. Even in the physical sciences, there have been scandalous cases where experimental data have been doctored by their proponents to support conclusions.³⁰ Fact selection to support a previously adopted thesis may even be unconscious.³¹ Stephen Jay

²⁸ See J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (1790) (1789) ("The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community . . .").

²⁹ See, e.g., Brief for the Defendant in Error at 18-84, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), reprinted in 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63, 83-149 (P. Kurland & G. Caspar ed. 1975); see also Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 628 n.15 (discussing the purpose of the "Brandeis brief").

³⁰ See, e.g., S. GOULD, THE MISMEASURE OF MAN 235-39 (1981) (discussing Sir Cyril Burt's fabrication of evidence to support the hypothesis of hereditary intelligence).

³¹ See T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 111-35, 192-98 (2d ed., enlarged 1970).

Gould described the process by which a respected scientist purported to establish the inferiority of black intelligence on the basis of statistics of head measurements: "His facts were reliable . . . but they were gathered selectively and then manipulated unconsciously in the service of prior conclusions. By this route, the conclusions achieved not only the blessing of science, but the prestige of numbers. . . . [The episode exemplifies] advocacy masquerading as objectivity."³² An experimenter can easily and in good faith attribute "anomalous" results of a particular set of measurements to defects in the techniques employed in that portion of the experiment. The temptation to do that is manifestly great when the experimenter envisions herself as the beneficent discoverer of a new remedy for a malignant physical or social disease.

This manipulability exposes one of the great weaknesses of reliance upon sociological data to prove the justice of a decision. Social scientists, advocates of academic theories, may shape factual arguments in much the same way that lawyers, advocates of legal positions, present an argument to a court. Greater awareness of this manipulability of the "facts" of social science would push both teachers and students of law toward a useful skepticism regarding the flood of economic, social, historical, and psychological data with which courts, legislatures, and lawyers are constantly inundated. In the classroom, one would hear more often the spontaneous question: "But is this result just?" In the post-Brandeis brief, the same question would be addressed in a systematic way, not merely as a rhetorical invocation. What makes a result "just"—reasonable expectations? balance of hardship? original intent of the legislators? impact on the community of a rule-generalization of the result? consistency of treatment of like cases?

B. *Justice and Constitutional Law*

Should blacks be segregated in schools and other public institutions? The answer to such questions can be found either in expediency or in principle, the principle of justice. In order to reject the separate but equal doctrine, the Supreme Court thought it appropriate in *Brown v. Board of Education*³³ to rely on sociological evidence demonstrating that separate was not equal and that the education of both blacks and whites was impaired by ethnic isolation.³⁴ But the statistics of that demonstration were vulnerable, and expert opinion could readily be

³² S. GOULD, *supra* note 30, at 85 (describing the work of Paul Broca in the field of cranial capacity).

³³ 347 U.S. 483 (1954).

³⁴ See *id.* at 494.

marshalled to show that the psychic wounds of intraclassroom ethnic rivalry and tension could also be debilitating and countereducational. Herbert Hovenkamp has brilliantly demonstrated that *Brown*, gratifying as that decision was, had no greater claim to being scientific than *Plessy v. Ferguson*,³⁵ the "separate-but-equal" decision that *Brown* overruled.³⁶

Consider how the Supreme Court would respond if a state chose to segregate for the avowed purpose of giving the segregated group a *superior* education. Suppose that the state attempted to carry out its purpose by providing *better* facilities and *more* and *better* teachers in order to compensate for past discrimination and to bring the segregated group more rapidly into the mainstream of American culture. A Supreme Court driven by notions of good policy and benign purpose might well sustain such a program. A Supreme Court attuned to the ideal of justice would be more likely to condemn a policy of "separate but superior," however benign.

*Kotch v. Board of River Port Pilot Commissioners*³⁷ is for me the epitome of an unaesthetic constitutional injustice based on implausible expediency. The Supreme Court there affirmed, by a five to four vote, the constitutionality of a Louisiana statute that restricted river boat piloting to members of the families of previously licensed pilots. Justice Black, writing for the majority, opined that this "economic" regulation could survive constitutional attack based on the equal protection clause so long as there was a rational basis for the legislative action.³⁸ He found that basis in the

useful function a closely knit pilotage system may serve. Thus the advantages of early experience under friendly supervision in the locality of the pilot's training, the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute, the close association in which pilots must work and live in their pilot communities and on the water, and the discipline and regulation which is imposed to

³⁵ 163 U.S. 537 (1896).

³⁶ See Hovenkamp, *supra* note 29 at 665-68. For an extensive bibliography regarding the use of social science in *Brown*, see D. KIRP & M. YUDOFF, *EDUCATIONAL POLICY AND THE LAW* 428-30 (1982); see also Yudoff, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, *LAW & CONTEMP. PROBS.*, Autumn, 1978, at 57, 109 ("Social scientists, of course, are quite capable of rendering such interpretive judgments, and these may well influence the judicial process. But they should not parade in the garb or language of the empiricism of the physical sciences.").

³⁷ 330 U.S. 552 (1947).

³⁸ See *id.* at 564.

assure the State competent pilot service after appointment, might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve.³⁹

In a remarkable footnote, Justice Black observed without irony the argument that "the pilots themselves were the first to see the disadvantages of the free or competitive system and to take steps toward the organization of associations. These associations soon developed into strong working combinations that eliminated competition and placed on a amicable basis matters that formerly produced much sharp rivalry."⁴⁰ In other words, the legislative arrangement by which a caste monopolized a profession for its own families was sustained partly on the basis of that caste's satisfaction with the "amicable" arrangement.⁴¹

It remained for Justice Rutledge, in dissent, to reject efficiency as a ground for excluding perfectly qualified nonconsanguineous pilots from the practice of their calling:

It is not enough . . . that a familial system may have a tendency or, as the Court puts it, a direct relationship to the end of securing an efficient pilotage system. . . .

Conceivably the familial system would be the most effective possible scheme for training many kinds of artisans or public servants, sheerly from the viewpoint of securing the highest degree of skill and competence. Indeed, something very worth while largely disappeared from our national life when the once prevalent familial system of conducting manufacturing and mercantile enterprises went out and was replaced by the highly impersonal corporate system for doing business.

But that loss is not one to be repaired under our scheme by legislation framed or administered to perpetuate family monopolies of either private occupations or branches of the public service. It is precisely because the [fourteenth] Amendment forbids enclosing those areas by legislative lines drawn on the basis of race, color, creed and the like, that, in cases like this, the possibly most efficient method of securing the highest development of skills cannot be established by

³⁹ *Id.* at 563.

⁴⁰ *Id.* at 561 n.22 (quoting DEPARTMENT OF COMMERCE, PILOTAGE IN THE UNITED STATES 29 (1917)).

⁴¹ *Cf. New State Ice v. Liebmann*, 285 U.S. 262, 294 (1932) (Brandeis, J., dissenting) (offering support for the monopolistic Ice Act, Brandeis stated that "the ice industry . . . acquiesced in and accepted the Act and the status which it creates"). See *infra* notes 44-53 and accompanying text.

law.⁴²

I invite you as lawyers and parents of law-aspiring sons and daughters to consider the attractiveness from a public policy perspective of the proposition that admission to the bar should be restricted to relatives of lawyers, since they would have been immersed from childhood in the traditions of justice, the ways of the wicked world, and the intricacies of courts, administrative agencies, and the internal revenue laws. Even our present conservative Supreme Court would give short shrift to such putative public gain to be achieved by a caste system.⁴³

Mr. Justice Black's great mistake in the *Kotch* case had its ideological roots in the famous Brandeis dissent in *New State Ice v. Liebmann*.⁴⁴ The Oklahoma legislature had passed a law forbidding anyone to engage in the manufacture or sale of ice without special permission of the state. Permission could be obtained only by proving that existing facilities for production or sale of ice were inadequate. Even in such a situation the existing operators would be given a priority opportunity to supply any deficiency. Although the statute was passed to correct an alleged oversupply of ice in Oklahoma, resulting in so-called destructive competition, no effort was made to either eliminate any of the many suppliers or to restrict expansion of operations by those who were in business at the time the statute was passed. Plaintiff, New State Ice Company, was an established operator at the time the statute was enacted and accordingly was issued a certificate of privilege to engage and expand without proof that its facilities were needed by the public.

Liebmann, the defendant, proposed to enter the ice business in Oklahoma City, attracted, undoubtedly, by the high prices obtainable from customers as a result of restriction of competition by the statute. Regarding the statute as both a constitutionally invalid restraint of his freedom to engage in a common calling and an arbitrary discrimination in favor of those who were already established in the ice business, Liebmann did not apply for a state certificate, nor did he undertake the hopeless task of persuading an industry-dominated state agency that his new facilities were required in the public interest. He simply started construction and operation. New State Ice Company, understandably regarding its state-protected franchise as property, entitled to protection against unauthorized rivalry, sued to enjoin Liebmann.

⁴² *Kotch*, 330 U.S. at 565-66 (Rutledge, J., dissenting).

⁴³ Cf. Supreme Court v. Piper, 470 U.S. 274, 285-87 (1985) (rejecting arguments that New Hampshire's residence requirement for lawyers should be upheld because residents are more familiar with local rules, more surely available for court proceedings, and more likely to render pro bono services).

⁴⁴ 285 U.S. at 280-311.

The majority opinion of the Supreme Court, written by conservative Justice Sutherland, rather summarily invalidated the Oklahoma statute on the ground that it arbitrarily restricted freedom to engage in an "ordinary occupation."⁴⁵ The result seems right to me because the statute unjustly discriminated in favor of the "ins" against the "outs" upon the flimsiest pretense of public welfare. It is not, however, an easy case. There is much to be said, as Brandeis did in dissent,⁴⁶ for broad, though not unlimited, deference by judges to legislators in matters of economic legislation. There is even more to be said on grounds of federalism for the United States Supreme Court to proceed with extreme caution when invited to intervene against state economic regulation. Moreover, legislative action must not be paralyzed by the fact that almost all statutory innovation affects some groups in the community more severely than others.

However, it was common ground between Sutherland and Brandeis that the Supreme Court did have the power and responsibility to intervene if the state action was arbitrary or capricious.⁴⁷ My point here is that Brandeis chose to apply the criterion of arbitrariness as if it were solely a question of expediency, as if anything that an Oklahoma legislature *might* have accepted as economic justification for the Ice Act would save the statute regardless of the disparity in treatment of like-situated individuals. The result of that extraordinary tolerance for expediency was to introduce into Brandeis's opinion a number of questionable features, as follows:

(i) Brandeis accepted the ice industry's manifestly absurd argument that the legislation was justified by the necessity to curb "natural monopoly" in the ice business.⁴⁸ He noted that the industry suffered from excessive competition, but failed to grasp that excessive competition is hardly a description of "monopoly." Even if it could be described as such, it is utterly illogical to seek to cure monopoly by restricting competition;⁴⁹

(ii) Brandeis, though he cited the ice industry trade publication's propaganda favoring restriction of entry,⁵⁰ did not draw the obvious inference that the legislation was pro-

⁴⁵ *Id.* at 279-80.

⁴⁶ *Id.* at 285, 291 (Brandeis, J., dissenting).

⁴⁷ See *id.* at 278, 279; *id.* at 284-85 (Brandeis, J., dissenting).

⁴⁸ See *id.* at 293-95, 304 (Brandeis, J., dissenting) (justifying the Ice Act as necessary to control monopoly resulting from destructive competition).

⁴⁹ See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 19-21, 29 (1977) (discussing maintenance of competition as the general objective of antitrust laws).

⁵⁰ See *New State Ice*, 285 U.S. at 292-93.

industry and anticonsumer, that its purpose was to raise prices and profits, not to recapture profits from an alleged monopoly; and (iii) Brandeis ignored the fact that competition and regulation are alternative forms of controlling trade, and that competition is the more severe discipline.

Of course the ice industry opted for the gentler controls of regulation, just as the motor carrier industry did and continues to do.

Probably, Brandeis knew perfectly well what he was doing—not opposing monopoly, but supporting a primitive brand of supply-side economics under which established business would be protected and made profitable so that banks would not fail, employment would be stabilized, tax revenues would grow, and deficits would evaporate. As the opinion shows, he was responding to the national economic crisis of the times, desperate for experimental solutions, hospitable to arguments of expediency, and correspondingly tolerant of individual injustices.⁵¹

One final point made by Justice Brandeis illustrates the fantastic extremes to which expediency as a test of justice can be pushed. Brandeis envisioned the use of noncompetitive profits in Oklahoma City to subsidize ice supply in remote rural areas, a kindness to mislocated farmers.⁵² Dairy farms dependent on refrigeration would, with this subsidy, no longer be economically required to cluster near the market cities but could disperse into regions otherwise unfavorable to milk production. On this theory, milk consumers in Oklahoma City would pay more for milk in order to increase supplies from inefficiently located sources. Dairy farmers closer to Oklahoma City would lose the natural advantage of proximity to the market, and would be required to share their business with artificially advantaged competitors. The aggregate transport cost, and consequently the aggregate price, of milk would then increase.

According to economic theory, the quantity of milk consumed would decline with increased costs and prices. The scheme as imaginatively rationalized by Brandeis included no provision setting limits on the mislocation of dairy farmers, but one is driven to the conclusion that inappropriate relocation of dairying, by subsidies in electric power and telephone rates, as well as ice rates, would have to be checked by similar bureaucratic control of farming.

The Brandeis dissent thus demonstrates the extent to which dubious expedience can obscure obvious injustice. The opinion does not re-

⁵¹ See *id.* at 307 (Brandeis, J., dissenting) (discussing “unbridled competition” as a contributing factor to depression).

⁵² See *id.* at 289 (Brandeis, J., dissenting).

flect the injustice of depriving Oklahoma mothers and children of milk in order to subsidize errant or unfortunate farmers nor did it address the injustice of bankrupting a marginal close-in dairy farmer in order to maintain artificially a marginal remote rival or the injustice of protecting old entrepreneurs who, like New State Ice, made their original investment without being promised immunity from competition against new entrepreneurs like Liebmann.⁵³

Two generations of experience with restrictionist solutions to industry problems have now brought us to the age of deregulation, in which we are dismantling barriers against entry into transportation, communications, and other public utility fields. This may be regarded as either a refutation of the public policy premises of Brandeis' opinion in *New State Ice* or as a development warranted by changing conditions and new perceptions of public policy. Either way, there is notice here of the contingent and problematical character of public policy judgments that manifestly prejudice some entrepreneurs and consumers.

C. *Justice and Criminal Law*

Criminal law has multiple and contradictory goals, some of them manifestly expedient, others emphasizing justice in the sense of individual culpability or "just deserts."⁵⁴ To the extent that the posited goals are deterrence, maintenance of public order, and protection of private security, criminal law tends to elevate public policy over justice to an individual defendant. Perceived needs for effective enforcement undermine normal safeguards against unfairness to the individual. For example, defendants may be convicted without proof of fault as in "strict liability" regulatory offenses.⁵⁵ Conviction for felonious drug peddling may be authorized where the seller, possibly a pharmacist handling a packaged patent remedy, is neither aware nor reckless of the presence of forbidden quantities of the dangerous substance.⁵⁶ Reasonable good

⁵³ I recognize, of course, that internal cross-subsidies are pervasive, acceptable, and to a degree inevitable in public business whether carried on directly by the state, as in education, road building, health, or national defense, or indirectly through public utility companies. The controlling consideration in such cases, however, is that large scale "externalities" or "natural monopoly" make market solutions impracticable. Moreover, such public businesses are not conducted for profit or have their profits limited by law.

⁵⁴ See, e.g., S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 181-248 (1983) (discussing justifications for punishment).

⁵⁵ See *Morisette v. United States*, 342 U.S. 246, 250-63 (1952) (tracing evolution of strict criminal liability for "public welfare offenses" and approving the existence of some such category while refusing to expand it to include common law crimes).

⁵⁶ See *United States v. Balint*, 258 U.S. 250 (1922).

faith mistakes of fact or law will not necessarily exonerate.⁵⁷ Insanity may not exculpate even if it negatives volition, the power to make the choice to conform to the law.⁵⁸

Sometimes the perceived public policy goal that overrides considerations of justice to the individual is "education" or celebration of common ideals by a dramatic ritual of condemnation and punishment. *Regina v. Machekequonabe*⁵⁹ provides an example. Machekequonabe, an indigene of Northern Canada, killed a man in the course of guard duty to which he and others had been posted by their community to ward off attacks by deadly spirits in human form. He was convicted of manslaughter by the Canadian government, despite the fact that the killing was manifestly justified by the commonly held beliefs of his isolated society. The conviction can be rationalized only as a substitute for peaceful conversion of a conquered group to the dominant culture. Likewise, *Regina v. Dudley and Stephens*,⁶⁰ the famous shipwreck cannibalism case, must be seen as a ritual condemnation of killing even under the most extenuating circumstances since the judges in effect renounced utilitarian and retributive goals by acknowledging that the standard of behavior embodied in the conviction was one they might themselves have been unable to follow.⁶¹ Ultimately, however, the sentence was commuted by the Crown, reflecting a concession to the demands of justice.⁶²

A peculiar aspect of balancing expediency and justice in criminal law is that it may at times be necessary to compromise justice in the individual case for the sake of enhancing justice in future cases involv-

⁵⁷ See, e.g., *United States v. Barker*, 546 F.2d 940, 949 (D.C. Cir. 1976) (stating that Watergate "foot soldiers" who unlawfully searched psychiatrist's files for information were not necessarily excused by reasonable, good-faith reliance on authorization by White House staffer); *People v. Olsen*, 36 Cal. 3d 638, 642-49, 685 P.2d 52, 57-59, 205 Cal. Rptr. 492, 494-99 (1984) (en banc) (holding that reasonable, good-faith mistake of fact as to age of victim provides no defense to a charge of lewd and lascivious conduct with a child under 14); *Regina v. Prince*, 2 L.R.-Cr. Cas. Res. 154, 173-77 (1875) (Bramwell, J.) (dismissing mistake of fact defense to charge of taking unmarried girl under 16 out of father's possession), reprinted in S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 54, at 283-86.

⁵⁸ See, e.g., *United States v. Lyons*, 731 F.2d 243, 245 (5th Cir.) (narrowing insanity defense to cases in which defendant was unable to appreciate wrongfulness of the criminal act and excluding evidence of addiction from trial for narcotics offenses), cert. denied, 469 U.S. 930 (1984).

⁵⁹ 28 O.R. 309 (Ont. Div'l Ct. 1897).

⁶⁰ 14 Q.B.D. 273 (1884).

⁶¹ *Id.* at 288. Cf. *Regina v. Howe*, 2 W.L.R. 568 (H.L. 1987) (following *Dudley and Stephens* in rejecting the defense of duress in murder cases).

⁶² See S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 54, at 186. Likewise, the jury recommended mercy in the *Machekequonabe* case. See *Machekequonabe*, 28 O.R. at 310.

ing others. One sophisticated criminologist puts it in terms of the rightness of sometimes doing an injustice.⁶³ I reject this oxymoron and prefer to recognize as just any decision that minimizes injustice after balancing immediate hardships against future hardships. Often the Bill of Rights makes it clear how such a balance is to be struck. In guaranteeing a jury trial, the right to counsel, freedom from compulsory self-incrimination and unreasonable search and seizure, and due process generally, the Founders knew they were trading an occasional unjust acquittal against intolerable governmental tyranny. They opted dramatically to pay the social cost for greater individual security from unjust official intrusion.

An example of the trade-off is the so-called exclusionary rule barring admission of illegally obtained evidence, however conclusively it might establish guilt.⁶⁴ The rule may lead to an acquittal that is unjust in that the outcome does not correspond to the defendant's culpability. The exclusionary rule is, however, defensible on the ground that it is the only effective method to ensure that police follow law enforcement standards prescribed by society.⁶⁵ Such standards are necessary if we are to minimize baseless intrusions (involving the innocent much more often than the guilty) into the privacy of individuals. Unwarranted intrusions are unjust—not all justice is administered by courts—and we may be unable to avoid the dilemma of accepting an occasional unjust acquittal to prevent many more unjust official intrusions. Note that the exclusionary rule would not be acceptable if alternative means were available to vindicate proper standards of police behavior.⁶⁶

A greater concern for justice in criminal law need not lead to complete abandonment of prosecution-favoring expedients like strict liability for regulatory offenses, limiting defenses based on mistake, or narrowing the scope of the insanity plea. Rather, legislatures and courts would be stimulated to refine the relevant bodies of law in order to preserve opportunities for the innocent transgressor to avoid unjust conviction. The expedient administrative and enforcement gains that are at

⁶³ See Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 271 (1987).

⁶⁴ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (expanding doctrine that evidence obtained by unconstitutional search or seizure is inadmissible in federal criminal trials to include state trials).

⁶⁵ See, e.g., *United States v. Calandra*, 414 U.S. 338, 347 (1974) (noting that the primary purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures").

⁶⁶ For an analysis of the improbability of effective alternative controls in the context of American political life, see Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023 (1970).

stake need not be entirely disregarded. It may be possible to preserve these gains while making a justice-serving partial reallocation of the burden of proof. Thus, it might be provided that a defendant can defeat prosecution for a strict liability offense by presenting convincing proof that it was committed under circumstances involving none of the dangers at which the law was directed. Similarly, the burden of proving exculpating insanity can be placed on the defendant.⁶⁷ Of course, any shift away from requiring the prosecution to establish guilt beyond a reasonable doubt is itself a compromise of traditional notions of justice.⁶⁸ However, as in the case of the exclusionary rule, this concession would be made as the necessary trade-off for avoiding more injustice in imposing criminal conviction and punishment on individuals without fault.

There are other ways as well to ameliorate strict liability law in the interest of justice. Offenses could be legislatively graded to preclude imprisonment for a first offense not involving recklessness with regard to the danger targeted by the statute. Substantial sentences could be restricted by law to cases of recidivists manifesting willful defiance of legislative or administrative controls.⁶⁹ Thus, substantial concentration on justice need not derail the criminal law goals of maintenance of public order and protection of society. Individual justice must not be forgotten. The expediency of simple convictions and efficient regulation of society cannot override considerations of justice in the field of criminal law.

D. *Expediency and Antitrust Law*

No field of law has been more beset by fictions of expediency than antitrust law. Almost four centuries ago, Parliament enacted the pio-

⁶⁷ This has, in fact, already been done. See, e.g., *Leland v. Oregon*, 343 U.S. 790, 799 (1952) (Oregon rule placing burden of proving the insanity defense upon the defendant did not violate generally accepted notions of "justice"); *Rivera v. State*, 351 A.2d 561, 563 (Del.) (upholding Delaware statute requiring defendant raising an insanity defense to prove mental illness by a preponderance of the evidence), *appeal dismissed*, 429 U.S. 877 (1976). Cf. *Martin v. Ohio*, 107 S. Ct. 1098, 1102 (1987) (Ohio rule placing the burden of proving self-defense upon the defendant did not violate due process); *Patterson v. New York*, 432 U.S. 197, 205-06 (1977) (upholding New York's shifting to defendant burden of proof of the expanded provocation defense of extreme emotional disturbance).

⁶⁸ The requirement that the prosecution prove guilt beyond a reasonable doubt is premised on our society's traditional determination that it is "far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970); see also W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 8 (1972).

⁶⁹ See, e.g., NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE* § 1006 (1970).

neer Statute of Monopolies,⁷⁰ referring to the "untrue pretences of public good" by which court favorites had sought to justify monopoly franchises.⁷¹ These untrue pretenses have recurred constantly in judicial decisions on the issue of what sort of restraints of trade should be regarded as reasonable. A famous eighteenth-century decision, *Mitchel v. Reynolds*,⁷² upheld as reasonable a covenant by the seller of a bakeshop that he would not reenter the business in competition with the buyer. The court thought that such an agreement ought to be enforced because it might be "useful and beneficial, as to prevent a town from being overstocked," or because it might enable an "old man" to get more money for his shop upon his retirement and so "procure to himself a livelihood, which he might probably have lost."⁷³ The fictitious or incommensurable character of the alleged public good is exposed, however, in the following analysis:

How will consumers of bread benefit by keeping the old baker from reengaging in trade? Can they be hurt by "overstocking"? What evidence of overstocking is there other than the contract itself? Reynolds must have been confident that the parish had room for two bakers, or at least that the townspeople would prefer his baking to Mitchel's. Assuming that too much confection can be harmful, is it wise to leave the matter up to two bargaining bakers, or should the town council make a determination as to how much is too much? And should the matter then be left open for reconsideration in case Mitchel proves inadequate? Should the town forearm itself against the putative evil of "overstocking," by refusing to let *any* new bakery be established unless the city authorities are satisfied that public convenience or necessity will be served?

Is the decision justifiable as a kindness to old bakers, a primitive form of social security and old age insurance? It is plainly not limited to the elderly or needy. The ailing old man is least likely to reengage in business. It is the successful entrepreneur who has built up "good will" who can get a premium for his promise not to reengage in business and

⁷⁰ The Statute of Monopolies, 1623, 21 Jac., ch. 3, *condensed in* L. SCHWARTZ, J. FLYNN & H. FIRST, *FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTI-TRUST* 1-2 (6th ed. 1983).

⁷¹ See L. SCHWARTZ, J. FLYNN & H. FIRST, *supra* note 70 at 2 (noting that the Statute's target was monopolies granted by the sovereign).

⁷² 24 Eng. Rep. 347 (1711).

⁷³ *Id.* at 350.

against whom vendees will need to invoke judicial sanctions. Besides, should a social security program be inaugurated at the expense of the citizenry for the benefit of retiring businessmen, the group most likely to have accumulated private savings?⁷⁴

Another notorious instance of judicial self-delusion or pretense of public good as justifying private arrangements to restrict competition is supplied by *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*⁷⁵ That decision enforced against the seller of an arms business a covenant that he would not compete with the buying company anywhere in the world. In a free-wheeling undertaking to vindicate British public policy in international affairs, defense, and colonialism, the court decided not "to encourage unfettered competition in the sale of arms of precision to tribes who may become [Britain's] antagonists in warfare."⁷⁶ The *Nordenfelt* opinion simply ignored the fact that the alleged British imperial policy was, and would continue to be, entirely at the discretion of the private traders. Had they chosen to omit the anticompetitive covenant from their deal, or if they had chosen subsequently to release the seller from his covenant, the spurious public policy would have evaporated into thin air. Moreover, the court, in excluding *Nordenfelt* from competing in domestic British arms manufacturing, foreclosed potential national defense gains from reduced cost and improved quality of British armament under competitive conditions.⁷⁷

The Reagan Administration has carried to absurd lengths the identification of expediency with justice in antitrust cases. In this field, expediency goes by the name of efficiency, and the Department of Justice and the courts are supposed to discriminate between mergers that promote efficiency and mergers that do not.⁷⁸ The most meretricious efficiency claims are taken seriously, as when General Motors and Toyota were authorized to enter into a joint venture to produce small cars in California on the ground that, despite the anticompetitive features of the enterprise, it was the only way that the American industrial colossus could learn to emulate Japanese wizardry in producing

⁷⁴ L. SCHWARTZ, J. FLYNN & H. FIRST, *supra* note 70, at 3.

⁷⁵ 1894 App. Cas. 535 (H.L.).

⁷⁶ *Nordenfelt*, 1894 App. Cas. at 554 (opinion of Lord Watson).

⁷⁷ This analysis is taken from L. SCHWARTZ, J. FLYNN AND H. FIRST, *supra* note 70, at 4-5. See also *Oregon Steam Navigation Co. v. Winsor*, 87 U.S. (20 Wall.) 64, 71-72 (1873).

⁷⁸ See UNITED STATES DEPARTMENT OF JUSTICE, MERGER GUIDELINES 1-2, 27 (1982).

small automobiles.⁷⁹ Never mind that General Motors is already intimately associated with those mysteriously successful teachers of automobile production in Japan, Korea, and elsewhere. Never mind the stupendous resources that General Motors deploys for internal development, for the purchase of foreign technology and know-how, and for the hiring of foreign engineers.⁸⁰ The school to which General Motors is determined to go to improve its skills must be operated jointly by teacher and pupil! It follows naturally that Ford Motor Corporation would emulate General Motors in the desperate search for a Japanese instructor; they too have proposed an intensified partnership with Mazda, of which Ford is already part owner.⁸¹

Forecasting efficiency gains from industrial combinations is notoriously difficult, and the corporate scene is littered with moribund enterprises whose viability was vastly misjudged by would-be builders of corporate empires.⁸² Moreover, enhanced efficiency from mergers and joint ventures would be pure serendipity when one considers the real motives of corporate executives and investment bankers. Supposed synergies⁸³ have little to do with the formation of giant conglomerates. Instead, financial decisions are dominated by the potential for finders' fees and bankers' commissions, by the prospects of "greenmail" or other arbitrage profits,⁸⁴ by the prospect of inflating earnings multiples of good,

⁷⁹ See Ordovery & Shapiro, *The General Motors-Toyota Joint Venture: An Economic Assessment*, 31 WAYNE L. REV. 1167, 1174 (1985). But see Note, *A Definitional Test for Joint Ventures*, 31 WAYNE L. REV. 1251, 1270-72 (1985) ("The rationale that no alternative [to the joint venture in California] was possible or desirable is unconvincing.").

⁸⁰ Cf. Ordovery & Shapiro, *supra* note 79, at 1168-69 (the American auto industry has recently adopted management, automation technology, and inventory innovations).

⁸¹ See Buss & Kanabayashi, *Critics Fault Ford Plan to Produce Small Cars with Mazda of Japan*, Wall St. J., June 23, 1986, at 1, col. 6. The article discusses the joint venture's predicted effect on deteriorating U.S. competitiveness, specifically the atrophy of the American firm's engineering skills, and mentions that Ford risks revealing more to Mazda than it will learn from Mazda.

⁸² See *Why Oil Companies Are Now Shying from Diversification*, San Francisco Chron., Dec. 3, 1984, at 58, col. 1, reprinted in Schwartz, *Diversification and Regulated Industries—What's Next for the Telephone Holding Companies?*, 7 COMM./ENT. 195, 207 n.50 (1985). Consider also observations that the value of the acquiring company's stock typically declines following the acquisition. See D. COMMONS, *TENDER OFFER: THE SNEAK ATTACK IN CORPORATE TAKEOVERS* 133 (1985) (citing Louis, *The Bottom Line on Ten Big Mergers*, FORTUNE, May 3, 1982, at 84, 84-89).

⁸³ See R. GILSON, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* 387-445 (1986) (discussing the phenomenon of "synergy" that may occur when two corporations are combined, causing the predicted value of the combined corporation to exceed the calculable value of the two individual corporations).

⁸⁴ "Greenmail" refers to the repurchase of stock by a target company from a hostile acquirer, often at a price greater than market value, resulting in profit to the acquirer and the continued independence of the target. See D. COMMONS, *supra* note 82, at 138. Arbitrageurs' acquisition of the target company's stock with a view to resale to

small enterprises when absorbed into glamorous "Fortune 500" companies, by "golden parachutes" for apprehensive corporate officers,⁸⁵ and by irrational rivalries to be "the biggest."⁸⁶ Public policy arguments, such as the promotion of American industrial efficiency and power in international markets that results from merger-created conglomerates, are reserved for regulatory commissions and courts, and are basically afterthoughts of lawyers.

E. *Justice and Tort Law*

The field of torts provides excellent examples of the distortion of justice when notions of expediency predominate in judgment. As mentioned in the opening paragraphs of this essay, a brilliant generation of legal philosophers has sought to define good tort law as law that places the risk of loss where it can best be borne or distributed and where the risk-taker is in the best position to take measures to avert the danger.⁸⁷ This notion of justice as equal to expediency requires only an economic calculation to determine the outcome of all cases. The most famous and plausible illustration of this rationalization of tort law is that of a farmer who places an inflammable crop next to a spark-emitting steam railroad line. The railroad is required to bear the loss of ensuing fires not because it has done anything reprehensible, but because it can factor fire losses into the rates it charges shippers, thus spreading the risk in small shares among many who can bear it more easily.⁸⁸ Moreover,

the acquirer not only offers an opportunity for profit to the arbitrageur on resale to either target company or acquirer but also facilitates acquisition through concentration of the supply of shares. *See id.*, at 30-32 (noting that individual shareholders, unlike the arbitrageurs who buy from them, may form attachments to management and thereby impede the takeover).

⁸⁵ The term "golden parachutes" refers to payments provided to corporate managers upon a change of control of the company. These payments, often equivalent to several years' salary, serve as both a defensive tactic for target corporations and as insurance against loss of income for corporate managers. *See* R. GILSON, *supra* note 83, at 670.

⁸⁶ For discussions of the private or irrational motivations for corporate takeovers, see D. COMMONS, *supra* note 82, at 25-34; Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1192-95, 1200-06, 1211-34 (1984); Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 101-02 nn. 2, 3, 7, 104, 119-24 (1979) (examining the "director's dilemma" in trying to safeguard both the short-term interests of speculating shareholders and the long-term interests of other shareholders, as well as the vitality of the firm and the national economy), *criticized in* Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 857-59 (1981). *See generally* R. GILSON, *supra* note 83, at 255-498 (reviewing contradictory theories and evidence of motivations for acquisitions).

⁸⁷ *See supra* note 5 and accompanying text.

⁸⁸ *See* R. POSNER, *ECONOMIC ANALYSIS OF LAW* 43-45, 164 (3d ed. 1986) (using

as a matter of optimal risk management, if the railroad is in the best position to take measures against spark emission, it should be given the greatest incentive to do so by being held strictly responsible, whether or not it is negligent. Such arguments are supported by the economic proposition that the total social cost of railroading, and hence the rates charged, should reflect all losses that would not have occurred absent the railroad operations. Overall efficiency is thus promoted, it is said, because consumers' choices will favor least-cost alternatives.⁸⁹

The expediency issue is much complicated by the consideration that farmers also have the ability to redistribute risks by buying fire insurance, that fire insurance premiums would be factored into the cost of crops (along with lowered costs of land near fire risks), and that efficient use of agricultural land calls for pricing that reflects all costs.⁹⁰ Some clever economists will further muddy the controversy over expediency by pointing out that risk-sharing between railroads and farmers can and will be governed by contracts between them so that ultimately the most valuable activity will pay for relief from the risk.⁹¹ Other clever economists will then raise the question of transaction costs, i.e., how expensive and efficient will the contracting process be?⁹² In sum, regarding the preceding sketch of tort theory, it is apparent that shifting and sometimes dubious ideas of public policy and pragmatic utility dominate thinking in this field, virtually eliminating concern about whether it is fair or just to make *A* compensate *B* for damage that *B* has suffered.

This lack of concern for individual justice may be acceptable as applied to risk-creating, risk-distributing collective enterprises such as automobile manufacturers, airlines, or insurance companies. In such contexts, indeed, issues of justice, as distinguished from expediency, hardly arise. The basic question is unavoidably managerial: how should economic activity be organized most efficiently? Only by dubious anthropomorphizing can one be unjust to a public corporation.⁹³ Tort lia-

hypothetical derived from *LeRoy Fibre Co. v. Chicago, M. & St. P. Ry.*, 232 U.S. 340 (1914).

⁸⁹ Cf. *id.* at 43 (presenting the idea that parties will negotiate a transaction that improves each party's position, regardless of the initial assignment of legal right).

⁹⁰ See *id.* at 7, 62 (suggesting external costs that, economically, should be incorporated by the farmer).

⁹¹ See Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, in *THE ECONOMICS OF LEGAL RELATIONSHIPS: READINGS IN THE THEORY OF PROPERTY RIGHTS* 204, 204-05 (H. Manne ed. 1975); Coase, *supra* note 5, at 4-6.

⁹² Williamson, *The Economics of Antitrust: Transaction Cost Considerations*, 122 U. PA. L. REV. 1439, 1442-47 (1974) (suggesting the various transactional and human factors giving rise to transaction costs).

⁹³ The proposition in the text expresses my own dubiety about attributing per-

bility of individuals is an altogether different matter. Consider the justice of a rule holding an individual landowner⁹⁴ liable to a guest or trespasser injured by a condition on the property that may be as unknown to the owner as to the injured. The dramatic and pitiable character of the injury may arouse strong sympathy for the plaintiff. Expediency might call for state-provided health and accident insurance that would be available to all accident victims without distinction in favor of those who by chance can embroil another solvent person as private insurer. Justice, however, would not allocate insurance liabilities so arbitrarily.

The jurisprudence of torts can justify (find justice in) a verdict that seeks to compensate an occasional unfortunate by postulating fault on the part of the defendant. The reality, however, is that the fault, if any, is often so marginal a failure to comply with the standard of "the ordinary reasonable person" that the drastic penalty seems grossly disproportionate to the misbehavior, i.e., an injustice. The motorist has driven only a mile or two per hour faster than an arbitrarily prescribed speed limit. The victim of the accident proves to be a prosperous young professional whose remaining life will be highly appraised in a jury verdict. The damages in that case will be vastly different from the damages assessed if the victim had been an aged derelict. This is a crude (unbeautiful? unjust?) system of social security. It discriminates in

sonal rights to great collective entities, not that of the United States Supreme Court. The Court has invalidated on first amendment grounds a public utility commission's ban on promotional advertising by utility companies. *See* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570 (1980); *see also* *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 544 (1980) (invalidating on first amendment grounds state prohibition of billing inserts expressing the views of public utilities on controversial issues); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 767, 795 (1978) (invalidating state statute that forbade any corporation from spending money to publicize political views on issues not related to the corporation's business). One would have thought a priori that it was well within the competence of a state, in a federal system that tolerates so much diversity in state incorporation laws, to confine the special privileges of incorporation to a range of specified commercial purposes, not including political propaganda.

⁹⁴ "Individual" includes, for present purposes, small-scale co-owners or co-occupiers—partners, for example. "Landowner" includes occupants responsible for the state of the premises. *See* Ursin, *supra* note 5, at 839-46 (discussing the trend toward applying a de facto strict liability standard to business landowners instead of the negligence standard applied to individual landowners). *Cf.* Nolan & Ursin, *supra* note 4, at 297-311 (discussing case law applying strict liability to "commercial" hazards).

The implications of the distinction here urged between liability of individuals and liability of collectives such as corporations, insurance companies, and municipalities are not explored in this essay. However, it would not be impossible to exonerate individuals while imposing liability on their insurers. That might require recasting liability insurance contracts so that they compensate the injured person rather than protecting the insured against tort judgments. Such a liability scheme would accord with the philosophy of compulsory auto insurance laws.

favor of well-to-do individuals and classes who are quite capable of buying their own disability insurance and who, if left to their own devices, would obtain a better form of insurance than one contingent upon both the solvency of a tortfeasor and proof of negligence.⁹⁵

It is not a long step, and it is one that has already been taken in some classes of tort,⁹⁶ from liability based on tenuous fault to liability without fault. This has the virtue of candor but completely exposes the basis of the institution in expediency rather than in justice. Liability without fault rests on a policy of strengthening the incentive of entrepreneurs to prevent or insure against accidents and a policy of avoiding prolonged and inconclusive inquiries into fault, often with capricious results. The nexus between adjudication and justice becomes attenuated, and the question arises whether the whole operation had not better be shifted out of the courts and into an administrative agency. An agency similar to a workers' compensation board could easily devise a schedule of compensation for an eye, a limb, a disfigurement, or a lifetime of paralysis.⁹⁷ If compensation for injury without fault is desirable, it should not be confined to injuries growing out of employment. The principle of social insurance should be applied equally to all who sustain injuries, including those who accidentally injure themselves or suffer injuries from strangers.⁹⁸

Paradoxically, some scholars who believe that the tort system is inexpedient or unjust nevertheless recommend that judges adhere to it and refine it and even exacerbate its follies. They postulate that either a sufficiently comprehensive set of fictional fault and strict liability will move the tort system incrementally towards a judicially formulated social insurance system, or the gradual exposure of the tenuous basis of the existing tort system will compel legislatures to enact remedial legis-

⁹⁵ I certainly do not mean to argue in favor of current legislative movements to set caps on the amounts recoverable in medical malpractice and other classes of cases. These initiatives have their own shortcomings.

⁹⁶ See RESTATEMENT (SECOND) OF TORTS §§ 519-24A (1977).

⁹⁷ See, e.g., 77 PA. STAT. ANN. tit. 77, §§ 511-516 (Purdon 1987) (Injured employees receive a stated percentage of their wages for a specific bodily injury; for example, an employee whose disability results from a permanent loss of a hand would receive 66-2/3% of wages for 335 weeks.).

⁹⁸ See generally G. WHITE, *supra* note 4, at 146-153 (describing the evolution of tort law from admonishment of blameworthy actors to compensation of the injured); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 564-73 (1972) (arguing that different paradigms of tort law are merely different standards for weighing individual interests against the "background risks" inherent in group living); Hutchinson, *Beyond No-Fault*, 73 CALIF. L. REV. 755, 766-71 (1985) (advocating societal assumption of health and welfare risks to individuals, to be achieved by greater democratization); Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 592-96 (1985) (criticizing tort law as a system for accident victim compensation).

lation.⁹⁹ This reasoning appears to embrace an extraordinary involvement of activist judges in pursuing the long-range goal of legislatively prescribed social insurance by means of provocative immediate decisional injustices.

F. *Justice and Professional Ethics*

Greater emphasis on justice would transform the teaching and practice of legal ethics and professional responsibility, especially in the area of adversarial advocacy. The predominant view of the legal profession is that the lawyer's obligation of zeal for her client mandates the assertion of every colorable claim or defense on the client's behalf.¹⁰⁰ The lawyer, other than a prosecutor, appears to be relieved of any obligation to provide the opponent with material evidence, except as compelled, for example, by discovery rules.¹⁰¹ Virtually any tactical delay or maneuver available under procedural rules is tolerated or admired. The profession and the public honor effective play-acting before juries, including impassioned pleas for propositions which the lawyer does not believe, histrionic tears, and attacks on the credibility of witnesses known to be telling the truth.¹⁰²

It is evident that excessive zeal by advocates especially endowed with talent, money, or moral callousness must often produce injustice. We have no idea of the frequency of such miscarriages of justice. It is an article of faith among most lawyers that a kind of expediency justifies the occasional troublesome injustice: clients want the kind of zealous representation that entails some cost to justice, and they can always get it from another lawyer, if not this one.

The argument is not always as crass as that. It can plausibly be maintained that this kind of adversary system is preferable to available alternatives even from the point of view of justice. It will be argued that only fully committed lawyers will imaginatively develop the facts and hypotheses that ought to be considered. Moreover, setting two lawyers against each other to advocate opposing interpretations of the situation is more likely to yield informed justice than, for example, reliance on an inquisitorial judge to follow investigatory hunches based, perhaps,

⁹⁹ See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 19.4 n.5 (1956).

¹⁰⁰ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1982).

¹⁰¹ See *id.* EC 7-13 (discussing the special responsibilities of public prosecutors); C. WOLFRAM, *MODERN LEGAL ETHICS* § 12.3.2 (1986) (qualifying this assertion with the statement that this view "has been seriously eroded by the institution of pre-trial discovery in civil cases"); *id.* DR 7-103(B) (requiring timely disclosure by public prosecutors and other government lawyers to the defendant of exculpatory or mitigating evidence).

¹⁰² See C. WOLFRAM, *supra* note 101, § 12.4.5.

on initial bias.¹⁰³

The issue is not whether to retain or abandon the adversary system, but how to minimize injustice within that system. Consider, first, that the adversary system is already substantially qualified in the interest of justice. The obligation of the public prosecutor and other government lawyers to do justice is explicitly recognized in the American Bar Association's Model Code of Professional Responsibility¹⁰⁴ and in the Model Rules of Professional Conduct.¹⁰⁵ Voices have begun to be heard in favor of a "rule of reason" to temper overzealous advocacy in legislative and administrative proceedings involving major issues between government and industries regarding environmental hazards, safety standards for food and drugs, and the like.¹⁰⁶ There is the beginning of recognition of the special obligations of securities lawyers to make disclosures to investors and regulatory agencies even where this may not be in the interest of the client.¹⁰⁷ Lawyers for promoters of tax shelters are likewise under pressure to be fair to the Treasury and to investors in describing what may prove to be ineffective devices for tax evasion.¹⁰⁸ One eminent legal ethics scholar has called for moral accountability of lawyers generally when they seek to promote their clients' unjust goals, at least in settings where the lawyer acts as adviser rather than as advocate before an impartial tribunal that also hears an advocate for the other side.¹⁰⁹

¹⁰³ See *Report of the Joint Conference on Professional Responsibility*, 44 A.B.A.J. 1159, 1160-61 (1958) (L. Fuller and J. Randall, Co-Chairmen).

¹⁰⁴ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1982) ("The responsibility of a public prosecutor . . . is to seek justice, not merely to convict. . . . [The prosecutor's decisions] affecting the public interest should be fair to all . . ."); *id.* EC 7-14 (a government lawyer has the obligation to avoid "unfair litigation" and "unjust settlements or results"); see also *id.* DR 7-103 (a government lawyer must not prosecute when the charges are not supported by probable cause and must disclose all evidence disproving or mitigating guilt).

¹⁰⁵ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 comment (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

¹⁰⁶ Cf. M. WESSEL, *THE RULE OF REASON: A NEW APPROACH TO CORPORATE LITIGATION* 19-24 (1976) (arguing for a new approach to litigation whereby lawyers would refrain from delay and other procedural tactics inconsistent with the client's publicized desire to resolve an issue quickly and fairly).

¹⁰⁷ See generally T. MORGAN & R. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 373-84 (3d ed. 1984) (cases and commentaries regarding the degrees of disclosure required or permitted under the Model Code of Professional Responsibility and by the Securities and Exchange Commission).

¹⁰⁸ See *id.* at 359-60 (excerpting a speech by then-Treasury General Counsel Mundheim expressing concern over the role of tax attorneys in promoting abusive tax shelters).

¹⁰⁹ See Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 690-95 (1978); see also Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 554-63.

An education in professional responsibility that is oriented towards justice will have to address more difficult cases than the foregoing special instances of "who is the client?" (securities issuer or investors? fee-paying client or third parties?) or "who will act in reliance on the attorney's legal opinion?" There will be occasions when there is no ambiguity regarding the identity of the client, but simply a recognition by the lawyer that the client has a legal advantage over the adversary and that exploitation of this advantage will result in injustice. Here are some illustrative cases:

(i) Defendant client has a valid defense under the statute of limitations because plaintiff's lawyer filed the action a few days late;

(ii) A debt unquestionably incurred by defendant client is unenforceable because the obligation was not recorded in writing as required by law; and

(iii) Client is the named beneficiary under a will that the testator unquestionably sought to revoke by written instructions for the preparation of a new will just before testator's sudden death.

Most lawyers, trained in a stark adversary mold, will have little trouble recognizing counsel's obligation under such circumstances. The client's legal rights must be vindicated. The lawyer is to administer the system as she finds it; her role is not that of a moral counselor.¹¹⁰ If the question of justice is raised at all, such lawyers comfort themselves with the idea that seemingly arbitrary requirements of timely action or formality of wills, though occasionally functioning unfairly, overall prevent more injustices than would follow from dispensing with the formal requirements. Alleged torts would have to be litigated long after witnesses had disappeared; spurious claims to decedents' estates would multiply.

Such arguments of expediency are plausible but will not wholly satisfy a lawyer committed to justice. Legal education should raise the consciousness of lawyers to the level where we are all uncomfortable with the potential injustice of such situations. That discomfort will produce palliative measures even if the basic principle of client entitlement to everything the law affords remains embedded in our system. Legal ethics is not all disciplinary rules, but on the contrary comprises much that is aspirational or admonitory.¹¹¹ Why should young lawyers not be

¹¹⁰ But see Jones, Book Review, 32 J. LEGAL EDUC. 649, 650-51 (1982) (reviewing T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981)).

¹¹¹ See Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30

encouraged, where their personal relationships with the client will tolerate it, to counsel moderation in the exercise of undoubted legal rights? The result might be no more than a proposal to settle pending litigation in a way that would be favorable to the client holding the legal trump cards but would also move in the direction of greater justice. That might even afford psychic satisfaction to the forbearing client and improve its public relations!¹¹² Any encouragement in the Model Code of Professional Responsibility to take justice into account in advising clients on the exercise of legal rights would have to explicitly exonerate the advising lawyer of any deficiency of zeal in representing his client, and so forestall subsequent malpractice claims against the lawyer.¹¹³

Justice-oriented lawyers could also avoid the discomfort of involvement in the unfair assertion of legal rights by promoting reform legislation to minimize the injustice often entailed in arbitrary requirements of time and formality. The canons of professional ethics and the training of lawyers should encourage such reform activity.¹¹⁴ One possibility for reform would be a provision tolling a statute of limitations where

CLEV. ST. L. REV. 571, 574 (1982).

¹¹² See, e.g., M. WESSELL, *supra* note 106, at 10-12 (discussing the damage to the business and corporate credibility of General Motors as a result of its investigation of Ralph Nader).

¹¹³ Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 comment (1983) ("A lawyer should act . . . with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client."). This seems better than MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1982), which orders the lawyer not to "[f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules." EC 7-9 hardly tempers the rigor of DR 7-101(A)(1) when it authorizes the lawyer to "ask his client for permission to forego such [unjust] action." EC 7-10 then pontificates that the duty of zeal "does not militate against [the lawyer's] concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." *Id.* EC 7-9 to -10.

¹¹⁴ MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1982) states that "A Lawyer Should Assist in Improving the Legal System." The accompanying Ethical Consideration notes that "[r]ules of law are deficient if they are not just," and that a lawyer who believes that a rule of law "causes or contributes to an unjust result" should try to have it changed. *Id.* EC 8-2. Improvement should be sought "without regard to the general interests or desires of clients or former clients." *Id.* EC 8-1. The MODEL RULES OF PROFESSIONAL CONDUCT (1983) appear to have retreated, perhaps unwittingly, from the explicit aspiration for "just" legislation. Rule 6.1, addressing the lawyers' public service obligations, focuses on the obligation to render legal services to the poor. It refers to "activities for improving the law" (without indicating who shall define "improvement") as one way of satisfying the obligation to "render public interest legal service." *Id.* at Rule 6.1. The "Model Code Comparison" for Rule 6.1 does not even mention the disappearance of EC 8-1 and 8-2. *Id.* at Rule 6.1 Model Code Comparison. As for the former admonition to seek reform even at a cost to client interests, the new resolution of this conflict in Model Rule 6.4 merely *permits* lawyers to participate in reform activities that "may affect" client interests. *Id.* at Rule 6.4.

the delay is marginal, excusable, and does not impair the likelihood of a just result upon trial. Another possibility would be a two-stage statute of limitations, with complete foreclosure of the action only at a later time. At the first stage, the action could be maintained, but only with a heavier burden of proof, i.e., beyond a "preponderance" of the evidence to "clear and convincing" evidence, or even proof "beyond a reasonable doubt." Provision might be made for dismissal if the defendant demonstrates that delay has impaired the likelihood of a just result at trial, as by the death of a critical witness. Similarly, an old will, not lacking in formal requirements, might be made subject to revocation or modification based on unequivocal recent evidence that it no longer embodied the testator's purposes. Adoption of such reform measures, while clearly costing the system some amount of expediency in the form of simple adjudication of matters, would place the proper emphasis on justice to the individual litigants.

G. *Justice, Judging, and Precedent*

I shall begin the discussion of this point by evoking a bit of ancient history: the growth of separate courts of equity to ameliorate the rigidity and harshness of "the law," and the eventual amalgamation of equity and law into the same courts.¹¹⁵ The courts of equity long ago restrained the grasping lender's over-hasty assertion of title to mortgaged property. They created the debtor's equity of redemption, the right of the debtor to reclaim the pledged property, regardless of literal provisions of the loan contract transferring ownership to the creditor upon default, until a judge ordered foreclosure of the debtor's interest.¹¹⁶ In other contexts, formal defects would be overlooked if they prevented the enjoyment of substantive rights: "equity regards as done that which ought to be done."¹¹⁷ Injunctions would be granted in the interests of justice if damages, the ordinary relief afforded by courts of law, would not compensate for the wrong done.¹¹⁸ Equitable defenses developed: estoppel, unclean hands, laches. The eventual merger of law and equity epitomizes the process of continual reincorporation of justice into judging, a process whose extension this essay supports.

If doing justice in light of something more than public policy or expediency is accepted as the primary function of courts, I foresee a

¹¹⁵ See generally L. FRIEDMAN, A HISTORY OF AMERICAN LAW 21-23 (1973) (discussing the history of and the differences between courts of common law and courts of equity and their eventual merger).

¹¹⁶ See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.3 (1973).

¹¹⁷ *Id.* § 2.3 n.24.

¹¹⁸ See L. FRIEDMAN, *supra* note 115, at 22.

change in the role of precedent. Too often the argumentation of lawyers, and consequently the rationalization that judges' opinions provide for their decisions, relies exclusively upon precedent. But old answers do not reliably serve as solutions to new problems. Instead of looking backwards to decide what to do presently, the judge should be guided by a self-imposed mandate to do the right thing presently, *unless prevented from exercising her best judgment by a clear mandate from the past*. Absent an indistinguishable recent precedent by a higher court or an unequivocal legislative direction, justice should be the deciding criterion. Under that guideline, precedent would still retain much of its significance, but its role would be reduced to a potential veto of any single judge's subjective view of what justice calls for in a given situation.

A subordinate role for precedent is quite consistent with the policies embodied in respect for precedent. I would list those policies as follows:

(i) respect for the legal system can be maintained only by assuring equal protection of the law, i.e., that decisions in like circumstances will be the same regardless of litigants' connections or of personal biases of the judge;

(ii) expectations reasonably evoked by earlier decisions and relied upon by people in their commercial and other arrangements ought to be fulfilled or at least not disregarded; disappointment of such expectations would be felt as an injustice;¹¹⁹ and

(iii) individual judges should respect, but not abdicate to, the collective wisdom of fellow judges; such a consensus of fellow judges is hardly to be inferred from a single precedent, especially if judges in other states have reached a different conclusion.

All of these policies serve to enhance the perceived legitimacy of courts and government.¹²⁰ The rendering of a manifestly unjust decision undermines the perceived legitimacy of courts and government even though the decision appears to follow precedent. Yet the issue is too complicated for any simple answer. The perceived legitimacy of a judicial decision will also suffer if settled ideals of separation of powers are violated, as when a court's effort to do justice in a particular case seems to carry the court into the realm constitutionally assigned to the legislature or the executive.

¹¹⁹ See, e.g., E. CAHN, *THE SENSE OF INJUSTICE* 20-22 (1949).

¹²⁰ On the "legitimizing" function of courts, see A. BICKEL, *THE LEAST DANGEROUS BRANCH* 29-33, 129-32 (1962).

Focusing on justice as the critical responsibility of judges may call for reexamination of the scope of judicial review of administrative decisions. Should we stick with the prevailing view that authorizes an appellate court to set aside an administrative order not supported by substantial evidence, or an order issued by an administrative agency that failed to follow prescribed procedures? Or should judicial review be more circumscribed, limited perhaps to situations in which the agency acted outside its jurisdiction or manifest injustice has been done?¹²¹ This sounds like a radical proposal until one remembers that lack of jurisdiction was once the prevailing criterion of judicial review in this country.¹²²

There are signs of a return of American doctrine towards the older narrow view of the role of courts of general jurisdiction in reviewing administrative determinations.¹²³ In the *Hope Natural Gas* case,¹²⁴ the Supreme Court upheld a rate reduction ordered by the Federal Power Commission although the Commission's decision involved a radical departure from prior law regarding rate base¹²⁵ and a dubious exclusion from the rate base of certain assets that the company's books recorded as having been expensed in prior years.¹²⁶ The court found it unnecessary to pass on the lawfulness of the exclusion because a review of the record persuaded the court that the result reached would still enable Hope to earn a fair return.¹²⁷ Affirmance of an administrative decision without addressing plausible claims of error suggests a narrowing of the role of the court in administration.

I neither favor nor forecast a sharp turnabout in the law of judicial review of administrative decisions. The practicalities of administra-

¹²¹ The scope of judicial review of federal agency orders is determined by the Administrative Procedure Act, 5 U.S.C. § 706 (1982). It provides that agency orders shall be set aside if the agency acted in an arbitrary or capricious manner, if it acted outside its jurisdiction, if it failed to observe required procedures, or if the order was unsupported by substantial evidence. *Id.* at § 706(2).

¹²² See generally K. DAVIS, ADMINISTRATIVE LAW TEXT § 28.02 (3d ed. 1972) (discussing the evolution from a common law presumption that administrative action was not reviewable to the contrary modern presumption); J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 41-47, 307-332 (1927) (discussing the "ultra vires" theory of judicial review).

¹²³ See Mikva, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115, 140 (1986) (arguing that courts should now "paint with a fine brush" as "[a]dministrative law has progressed to the point where we have a reasonably workable and finely detailed body of doctrine").

¹²⁴ Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944).

¹²⁵ *Id.* at 648 (separate opinion of Jackson, J.).

¹²⁶ See *id.* at 624 (Reed, J., dissenting).

¹²⁷ See *id.* at 605. Cf. Southern La. Area Rate Cases v. Federal Power Comm'n, 428 F.2d 407, 439 (5th Cir.), (affirming agency decision despite "serious misgivings" as to a central issue), *cert. denied*, 400 U.S. 950 (1970).

tive law are that regulated industries tend to acquire dominant influence over the agencies supposed to control them.¹²⁸ New appointees to a commission can drastically revise the impact of the law they administer, with little or no reference to the statutory language or congressional intent.¹²⁹ The political and commercial pressures on agencies tend to convert them into forums for compromise between pressure groups.¹³⁰ This process should not remain unchecked, free of the rationalizing discipline of the relatively independent judicial system.¹³¹ What is here being argued is only that judges who perceive their primary input into the system as "justice" will be cautious not to intervene too much in the managerial and executive functions of administrative agencies.

A national resolve to identify judging with doing justice would lead to reconsideration of some inappropriate allocations of administrative responsibilities to judges. Traffic courts, for example, are not engaged in doing justice, as can be seen in the fact that strict liability (without proof of fault) prevails, that nearly all controversies are settled without trial, and that in the few cases tried defendants need not be provided with counsel as required in ordinary prosecutions.¹³² Have we not a case here for ending this pretense of doing justice and transferring this operation to an administrative agency? Such a structure could follow precedents for extricating judges from the routine business of awarding compensations or entitlements. Consider, for example, the shift from tort litigation in courts to administrative awards under work-

¹²⁸ See, e.g., M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 90-95 (1955) (capture occurs when consumer coalition that caused agency to be formed dies out); R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 19-20 (1985) (phenomenon called "agency capture" exists when an agency favors the concerns of the industry it regulates over the interests of the general public).

¹²⁹ See, e.g., Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 *STAN. L. REV.* 1041, 1061 (1975) (discussing the chief executive's significant opportunities to influence the conduct of administrative agencies through the appointment power); Norman, *The Strange Career of the Civil Rights Division's Commitment to Brown*, 93 *YALE L.J.* 983, 989 (1984) (noting the current Justice Department strategy of urging the abandonment of busing).

¹³⁰ See *supra* notes 124-27 and accompanying text; see also Jaffe, *The Illusion of the Ideal Administration*, 86 *HARV. L. REV.* 1183, 1190-91 (1973) (discussing the effect of the political process on operation of administrative agencies).

¹³¹ Compare Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 *HARV. L. REV.* 436, 464-71 (1954) (arguing for a narrow scope of the doctrine of "primary jurisdiction") with Scalia, *Regulatory Reform—The Game Has Changed*, *REG.*, Jan./Feb. 1981, at 13 (arguing that the appointment of Republican deregulation-prone administrators should lead conservatives to help free the agencies from procedural constraints and judicial review).

¹³² See, e.g., Sayre, *Public Welfare Offenses*, 33 *COLUM. L. REV.* 55, 72-73, 84 (1933) (listing offenses for which mens rea need not be proven, and arguing that this should be confined to public welfare offenses).

men's compensation laws.¹³³

Judges should not be vested, as they are in many states, with the power to appoint members of school boards, tax commissioners, park commissioners, and the like.¹³⁴ One can understand the impulse to insulate certain public offices from "political" influence by vesting appointment powers in judges believed to be somewhat isolated from politics. But experience reveals that this arrangement more often embroils the judges in politics. Confining judges more closely to the justice business would clarify their primary responsibility and enhance legitimacy.

Finally, getting judges out of administration, so that they become more exclusively enforcers of justice, would have implications for the kinds of decrees the courts should issue. Ways should be found to avoid involving courts in prolonged day-to-day administration of prisons, schools, or voting systems.¹³⁵ The spectacle of bankruptcy courts administering vast debtors' estates and corporate receiverships for years upon years, organizing successor corporations, holding off some greedy competitors and yielding to others as expediency may require builds an image of the judge as an involved actor, not a detached dispenser of justice.¹³⁶

¹³³ See 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 5.20, 5.30 (1984). But see Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CAL. L. REV. 857, 877-78 (1985) (suggesting that some jurisdictions may be on verge of allowing tort damages in addition to workers' compensation for harm not covered by workers' compensation).

¹³⁴ See, e.g., Schweit, *End to Court Appointed Election Panels Urged*, Chicago Daily L. Bull., Feb. 26, 1987, at 1 col. 2.

¹³⁵ Cf. 15 U.S.C. § 47 (1982) (authorizing a court to refer cases to the Federal Trade Commission as "master in chancery" for aid in framing a decree). The issue of court involvement in protracted programs to reform other government institutions has received extensive scholarly discussion. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298-1302, 1313 (1976); Horowitz, *The Judiciary: Umpire or Empire*, 6 L. & HUM. BEHAV. 129, 129-130 (1982) (arguing that it is inappropriate for federal courts to labor in the unfamiliar terrain of administration of various social programs); Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753, 795-805 (1984) (discussing the authority arising from FED. R. CIV. P. 53); Mishkin, *John Randolph Tucker Lecture: Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 950 (1978) (challenging the "regularization" of "institutional decrees" and the "acceptance of the set of mind that, having identified a real social problem, too easily concludes . . . that judges must therefore act in a wholesale fashion to reform government to bring about the 'cure'"); Frickey & Levine, Book Review, 3 CONST. COMMENTARY 270, 276-280 (1986) (reviewing D. ROTHMAN & S. ROTHMAN, *THE WILLOWBROOK WARS* (1984)).

¹³⁶ See, e.g., *In re New York, N.H.&H.R.R.*, 632 F.2d 955, 957-59 (2d Cir.) (chronicling over three decades of bankruptcy reorganization and judicial management), cert. denied, 449 U.S. 1062 (1980). See generally Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 485-86

Even an enthusiast for the antitrust laws may experience misgivings when the monopoly prosecution against AT&T is settled on a basis that converts a federal judge into a specialized Federal Communications Commission passing on issues such as the right of successor telephone companies to engage in data processing, selling office equipment, providing construction services abroad, or any other operation that management desires to undertake.¹³⁷ Such diversification may be quite undesirable;¹³⁸ but the issue is plainly expediency, not justice.

I hasten to say that I am not opposed to receiverships as an ultimate remedy for basically malfunctioning public agencies, whether they be prisons, school boards, police departments, or hospitals for the mentally ill. Litigation to achieve institutional reform may be the only realistic leverage against the legislative or bureaucratic apathy that permits constitutional outrages to continue.¹³⁹ Judges' decrees, however, should distance the court from daily administration and extricate them from ongoing responsibility at the earliest feasible moment. Perhaps the execution of complex, continuing administrative remedies for illegalities found by courts should be entrusted to an appropriate regulatory agency. There would be reserved for courts only the usual judicial review of administrative action, such review concerning itself with injustice, not prudence or expediency.

H. *Justice and Organization of the Executive Branch*

Recognition of the uniqueness of justice as a concern of government would have important implications for the structure of the executive branch of government. The Department of Justice would be the most affected; it could be freed of its compromising entanglement with bureaucratic administration in such fields as immigration and naturalization, prison administration, alien property controls, and ongoing reg-

(1980) (describing judicial use of administrative powers when managing institutions as a result of bankruptcy and reorganization litigation).

¹³⁷ For an extensive discussion of the role played by U.S. District Judge Harold H. Green, see S. COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* (1986). See also Schwartz, *Form and Substance: Introduction to the Symposium*, 9 COMM./ENT. 1 (1986) (symposium on the divestiture of AT&T).

¹³⁸ See generally Schwartz, *Diversification and Regulated Utilities—What's Next for the Telephone Holding Companies?*, 7 COMM./ENT. 195 (1985) (discussing diversification in the telecommunications industry).

¹³⁹ See Chayes, *supra* note 135, at 1307-09; Levine, *supra* note 135, at 753-56. Prof. Levine's review (with P.P. Frickey) of *THE WILLOWBROOK WARS*, Frickey & Levine, *supra* note 135, at 271-76, thoughtfully canvasses the issues in the context of judicial intervention to remedy intolerable conditions at "an abysmal state institution for the mentally retarded." *Id.* at 270.

ulation of corporate structure and operations.¹⁴⁰ The governing principle should be the minimization of conflicts of interest that arise when a single agency combines the functions of doer and judge of its own doing. Running a prison system entails entrepreneurial, custodial, educational, and supply functions comparable to operating a chain of hotels or hospitals.¹⁴¹ In the course of such operations, injustice may be done to prisoners. But that is no more reason for incorporating the Bureau of Prisons into the Justice Department than it would be for incorporating the Internal Revenue Service into the Department on the ground that numerous grave injustices have been perpetrated by the Internal Revenue Service.

Moreover, when allegations of injustice, perhaps amounting to cruel and unusual punishment, are brought by inmates of a penal institution, the government ought not be represented by an Attorney General who was directly or indirectly responsible for the allegedly inhumane conditions. Rather, it should be represented by a Department of Justice that can take a stance to some degree independent of the client, a stance in which it is more likely that the ethical canon calling upon government lawyers to moderate their adversary posture¹⁴² will be observed. The Justice Department has no more claim to run the prison system than have the courts which send the prisoners there. The ancient sentencing formula by which the convict is committed to the custody of the Attorney General is plainly an anachronism dating back to an era of monarchical discretionary justice, before the development of a doctrine of separation of powers.

In the field of immigration and naturalization, there is a long history of hardships too easily imposed upon groups whose very right to be here may be questioned.¹⁴³ The policies to be implemented are chiefly matters of international relations, labor relations, humane treatment of political or economic refugees, and border patrol—hardly matters to which a Department of Justice can claim special expertise.¹⁴⁴

¹⁴⁰ For a general overview of the Department of Justice and a description of its relationship with these various fields of law, see OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, 1986/87 THE UNITED STATES GOVERNMENT MANUAL 338-71 (1986) [hereinafter GOVERNMENT MANUAL].

¹⁴¹ The Department of Justice is in the prison business running four U.S. penitentiaries, 20 federal correctional institutions, and 19 federal prison camps. See *id.* at 358-60.

¹⁴² See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1982).

¹⁴³ See E. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, at 461-77 (1981).

¹⁴⁴ Principal authority for the administration of the immigration and naturalization laws, as well as for enforcing its provisions against lawbreakers, is vested in the Attorney General. See 8 U.S.C. § 1103 (1982). For a discussion of the role of the Department of Justice in the formulation, administration, and enforcement of the im-

The Department's repute for evenhanded justice in this area is compromised by involvement in the formulation and execution of policies that inevitably restrain human liberty and entail discrimination based on ethnicity, country of origin, political views, and motivations in seeking refuge. The notorious Palmer raids of the 1920's, carried out against "foreign anarchists," remain a byword of lawless political action by the Justice Department.¹⁴⁵

Civil liberty and justice would be better protected if the Department entered the picture clean of any involvement in the confrontations. That is the way it regularly operates in representing executive agencies before the Supreme Court, where it is free to confess error or otherwise vindicate notions of the higher interests of the government as a whole, including justice.¹⁴⁶

Although the case for a realignment of functions between the Department of Justice and other executive departments is here argued primarily on the basis of the desirability of institutionalizing a higher priority for justice over administration, it is worth noting that such realignment would also promote efficiency. Where an independent agency such as the Securities and Exchange Commission, the Food and Drug Administration, or the Postal Inspectors (law enforcement branch of the Post Office) has cases to bring before the courts, little is gained by interposing Justice Department monitoring between the agency and the local district attorney and court. My own observation, as an attorney first for the Securities and Exchange Commission and later in the Criminal Division of the Justice Department, was that such monitoring slowed operation, multiplied paperwork, dispersed responsibility, and too often afforded an opportunity to bring political influences to bear against proposed prosecutions. A reorganization of the executive

migration laws, see T. ALEINIKOFF & D. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 81-93 (1985). The possibilities for and reality of conflicts and confusion of roles arising from the potential incompatibility of the tasks of administering and enforcing the immigration laws are explored in SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, *U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST* 238-44 (1981); U.S. COMM'N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* 40-43 (1980).

¹⁴⁵ See T. ALEINIKOFF & D. MARTIN, *supra* note 144, at 352-55; E. HULL, *WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS* 16-17 (1985); see also Note, *Statutory and Constitutional Limitations on the Indefinite Detention of Excluded Aliens*, 62 B.U.L. REV. 553, 553-55 (1982) (arguing that the Justice Department's refusal to terminate the confinement in camps in Miami of Cuban nationals who attempted to immigrate to the United States was an abuse of discretion).

¹⁴⁶ See Caplan, *The Tenth Justice* (pt. 1), *NEW YORKER*, Aug. 10, 1987, at 32 ("The Justices . . . count on [the Solicitor General] to look beyond the government's narrow interests. They rely on him to help guide them to the right result in the case at hand, and to pay close attention to the impact of the case on the law itself.").

branch, focusing upon the inherent conflicts faced by those who must formulate, enforce, and judge their own policies, would serve the promotion of justice at no expense to expediency.

III. THE PRESS AND THE PERCEIVED JUSTNESS OF GOVERNMENT

My theory of justice, which relates it to beauty and the sense of the fitness of judgment to circumstances, puts great emphasis on the aesthetic responses of citizen observers. If there is a consensus that the regime governs justly, not perhaps perfectly, but as justly as human political institutions can manage, the regime will be stable; the citizenry will feel secure, and the government's legitimacy will be proof against violent overthrow. Manifesting the legitimacy of government is one of the most important functions of judging, as well as of lawmaking and elections.¹⁴⁷ However, the theory encounters obvious problems that must be confronted. One is the question of whose perceptions should count.

It will not do to say that a lynch mob is doing justice even if, by giving expression to vengeful or ethnic passions, it gratifies most members of the community. That would be akin to abdicating literary or artistic criticism to the most vulgar tastes. Nor should the ultimate verdict on justice be made by professional critics: persons educated in law, philosophy, morals, and political science. Refined critics of law and government are likely to be members of the elite of society, beneficiaries of the status quo. They are not sufficiently representative of the community that their favorable judgments would necessarily lend legitimacy to government.

Besides, it is notorious that the professional critics are divided amongst themselves and are perhaps least reliable when they close ranks. When they do agree, the apparent consensus is likely to be attributable to the development of a priesthood that dominates the schools in which new critics are trained to orthodoxy. Rejecting the infallibility of that priesthood does not, however, mean that it has an unimportant role to play in the critique of justice. Basically, its role is to aid the self-education of a political society. Their analyses, especially their conflicting analyses, illuminate the issues and emphasize the importance of rationality. It remains for the judges and the press to integrate the critics' insights into the consciousness of the community.

If the professional critics are insufficiently representative to make their views determinative of justice, one might suppose that elected rep-

¹⁴⁷ See 1 ST. AUGUSTINE, CITY OF GOD 115 (J. Henley trans., R. Tasker ed. 1973) ("Set justice aside then, and what are kingdoms but fair thievish purchases?").

representatives of the people, i.e., legislators, are best qualified to decide what is just. The views of the legislature are, indeed, entitled to weight in this regard, and a judiciary that is perceived to disregard the legislature gambles with its own reputé as a defender of justice. On the other hand, few things are better settled in our community conscience than awareness that a legislature may enact unjust laws which the judiciary is obliged to disregard as unconstitutional.¹⁴⁸ Legislatures, as well, may be imperfectly representative of the electorate, especially when the elective process becomes prohibitively expensive and candidates consequently become unduly responsive to voters that can provide money.¹⁴⁹ Possibilities of corruption aside, even a representative legislature can act like a surrogate lynch mob giving crude expression to the will of a tyrannical majority.¹⁵⁰ Procedural protections of accused persons can be harshly constricted in consequence of public outrage over a jury's acquittal of a person whom the press has already convicted. Political and

¹⁴⁸ See, e.g., J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135-36 (1980) (arguing that the role of the court is the protection of those groups that the political process fails to protect).

¹⁴⁹ The money raised and spent on political campaigns is staggering. The Republicans collected \$107 million for their 1986 Senate campaigns; the Democrats collected \$79 million. Berke, *GOP Millions Didn't Save Senate*, N.Y. Times, Feb. 8, 1987, at A28, col. 3. Senate candidates spent a record \$155 million on their 1986 campaigns; their House colleagues spent \$187 million. Tolchin, *Record Spending in Congressional Campaign Had Mixed Result at Polls*, N.Y. Times, Nov. 7, 1986, at A18, col. 1 (citing FEC records). Those campaigns rely on the support of political action committees ("PACs"). PACs contributed \$44 million of the \$186 million raised in the 1986 campaigns. Berke, *supra*, at A28, col. 3. PAC contributions are heavily weighted towards incumbents; 83% of their contributions in the 1986 elections went to reelection campaigns. Molotsky & Weaver, *New Fodder in PAC Wars*, N.Y. Times, Nov. 14, 1986, at A16, col. 1.

The Supreme Court has consistently upheld the right of individuals to contribute to PACs and the right of individuals and PACs to contribute to political campaigns. See *Fed. Election Comm'n v. National Conservative Political Action Comm.*, 105 S. Ct. 1459, 1467 (1985) (individual participation in political action committees and PAC participation in federal elections is protected by first amendment freedom of association); *Buckley v. Valeo*, 424 U.S. 1, 15 (1975) (per curiam) (the giving and spending of money in a political campaign is included in first amendment protected areas of political association and political expression). Although the Court has recognized that the right to political association and expression "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly and optimally 'effective,'" *Id.* at 65-66, it has allowed federal restrictions on individual contributions to PACs and campaigns, and PAC contributions to campaigns. *Id.* at 58 (limitations "serve the basic governmental interest in safeguarding the integrity of the electoral process"). The government cannot, however, limit a candidate's expenditure on her own behalf, limit overall campaign expenditures, *id.*, or limit individual and group expenditures to support or oppose ballot measures, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 299 (1981).

¹⁵⁰ See *THE FEDERALIST* NO. 10, at 132 (J. Madison) (B. Wright ed. 1961) (popular government enables a majority faction to "sacrifice to its ruling passion or interest both the public good and the rights of other citizens").

religious rights of minorities can be overridden.

This brings us to the role of the press. Given that it is the *perception* of justice done that contributes to the legitimacy of government, it is clear that the mass media plays a crucial role. If the government, following a widely publicized crime or civil disturbance, selected a scapegoat without regard to guilt or innocence, for example by chance or by secret political determination, uncritical or laudatory reporting by the press would create the impression that law and order had been vindicated and justice done.

On the other hand, the press can unjustifiably undermine respect for the law and the legitimacy of government through misleading reporting.¹⁵¹ Trumpeting that a defendant who is plainly guilty has been held "innocent," when in truth he has merely been acquitted because the proof, even though conducive to belief in guilt, did not exclude reasonable doubt, certainly undermines respect for the courts. If the press does not handle cases in a manner that invites consideration of the classic safeguards of innocence and of the price that must be paid for them, the court's judgment will be wrongly perceived as unjust.

A more serious press failure that distorts understanding of justice occurs in the reporting of convictions reversed because of a violation of the Bill of Rights in the course of prosecution.¹⁵² It is not uncommon for such decisions to be reported in the spirit of "criminal escapes punishment on technicality." Rarely do the news articles make clear that reversal of conviction because of unconstitutional police behavior leads not to escape but to a retrial without the unlawful evidence. The reader is not reminded that rules such as those regulating arrest, search, interrogation, and right to counsel exist in order to protect ordinary unoffending citizens from harassment by the government, even though the rules are unavoidably invoked by persons perceived as guilty.

It is, of course, possible to loosen the reins on the police and catch

¹⁵¹ See, e.g., T. LEONARD, *THE POWER OF THE PRESS: THE BIRTH OF AMERICAN POLITICAL REPORTING* (1986) (discussion of how the press came to shape American attitudes toward government from the revolutionary era to the early 1900's); S. LICHTER, S. ROTHMAN & L. LICHTER, *THE MEDIA ELITE: AMERICA'S NEW POWERBROKERS* (1986) (study exploring media reporting of the safety of nuclear power, busing for racial integration, and the oil companies' role in the energy crunch); D. SCHILLER, *OBJECTIVITY AND THE NEWS: THE PUBLIC AND THE RISE OF COMMERCIAL JOURNALISM 179-197* (1981) (discussion of the rise of the press in the United States); Muravchick, *Misreporting Lebanon*, 23 *POL'Y REV.* 11, 62 (1983) (U.S. news media coverage of the war and seige in Lebanon "[t]oo often . . . was flawed by inaccuracies, imbalance, and hyperbolic or tendentious reporting").

¹⁵² See generally R. DRECHSEL, *NEWS MAKING IN THE TRIAL COURTS* 1-9, 152-56 (1983) (criticism of court coverage and selected bibliography of related studies and articles); S. ZAGRI, *FREE PRESS, FAIR TRIAL* 3-10 (1966) (case study of trial by press).

a few more criminals, but only at the price of many more unpleasant police intrusions on ordinary people. As we are constantly reminded by economists and conservative politicians, there is no such thing as a free lunch. If we desire a society uncowed by police, we must be prepared to accept fewer arrests and convictions. But standard journalism seldom provides the public with any sense that the tiny fraction of prosecutions aborted by vindication of constitutional rights has little bearing on the deterrent force of the law. The main impact of the constitutional provisions is on the police, who in their normal operations *comply* with the requirements of the Constitution. This hidden cost of conformity with the Bill of Rights means that, because of our commitment to the Constitution, vastly more suspects escape at the police level than at the court level. Normal police compliance accepts the social cost of fewer arrests, a cost that the constitutional Fathers—who had no illusions about free lunches—clearly chose to incur.

CONCLUSION

The idea of justice should have a larger explicit role in teaching, practice, and judging. Justice is something beyond public policy or expediency. Especially, it has an aesthetic dimension that I call beauty. Are these true or meaningful propositions? I don't know. Their merit, if any, may lie in their quality of provocative error, error that evokes critical response and leads to new synthesis. I have played this jurisprudential game despite the fact that I am as skeptical of jurisprudence as I am of economics and sociology. All these rhetorics are, to me, like music and chess, mysteries to which humans are pardonably addicted.