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Approaches to Court Imposed Compromise-The Uses of Doubt and Reason

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ANY judicial system involves continuing accommodation between the need to preserve a coherent set of ordering principles and the quest for tolerable results in individual disputes. The reconciliation of general and special justice is occasionally impossible, and John Doe suffers for the sake of order and prediction. But one test of any system is the incidence of compatibility between dominating formal theory and justice for individual litigants. Constant harmony between the two is an unattainable ideal—but an ideal nonetheless.

Tension between these two orders is sensed acutely within the common law as in all systems emphasizing formalized principle. To be sure, influences within the common law tend to narrow the gulf between general and particular justice. The case approach tends to mitigate the seeming universality of legal rules, frequently permitting—within limits—the consideration of the dispute as a unique event. The emphasis upon economy of scope in interpreting precedent preserves the deserving litigant’s hope of escape from embarrassing principle. Nevertheless, narrow construction of precedent is no insurance against the square holding, and the proliferation of decided cases coupled with stare decisis progressively limits judicial alternatives. Thus it is that the common law tends to raise the rationale of decision—particularly on appeal—to a level of relative detachment from the problems as they appear to Doe. At the same time “policy” aspects of decision making more and more tend to become public policy to the exclusion of special concern for flesh and blood litigants. The logical drift of a case system is toward the enunciation of sound doctrine, producing individual justice only adventitiously.

Counter forces have always had some success in combating this inclination to remote abstractionism in the common law. Historically the legal fiction managed to secure Doe’s due occasionally, even if the law paid a price in obscurantism. Equity has often played a leading role in the adjustment of form to the demands of the case; and, especially in recent history, legislation has continually restructured principle, in part for that same end. Finally, this century has witnessed the advent on a grand scale

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of systematic and candid reform of principle by the judges themselves, often under the spur of the appealing equities of an isolated dispute. Inherent in nearly all such reform, however, has been its potential remoteness from actual litigants. The well tempered rule enunciated in one case may pinch and bind in the next. The repair of principle seems at best to improve only the statistical probability of fair results in actual cases. So long as the judge is required to choose winner and loser on an all-or-nothing basis, "sound" doctrine does not provide him the variety of alternatives logically, if rarely, necessary to achieve perfect adjustment in hard cases. Such cases are potentially infinite in their variety. Logically their perfect adjustment would require an absolute and unthinkable discretion. This is merely another way of stating the dilemma. The law appears eternally bound to an unsavory choice between a formless and unpredictable qadi justice on the one hand and, on the other, universal rules which falsify the realities of particular existential situations. Under a system of winner-take-all the one-sided result reached upon principle in the close case must continue to trouble the conscience of the law. Only the power to adjust quantitatively the rights and responsibilities of the parties could provide the court with sufficient alternatives to face this problem directly. Is there a manner in which such quantification of justice may be realized without the bestowal of arbitrary power? Is there a way in which to increase flexibility without unduly increasing discretion? Whether, why, and under what general circumstances and limitations such reform might be undertaken without making a wreck of the common law system of principle and the expectations it has created is the central concern of this paper.

The judicial power to compromise between the often harsh alternatives of all-or-nothing has received little consideration as a special problem in our jurisprudence. Its neglect is peculiar in the light of the high incidence of compromise through private settlement—a procedure of peacemaking in which the judge has taken an increasingly active role as mediator. Judicial activism in chambers is matched only by judicial paralysis on the bench. The "fair" decision promoted in private is one unattainable by law. That which the judge thinks just he cannot order. That which in chambers he calls "unjust" he orders and defends with thirty pages of rhetoric. Strange law? Passing strange I'd say—at least it might seem so to a Lunar visitor who shared our logic but not our legal experience. In fact, of course, the system is quite defensible in most cases, but the apologia is complex, and the law ought to bear at least part of the burden of proof. Instead the question is largely ignored. As far as I can ascertain it has scarcely been considered by legal philosophers except by oblique implication. Those writers who declare the generality of legal principle to be its most essential quality may suggest indirectly a danger lurking in the apportionment of rights and the tendency toward radical individualization of decision making. Perhaps to them the imposition of compromise by judges is simply un-
thinkable and therefore irrelevant. On the other hand, compromise would seem to exhibit at least superficial compatibility with the doctrines of those "realists" strongly committed to the need for "personal justice" and "relaxation of principles" in the name of equity. Yet suggestions from this quarter for judge imposed settlements seem equally rare. It was the apostle of Realism—Mr. Justice Holmes—who once observed that "general propositions do not decide concrete cases." But Holmes' own generalization is clearly wrong. He himself faithfully served the general proposition that under our system, with rare exceptions, one party loses and one party wins. Even those "realists" who are suspicious of principle have generally left unscathed that most ubiquitous of principles, winner-take-all.

**Scope and Nomenclature**

I am sensible that the form, analysis, conclusions and nomenclature of this exploratory effort are likely to prove as perishable as the problem is imperishable. Discussion will focus primarily on the litigation of civil suits and the prospects and proper limits of the imposition of settlements upon the parties. The term "imposed compromise" ordinarily will be used to describe such judicial activity. Compromise is, of course, an ambiguous term. Clearly here it should not be taken to refer to the world of bi-lateral, consensual bargain where compromise denotes the achievement of human purpose through the voluntary and mutual surrender of individual freedom of action. We speak not of contracts, gentlemen's agreements, political horsetrades, or social understandings. Nor do we consider directly the voluntary settlement of disputes by persons already in litigation, for this is a species of contract. Even arbitration, at least in its contractual-jurisdictional aspect, is excluded as being a species of "bargain-compromise". On the other hand the content and rationale of the arbitrator's decision may and will be viewed briefly apart from the question of its binding character.

Within the judicial process itself there is of course more than one form of compromise. Commentators very commonly style as "compromise" the judicial balancing of divergent considerations of public policy. The judge—certainly the appellate judge—must consider any case from the point of view of the system as a general order with demands of its own and of the society which it serves. In a defamation action he must estimate the relative threats to freedom of communication on the one hand and to the general security of reputation on the other which are implicit in the alternatives available to him. This balancing of social interests is a unilateral function of the court with no element of bargain. The generality of this function—its relative detachment from the specific parties to the litigation—give it the air of legislation. This aspect of decision making is obviously relevant to the present subject matter but is not what will be described as judicially imposed compromise.

That phrase will be employed to describe certain kinds of court selected
Approaches To Court Imposed Compromise

alternatives to what we have already called “all-or-nothing” or “winner-
take-all”. These alternatives may differ radically among themselves in their
rationale. They will certainly differ in their practical effect upon litigants.
For example, one important type will involve an equal division—a fifty-
fifty split—of rights and/or duties between plaintiff and defendant. In
other cases a more sophisticated apportionment may be indicated as under
a comparative negligence rule. Under all the techniques considered, a type
of apportionment unilaterally imposed by the court will be at issue. To
formalize it in the broadest terms, imposed compromise shall mean the
apportionment of right and duty between opposed litigants by a court ac-
cording to a quantitative standard that is not limited to the favoring of
one party to the exclusion of his adversary.

Cases theoretically amenable to imposed compromise are exceedingly
numerous. Any dispute involving injuries or rights that can be evaluated
in money is a potential subject of apportionment. Broadly speaking, most
civil cases in which a remedy at law exists could be handled under rules
creating proportional rights if this were inoffensive on policy grounds. In-
deed, it is often suggested that apportionment is now being achieved on a
grand scale by a variety of sub rosa techniques and in a multiplicity of situa-
tions. Averaging by juries, the ignoring of contributory negligence except
as mitigation, and—where multiple claims are involved—a distribution of
the prizes between plaintiff and defendant all make possible a rough quan-
titative calculus of justice. Aunt Emma gets the house, but the court finds
that the testator surely meant Uncle Charlie to have the farm. A recent
analysis in the Yale Law Journal suggests that apportionment of losses is
now achieved in some restitution situations by arming the court with a
sufficient number of inconsistent rules to guarantee at least one path to
justice.\footnote{Comment, 69 YALE L.J. 1054 (1960).} Under multiple guises a contorted apparatus of unpredictable,
rough-and-ready apportionment surely is operating. This may be one
reason that the subject receives little overt judicial attention. Its apparent
workability as an intrigue may make candor seem a risky self-indulgence.

But, for the moment, the point is merely that imposition of compromise
is conceivable in a variety of cases. Consider the following examples:

1. \(A\) and \(B\) are unsecured creditors of \(X\) whose assets are insufficient to
   satisfy both \(A\) and \(B\).

2. An Act of God destroys part of the grain stored in Jones’ grain elevator
   by \(A\), \(B\), \(C\), and Jones.

3. The good ship Marylyn survives a tempest by throwing overboard
cargo belonging to \(A\). Cargo of \(B\) and \(C\) is thereby saved.

4. \(A\) and \(B\) collide at an intersection with resulting damage and injuries.
   Both were negligent, but \(B\) was more negligent.

5. A check, of which \(A\) is the holder, bears what is apparently \(B^{'s}\) signa-
B denies signing such a check. Handwriting experts disagree with each other. There is no other evidence.

6. A swears he is the owner of an unbranded cow in B's possession. B swears the cow is his. There is no other evidence.

7. A and B both enjoyed the favors of C, a young lady, on a given evening. C has in due course and at the appropriate time given birth to a child. A, B, and the child have similar blood types.

8. A purchases a hi-fi set at a reputable store. The set was sold to the store by X who had borrowed it from B. B demands its return. The store is insolvent. X is gone.

9. T leaves an ambiguous will. It is impossible to tell whether he intended X or Y as his devisee of Blackacre.

Examples 1, 2, and 3 are familiar cases in which losses are apportioned according to an accepted rule of law, equity, or admiralty jurisprudence.

Example 4 is a case which would involve judicially imposed compromise only in a comparative negligence state. In other states an all-or-nothing result would be inevitable, limited only by the possibility of "improper" jury averaging.

In Examples 5 and 6 the result will be all-or-nothing under any existing view, even if the finder of fact considers the probabilities exactly equal.

In Example 7 a jury likely will decide that either A or B is the father. He will be solely responsible for the maintenance of the child. The jury may of course determine that neither has been proved the father.

In Example 8 the owner generally prevails under the common law.

In Example 9 the court will probably award the lot to either X or Y after a more or less convincing application of "rules of construction", thus potentially defeating T's intention by 100 per cent. It may also declare the devise unenforceable thereby insuring that same result.

Assuming no impediment to judicial power, and further assuming the wisdom of doing so, the judge in each of these last five situations could compromise the claims of the interested parties. But why should he do so? Under what rationale, and in what general kinds of cases would this be appropriate?

It is my conviction that at least four fundamentally different kinds of justification may be offered for the imposition of compromise by a court. Each of the four may produce a different form of practical result in a given dispute. These four approaches will be labeled compromises of (1) doubt, (2) policy, (3) discretion, and (4) community interest. Examples of the last three will be noted. Whether examples of doubt-compromise exist is largely a matter of speculation about unarticulated judicial motivations.

Doubt-Compromise or the Argument from Indeterminacy

Those who study the matter tell us that the intellectual life of the angels is a thing to envy. Science, art, deduction—all the intermediaries of
human understanding—are for angels superfluous; not for them the anguish of inquiry and the ordeal of doubt. These are the lot of humanity. It is man alone who must dwell in the maze of image and sensation, escape from which is the classic human riddle. None of us ever makes a clean getaway. In the end we all settle for the kinds of truth we call philosophy, art, science, medicine, law—organized and stylized learning dependent upon hypothesis, observation, memory, inference, and probability. Here is the habitat of the major premise. It is the best we have managed on the plane of nature. Human institutions—law among them—find both their purpose and their limitations in the fallibility of man.

For the truths it holds and the judgments it must make, the law, like other institutions, gropes among contingencies of particular and universal, of the real and the imaginary, of “fact” and “law”. The experience of groping—the agony of uncertainty—has influenced the intellectual forms and working mechanisms of law. As with other men, uncertainty goes down hard with the lawyers. Unable wholly to eradicate it, they are under an abiding temptation to disguise it. Where it persists, they have learned to sweep it under the rug with a grand gesture. Presumptions and burdens of proof are efficient and elegant devices for disposing of perplexing factual disputes; and where facts are clear but wisdom not, the substantive rules are adroit in clinching a result so neatly that the end seems pre-destined. Most splendid of the rules—and sheltered by a whole panoply of major premises—is winner-take-all.

Rules, burdens, and presumptions, by producing polished, ornamental, and one-sided results, often obscure a stubborn underlying indeterminacy of fact and principle. The aseptic precision of winner-take-all conceals an intelligible alternative that is based fundamentally upon a hearty acceptance of the human condition. Indeterminacy of fact or principle is not a quality necessarily to be first despised and then disguised. It has both a logic and a plausible utility that merit attention.

**Fact Indeterminacy**

In Example 6 above, A as plaintiff would receive short shrift in a replevin action for the cow unless he is an extraordinarily convincing witness. Given substantially equal credibility, A fails on two grounds—that he has failed to overcome the presumption of ownership arising from B's possession of the cow, and (what amounts here to the same thing) that he has failed to overcome what Wigmore first styled the “risk of non-persuasion.” In other words, the plaintiff has failed to sustain his burden of proving ownership by something called a “preponderance of the evidence.”

Sustained scholarly effort has been given to sorting out the meanings of the vital formulae employed by the law to settle close factual questions.

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9 Wigmore, Evidence § 2485 at 270 (3d ed. 1940).
One would be bold indeed writing in the house that Wigmore built to ignore the importance of the rules of "burden". It is no heresy, however, to suggest that the assignment of the risk of non-persuasion is, in a significant number of cases, a virtually arbitrary process. The great Dean himself said nearly as much:

There is, then, no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness.3

What are the reasons of "experience and fairness"? Is it human experience that plaintiffs are more likely to lie or blunder than defendants? Is the possessor of a cow inherently more credible than his adversary who claims ownership of the beast? Is not the contrary presumption at least equally convincing—that groundless litigation, while frequent, is statistically in the minority, and that most of mankind must have something to complain about before they will resort to litigation? If so, and if we are concerned with probabilities, the logical justification of the assignment of the burden of persuasion to the non-possessor is hard to discern. Even on the assumption that we know and can know nothing about the incidence of bona fides on the part of the plaintiffs or possessors, the rationale is equally obscure. Given only this, the preference for the possessor is yet unexplained. The assignment of burden, at least in many difficult cases, may well rest upon something other than or in addition to the inherent factual probabilities.

It may be said that the imposition of the burden of persuasion has at least the beneficial functions of getting the case decided, of taking it off the hands of the court, and of fixing the rights of the parties so that life may resume a stable pattern. This is surely true but begs the question. Any judgment by the court describing coherently the respective rights of the parties has that same consequence. Important as it is, the mere termination of litigation is not self-justifying, even in opaque factual situations. Justification must wait upon a showing that there is no better alternative.

It also may be said that winner-take-all is an aspect of a healthy judicial conservatism which stands in balanced inertia until impelled by sufficient proof to move to the aid of the litigant seeking its intervention. It is a preference, in other words, for doing nothing. Now the virtues of doing nothing are legion. They cannot be invoked, however, to justify a universal judicial inertia, for there are simply too many cases in which justice must move in order to stand still. Is it an expression of conservatism to refuse to act between two parties in a dispute over a valuable right? Or

3 Id. § 2486 at 278.
may the refusal itself often constitute the most decisive kind of judicial action simply by preserving a status quo? Some higher convenience than a mere verbal conservatism must be pleaded to justify an all-or-nothing result formally based on an equality of proof. Again the question is whether any superior alternative can be suggested. The quality of the hypothesis to be explored here is surely open to question and will be critically evaluated in due time. First let it be stated.

It may be put this way: Where a judgment for one party in a civil case at law can be based upon no greater probability of factual accuracy than its opposite, and where no reason of policy intervenes, the court should divide between the parties in equal quantitative parts the rights and/or duties at issue. What happens then to the disputed cow? Simply this: If the trier of fact finds the truth of the matter indeterminate in the sense of an equivalence of probabilities, the court may order the beast sold and the proceeds divided or may award her to either party upon payment of half the value to the adversary. This is the essence of "doubt-compromise" as applied in a case of factual indeterminacy.

The proposition is sufficiently startling that I wish to anticipate later evaluation and emphasize that limitations of policy probably would eliminate most or all cases of factual dispute from the practical operation of the principle. Nevertheless, however few the cases affected, the principle has a certain attraction and deserves consideration. The approach is one that might commend itself, at least emotionally, to the general "sense of injustice". Whether it makes sense, however, is the matter for consideration. The rationale is mercifully brief.4

The justification for doubt-compromise in cases of factual indeterminacy lies in the principle of equality before the law. Insofar as men ought to be treated by the law without unnecessary discrimination, the imposition of a burden of persuasion on either party raises an issue of partiality. Why either party without substantial reason ought to bear a risk of judicial inaction is by no means clear. If in substance plaintiff and defendant have asserted equally probable versions of the facts, and if no issue of overriding policy intrudes, the impulse to judicially imposed compromise should be strong indeed. What excuse exists for awarding judgment to one party? In cases of factual impasse where this question is left

4 The equal division of rights appears superficially a harmless modification. If we restrict our examination to cases in which the discovery of truth and error by the trier of fact will involve substantially random selection, we may say that we have merely substituted an unvarying error of fifty per cent in all such judgments for an error of one hundred per cent in half of these same judgments. Such a total result is neither more nor less irrational in this respect than the other, and has the virtue of being realistic about the probabilities in each instance. The constant, candid toleration of error has, however, certain disadvantages which will be later examined. In any event, mere inoffensiveness is no justification for the departure from historical practice.
unanswered—where no substitute rationale is offered—the all-or-nothing judgment appears an arbitrary preference of one litigant over another.

Note that "equality" in this context suffers little from formal ambiguity, possessing even a pseudo-mathematical quality. It means simply that to the eyes of the trier of fact there appears a substantial equivalence of probabilities that plaintiff and defendant are correct on the critical issues of fact. The existence of such an equivalence of probabilities is itself, of course, a question of fact.

Let us examine the application of this rationale to example 7—the case of "dual paternity." Here the inherent probability of A and B's respective fatherhoods is mathematically calculable, and precisely equal. It is no more probable that either is the father than the other. Nevertheless, precedent suggests that either A or B may be held legally responsible and solely and totally responsible—not both, nor each for a share. In a sense this result represents the ultimate triumph of winner-take-all. It is commonly explained on grounds of sympathy and public policy, but it is as readily viewed as a manifestation of the amazing vitality of the all-or-nothing principle. Taking all-or-nothing as the major premise, the decision appears simply a choice as to which is to suffer—the plaintiff or the burden of persuasion. If we start the other way around—with a "plaintiff must win" commitment—we are left with a further anomaly to explain. One, again, is the trampling of the burden of persuasion. The additional eccentricity is the total amnesty granted the second potential father.

There may, of course, be policy justifications for a "one father" result which are not immediately apparent. In their absence, however, the case for apportionment of responsibility through imposed compromise is a strong one. It is based squarely upon the impossibility of preponderating proof and the consequent infelicity of unitary responsibility. An imposition of duty upon each defendant proportional to the probabilities of actual paternity is a viable result and an exact expression of the equality principle. Whether each defendant should be responsible for more than his share in case of default by the other would be a separate question. Such a sophistication would superimpose a residual element of the present system but might be considered a necessary precaution. Each defendant then would stand as principal debtor for his own share and surety for the other.

Now such an approach to factual dilemmas is, as far as I know, without support in Anglo-American law. It might be thought that comparative

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6For possible exceptions see note 19 infra. In Sweden, legislation now provides for support by both "fathers" in the affiliation cases. Bassett, A New Sex Ethics and Marriage Structure 263 (1961).
negligence bears a superficial resemblance to doubt-compromise in factual disputes, but, as we shall later elaborate, its underlying rationale is precisely the opposite. In the apportionment of responsibility through a comparative negligence rule the assumption is that it is necessary and possible for the trier of fact to ascertain the relative negligence of the parties. That rule is based upon a sufficiency of reason rather than upon the frustration of reason that constitutes factual indeterminacy. In comparative negligence the law purports to render what is at least in form a precise justice. Doubt-compromise on the other hand is available in factual disputes where neither precision nor probability is obtainable. It might indeed be employed as an auxiliary and consistent principle in a comparative negligence jurisdiction for cases involving factual indeterminacy, though just how this would work is not easy to see, and much would depend on the special features of the negligence statute.

The distinction between doubt-compromise in factual disputes and comparative negligence helps to explain another difficulty. If a fifty-fifty split is conceivable at all, why not sixty-forty or some other proportion? If winner-take-all is arbitrary, why is any other intermediate result less so? The response must be in terms of the indeterminacy-equality principle which is only relevant where proofs are substantially in balance. Any split other than fifty-fifty can only be based upon a sufficiency of knowledge—a condition absent by hypothesis in the factual problems under discussion. As long as we confine our attention to instances of balanced probability, any division other than fifty-fifty would discriminate against one party. In other words it would offend the equality principle. It would of course be possible to construct a formula apportioning all claims according to the factual probabilities, but that is not our present concern.

There is one branch of negligence law which seems to be flirting with, or at least tolerating, one aspect of the rationale suggested above for imposed compromise. A California decision, *Summers v. Tice* is an intriguing example. Here the plaintiff lost an eye in a hunting accident. One of two defendants each of whom was hunting with plaintiff had caused the injury. Each had fired his gun. Both were found negligent. Judgment was affirmed against both defendants.

If defendants are independent tort feasors and thus each liable for the damages caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment. . . . Some of the cited cases refer to the difficulty of apportioning the burden of damages between the independent tort feasors, and say that where factually a correct division cannot be made, the trier of fact may make it the best

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*a* 33 Cal. 2d 80, 199 P.2d 1 (1948).
it can, which would be more or less a guess, stressing the factor that the wrongdoers are not in a position to complain of uncertainty.\footnote{Id. at 88, 199 P.2d at 5.}

Here dissatisfaction with traditional requirements of proof has not only shifted the burden of persuasion to the defendant as in the typical \textit{res ipsa loquitur} situation, but has also tagged a defendant with responsibility though it is certain he has caused no injury. In similar cases involving medical malpractice multiple defendants have been held responsible even where it appears that some not only caused no injury to plaintiff but were innocent of any wrongdoing whatsoever and also acted independently of each other. Such cases (and there are many) involving multiple defendants are not completely apposite to the question here at issue, for they represent winner-take-all as between plaintiff and defendant. They do suggest, however, that factual indeterminacy may be no bar to recovery in limited circumstances even against innocent defendants. By comparison the concept of an evenly apportioned responsibility where guilt is indeterminate appears relatively tame.

The objections to the imposition of compromise in cases of factual indeterminacy, however, are many and persuasive. What room they leave for such a device is questionable. The focus of all objections is the contingent and artificial character of the judgment of equality in actual cases. We have defined equality as a balance of probabilities. The existence of such a balance, however, is itself necessarily based upon an antecedent judgment by the trier of fact—a judgment rife with all the standard difficulties and contingencies of factual decision, and a few that are unique. Equality in specific cases is merely a construct which, though intelligible as an idea and perhaps useful, must compete with all other considerations of policy that may be relevant. It is not a "natural" or "political" equality which can claim precedence over all competing considerations as a form of universal first principle.

First among these competing considerations is the danger of increased litigation. By definition more plaintiffs would prevail—if only by moieties—in any system no longer requiring more than a balance of proof. This is the objection voiced so frequently to compulsory arbitration as a part of the collective bargaining process preceding final agreement. It is said to inhibit prompt and serious bargaining by the assurance that a balance will be struck by the arbitrator. Even accepting this version of the realities of arbitration, however, the analogy to legal process is in this respect not close. The alternatives in collective bargaining arbitration are never all-or-nothing. Considering the protean character of most such contracts the area of disagreement is generally exceedingly narrow in comparison to the scope of accord existing prior to the arbitration. If one party were to lose all points at issue the result would rarely be disaster. Collective bargaining
is not an athletic contest with arbitration as a sudden death overtime to
determine the victor. It is much more akin to a hand of showdown to dis-
pose of the loose change at the end of a poker game. If each player's whole
stack of chips were at issue, few would stay. In litigation each party runs
the risk of losing all, for a compromise judgment would be merely one of
three alternative possibilities.

Where arbitration undertakes to interpret rights under an existing
commercial or labor contract, the analogy is closer. It is even less clear,
however, in such cases either that compromise by arbitrators is in fact
common or that parties exhibit a uniform eagerness to take all disputes
to arbitration. Each bi-lateral community is largely a unique phenomenon.
There is an infinity of imponderables arising from the continuing relation
under such contracts that defies any generalized comparison to litigation
on this point.

It is also conceivable that, under a system of imposed compromise,
some parties to especially difficult factual disputes actually would be dis-
suaed from litigation by their own judgment about the likelihood of an
imposed settlement. The incentive to go for broke on a roll of the judicial
dice would be attenuated by the prospect that the result may in the end
be compromise. The spite case would no longer provide a sure substitute
for the duel.

Obviously all this is sheer speculation. My best guess is that litigation
would be increased somewhat but not radically. In any event other objec-
tions are clearer. The temptation to oppression would be enlarged, since
the defendant's total escape from liability could be managed only by pro-
ducing a preponderance of evidence. The fabricated story might be denied
but not disproved without the aid of a burden of persuasion. My own
judgment is that some increase in counterfeit claims would be likely.

Temptations to the trier of fact would be an additional difficulty. It
is an irony that human fallibility provides both the argument for com-
promise and one of the strongest policies against it. The problem would
appear particularly acute in jury trials where the possibility of compromise
would tend to erode the incentive for careful argument of strongly held
opinions. If winner-take-all had no other virtue it does demand an effort
from the jury at a healthy clarity of judgment. This goes as well for the
judge, and, while we are at it, we might note the difficulty of avoiding the
jury problem by declaring the existence of balanced doubt a question of
law. If a reasonable man (the judge) could conclude the probabilities were
equal, it would be a rare case (possibly the dual paternity case) in which
other reasonable men (the jury) could not logically find a preponderance
for plaintiff or defendant. In fact, since by definition any facts sent to a
jury permit a verdict for either party, the balanced probabilities case—
because it falls within these limits—theoretically must be a jury case. To
make it a question of law would flirt with constitutional questions con-
cerning the right to jury trial as well as threaten sensible administration. On all these grounds, and perhaps others, the compromise verdict at the moment seems to me an unwarranted risk. The analysis has so far produced not a justification for compromise but, instead, only a rationale of the burden of proof in jury trials.

The wisdom of imposing compromise of factual disputes in bench trials is a more difficult question. The basic issue is simply whether we trust our judges to withstand the novel pressures arising from such a technique. I speak not of the pressures of a crowded docket. Compromise from the bench would have only a very indirect influence on speed of administration. The judge must still hear all the evidence and decide. The principal assault on judicial virtue would arise from the judge himself. First of all, as long as he is able to decide close issues by application of a mechanical depersonalized burden of proof the judge is protected from a species of embarrassment that lurks in every hard case. Resolving factual issues against good men is often a distasteful duty. Remove that duty in close cases, and it is likely that more and more cases will begin to seem close. Now realist philosophers may reply that this is precisely how most factual questions ought to seem, since we are rarely sure in any event precisely what we are doing. My pessimism, already stated, is not so keen as this, and the possible invitation to sloppy analysis is disquieting. It also troubles me that imposed compromise would add another dimension in which sheer sympathy for one party may be translated into dollars. Of course I suppose there is something to be said for permitting the judge a mechanism for indulging his compassion by halves as opposed to the possibilities now existing.

Finally, we must take account of an ambiguity which has been unduly tolerated throughout the discussion. We have spoken of factual dispute as if it were radically discrete from issues of law or principle. The opposite, of course, would be nearer the truth in many instances. For example, we may speak loosely of negligence as a fact, but, until the judge or jury speaks, there is no negligence as far as the law is concerned. There is only objective act and circumstance. The existence of negligence is a question on a different and higher level of generality than the questions of fact heretofore noted. Questions as to the existence of "negligence", "agreement", or "fraud" involve notions of value that are missing or subdued in "pure" fact questions sensually oriented such as speed, weight, time, distance, and word sounds. Of course even these factors are no more than remote constructs of the existential reality. They are images in the mind of the tiler of fact. Unlike negligence, however, they have no ethical content of their own but only in context. It is, consequently, one thing in a contract action for the judge to declare that the probabilities are equal of the defendant having said "x" and to conclude from this that the probabilities of the existence of an agreement are equal. It is quite another to say that
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all physical facts are proved by preponderance but that the existence of an agreement is yet factually indeterminate. Whether facts X, Y, and Z—once they are proved—add up to the “fact” of agreement, is not an issue which I would like to see the trial court generally free to compromise on a theory of factual indeterminacy. It may be, and I will so argue, that in certain cases involving no issues of raw objective fact, general rules or principles of compromise should be developed. We should be clear, however, that such an approach is based not upon a balance of doubt as to fact but rather upon an equilibrium of perceived competing policies. Such doctrines of compromise can only be developed with candor and clarity on the appellate level. To treat them under the guise of factual issues at the trial stage would not only obscure the function of these proposed changes but would pervert the role of the trial judge. The question whether proved objective facts satisfy a legal definition of a high level of generality seems best regarded as always a yes or no issue to be decided by the trial judge on principle supplied by appellate precedent.

What room is left for compromise in factual disputes? Has the effort produced even a mouse? Excluding all jury trials and all judge-tried issues of “ultimate fact”, what remains? Only this: conceivably in bench trials in which the judge faces balanced probabilities of the occurrence of physical objective fact, there may be no overriding objection but rather some advantage in recognizing a residual judicial power to impose an equal division of rights between the parties rather than an all-or-nothing solution reached under applicable burdens of proof. The risk does not seem intolerable. Of course, the recurrent ambiguity as to what is “ultimate fact” and what is “physical objective fact” is ineradicable, and I see no way to state the confines of such a power as to avoid entirely the possibility of abuse. However, an appellate decision delineating the authority could preserve some confidence by emphasizing that the relevant facts which might be handled in this way are matters of space, weight, and number, not of subjectivity. Was Jones the driver of the car? Did the defendant say the words alleged? Is this the letter? Was the plaintiff present at the meeting? In a contract case otherwise proved by the plaintiff, the timely mailing of an acceptance might be essential but indeterminate. In this situation the damages might well be split. In a medical malpractice case proof of causation may be a standoff with the same result.

One final caveat is yet necessary. Suppose that in the contract situation noted that there is an additional relevant objective fact of equal probability. Will the standard burden of proof then be applied to the case on the theory that two equal probabilities would produce a three to one chance? In other words, is the rationale applicable only in a case involving one such issue? Logically and sensibly the answer is yes. The only practical alternative is to permit the court to view the evidence as a whole in determining the question of equal probabilities. This would reintroduce
the objection that the trial court is involving itself in compromise upon the ultimate issues—negligence, agreement, fraud, malice—issues not truly questions of fact in the same limited sense, but heavily weighted with value content. It therefore seems likely that any adventures in imposed compromise based upon indeterminate fact ought to be confined to cases which, at the moment of judgment, involve only one factual issue remaining in a state of equilibrium.

In any event whatever narrow reform may be defended, it can hardly be expected. It is almost impossible to imagine a trial court willing to embark upon explicit compromise on such a rationale without warrant from appellate precedent. It is equally unlikely that an appellate court would find occasion to declare the indulgence even if it wished to do so, for again, by definition, factual issues involving an equivalence of probabilities fall within the final power of the trial court. The authorization from the appellate level could come by way of dictum only. Its advent is not probable from judicial sources, and the legislature seems an equally doubtful breeding place. This leg of the journey has been largely academic. The next is less so.

**Rule Indeterminacy or the Problem of Policy Collision**

To this point we have considered the imposed compromise as a possible derivative of factual indeterminacy. Now it will be examined as a logical outgrowth of an analogous balance of doubt respecting applicable rules. Hereafter, unless specifically noted as instances of factual indeterminacy, all cases of doubt-compromise will be of the "rule indeterminacy" type. This cumbersome expression does not refer merely to situations for which the law has developed no solutions. Rather it suggests all cases in which any solution—existing or theoretical—which awards an all-or-nothing judgment to either party is basically unsatisfactory because it involves the sacrifice of policy goals equal in significance to those it promotes. In these situations rules are seen as indeterminate in the sense that diametrically opposed results would appear equally plausible or implausible to a disinterested observer. With policy considerations in balance, an implacable winner-take-all rule makes the two available results appear as the horns of an inescapable dilemma. Bad law sometimes makes hard cases.

It should be emphasized that the indeterminate factor here is not the relevant policies. By hypothesis the competing policies are perceived, or there is no problem. The doubt lies rather in the proper solution of the dilemma. The indeterminacy is one of the rule to be adopted.

The problem of rule indeterminacy is fairly illustrated by the classic encounter between those cheerless innocents the victimized owner of the stolen or decoyed chattel and the bona fide purchaser of the same. Assuming a case where neither has acted foolishly, the equities and policies stand in
rough balance. The owner's expensive hi-fi has been lifted from his un-
locked car. The BFP has paid cash under suspicious circumstances.
Possibly some will disagree about the equities and policies at stake here,
but no matter. The facts may be altered as desired to make them balance.

Dean Pound's analysis of the appellate handling of such problems is
keen and convincing. Society's conflicting interests in "security of acquisi-
tions" on the one hand and "security of transactions" on the other must
be identified and appraised. "It is enough to say that every item in the
catalogue must be weighed with many others and that none can be ad-
mitted to its full extent without impairment of the catalogue as a whole."8
Fair enough—the court reckons a careful calculus of social advantage. It
prepares an opinion demarcating the areas of freedom and protection re-
main ing for future enjoyment of the interests in conflict, preserving as
much as possible of each. Then it awards the whole pie to one of the
parties—in our case probably the original owner—even though the social
interests involved may be in perfect equilibrium and though the parties
to the litigation are equally culpable or innocent. It appears that, when the
law descends from the level of social engineering to the level of the unique
instance, its balancing function is stultified and justice is polarized.

Perhaps this should not surprise us. After all, what predictive utility
has a system of principle if that principle is not employed in the resolution
of cases? If each dispute is to be treated as unique, the general order be-
comes merely an exhortation and no longer a threat. The only law is the
law of the case—and that law discoverable only ex post facto. Law is re-
duced to a radical nominalism and men can no longer plan their activities.
This objection is sound, it seems to me. Individualized justice in an in-
dustrialized society is a nightmare. But imposed compromise in the sense
now to be considered is a different species altogether. It should not be
confused with individualized justice, though it would assist the realiza-
tion of results that individualized justice could happily endorse. It is
merely a part of the continuing effort to develop theory which in applica-
tion will produce sensible results with the highest degree of regularity.

The argument from rule indeterminacy proceeds by way of a reduction
to absurdity. If in a type situation X any resolution of the case favoring
one party is no more convincing than its opposite, such a result is re-
jected. As in cases of fact indeterminacy the parties are in a status of
equality arising from a balance of doubt. It would be discriminatory to
prefer either. Here the doubt exists at the level of principle not of fact.
A one-sided result will have effects that are undesirable—and equally
undesirable whichever is chosen. As it now stands in such cases the ap-
licable substantive rule plays the same role as the burden of proof in a
factual impasse. Cutting the Gordian knot, it terminates the litigation

by declaring one party the victor. Seen from the point of view of equality such a result is fundamentally defective. The equality premise suggests the propriety of a division of rights by doubt-compromise, unless by such a division new and separate policy objections intrude.

The question of reform on such a foundation is preeminently an appellate concern. The practical proposition—the program—might be stated thus: it should be a conscious purpose of appellate jurisprudence to identify and describe categories of disputes involving claims which can be reduced to money and as to which solutions favoring one party are substantially no more plausible than their opposites. Where no considerations of policy make compromise undesirable, rules should be developed assigning the rights and responsibilities at issue in such disputes to each party on the basis of equality. The suggestion, in short, is the addition to the corpus juris of rules requiring imposed compromise in certain defined instances. The justifying rationale is the indeterminacy-equality principle. Thus, for many Owner v. BFP cases it should be possible to define with fair generality a set of circumstances in which the all-or-nothing result would be replaced by an even split. The content of the category of cases excepted from an all-or-nothing result would obviously vary according to the views of each jurisdiction as to which situations represent the intellectual standoff I have dubbed rule-indeterminacy. Cases involving raw theft from the original owner might be left as they are or even divided into those thefts involving, and those not involving, carelessness or "invitation" by the owner. On the side of the BFP, as a condition of his qualification for compromise, the law would wish to demand some generalized standard of sensible conduct, perhaps less stringent than the existing standards for BFP status, perhaps not. In any event the process of rule formulation would differ in no essential manner from familiar techniques. The whole difference would be in the now three dimensional consequence of whatever rule package would be produced. Nor would any new form of difficulty in interpretation be introduced at the trial level by such an alteration, for the court would face the same old conundrums of fitting existential situations into abstract pigeonholes, the boundaries of which are defined in verbal symbols. There would, of course, be a third pigeonhole added to the existing "BFP Wins" and "Owner Wins" classifications, but in many respects this may actually simplify the question of rule interpretation. Much of course depends, as always, upon the skill with which the rule has been articulated—hardly a novel consideration. Unfortunately, there will be problems where issues of fact are tried under such rules before a jury, but the consideration of this question will be reserved for the moment.

Within existing rules scattered examples suggest compromise of this type. I cannot demonstrate but suspect that a half conscious recognition of indeterminacy informs such rules. Take the example given earlier of
the problem of distributing inadequate assets to unsecured creditors. The familiar result favoring proration may appear simple and obvious justice, but I wonder how much of this feeling is conditioned response. It is in fact a result which required considerable struggle to secure. Langdell spoke of "...one of the most cherished objects of equity, namely, equality among creditors," but between the desire and its fulfillment lay several hundred years of complex history and sometimes internecine struggle between law and equity. If equity had begun in 1500 to distribute according to chronological priority of creditors, what volume of complaint would be heard today? It is quite possible to picture modern commentary commending the chancellors who early saw the ethical and policy advantages of preferring those whose credit was extended when the risk of insolvency was less foreseeable. Long established absurdity tends to generate its own rationale. Fortunately, in the insolvency situations, the chancellor somehow resisted the all-or-nothing sirens. Equity may have sensed and reacted to the sheer vacuity of a polarized result. It is possible to view the rule as an impulsive and historic expression of equality, insofar as it prefers none of the creditors over another except to the extent of his superior contribution—a subsequent and quite separate consideration. At the same time it has preserved for the secured creditor a sensible winner-take-all result.

Whether the chancellor's intellection followed this course is sheer speculation. The outcome, however, conforms exactly to the suggestion above with respect to Owner v. BFP situations. The object is such cases is to declare an end to the dilemma by defining an intermediate third category in which the one-sided result would be scrapped. Equity achieved this objective with sense and skill, and produced, with immensely important consequence for all phases of debtor-creditor relations, a principal which familiarity latterly has clothed with the guise of inevitability.

The same may be said of either the Admiralty rules relating to general average or of the proration of losses occurring in grain elevators providing common storage. The inexorability of apportionment in such cases is an illusion. These are simply more obvious instances of the relatively common situation in which either one-sided result is conceivable but unsatisfactory—at some point so unsatisfactory that winner-take-all capitulates. At what point along the spectrum of judicial reactions between the clearly favorable and the clearly emetic does the one-sided result become unbearable? This is a neglected question of

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9 Langdell, Equity Jurisdiction 169 (1908).
10 See example 3 supra, p. 753. The owners of jettisoned goods share proportionately in the value of the goods preserved. See Star of Hope, 76 U.S. (9 Wall.) 203 (1869).
broad importance on which appellate courts should engage their energies. It is not a question confined to a few legal freaks but is a legitimate inquiry in a multitude of polarized legal situations of which the Owner v. BFP scrimmage is but one example. Traditionally the courts and their commentators have treated such hard cases, with few exceptions, as painful dilemmas impaling the court on either doctrinal horn. It is all the more gratifying to find in Karl Llewellyn's last book this highly relevant aside on the BFP puzzle:

"This is a hard case." It is, indeed; and where there is no uniform commercial act or title certificate law to cut the knot, it is a type which will continue to bother court and counsel until some Solomon dares to split the loss.12

In a footnote he adds an implication that the impasse be avoided by the Admiralty approach or that of the grain storage cases. The suggestion is comforting, if so far academic.

Albert Kocourek once argued for similar disposition of certain types of claims involving circular priorities. He suggests the following case arising under a "notice" type of mortgage recording statute: A lends the debtor $5000 and receives a mortgage which he fails to record. B, knowing of the prior transaction, lends the debtor another $5000 taking a mortgage which he records. Thereafter, C, in ignorance of the prior transactions lends the debtor $5000, taking a mortgage. Under standard doctrine A's lien is prior to B's which is prior to C's which is prior to A's. If the security is worth $5000 the doctrinal impasse is as nearly perfect as one can expect. It may be thought, as some courts suggest, that A is at "fault" for not filing and should therefore be penalized. That imperfection can be eliminated by supposing the case to arise, as it has recently and frequently, by operation of inconsistent rules of priority for different types of interests

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12 LLEWELLYN, THE COMMON LAW TRADITION, DECIDING APPEALS 231 (1960). A lively departure from the standard solutions appears in Lord Justice Devlin's recent dissent in Ingram v. Little, [1960] 3 All E.R. 333 (C.A.). The case is a classic example of the reasonable but outsmarted vendor versus the reasonable but outsmarted BFP with the triumphant rogue unknown. It produced three intricate opinions, that delivered by Lord Justice Sellers lamenting "that our decision here will not have served to dispel the uncertainty." Devlin willingly grappled with precedent and principle, but he added as well a new dimension:

For the doing of justice the relevant question in this sort of case is not whether the contract was void or voidable, but which of two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided between them in such proportion as is just in all circumstances.

3 All E.R. at 351-52.

Lord Devlin's approach would accord unfettered authority to determine "fault or imprudence" as in comparative negligence. It would, therefore, be consistent with "discretion compromise" as defined infra pp. 774, but is not compatible with compromise by rule as here suggested.

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in cases involving no fault whatsoever. Kocourek argued in a fashion quite in harmony with the indeterminacy-equality principle: "[N]o sound reason can be found to give the entire fund to A or to any other party. There is only one possible solution and that is to divide the fund equally...." As far as I know no court has adopted such a solution.

There is one danger in employing this example—it is too perfect. The geometrical character of the impasse suggests that this is all we mean by "rule indeterminacy." Actually the circular priority situation is merely a uniquely clear instance of the multitude of logical and/or policy impasses encountered in any system largely committed to winner-take-all.

But the moment we consider examples of such cases which have troubled the courts we sense difficulty in applying doubt-compromise. Take two simple cases at random: first, consider the problem of the contract in need of interpretation. In a tight issue of construction the court may be unhappy giving either party full recovery but equally unhappy scrapping the whole agreement as too uncertain. Yet in a suit for profits could a defendant sensibly be held bound to pay half the loss of the bargain? As a second example suppose Jones insures his stepmother for his own benefit. She dies of natural causes. If the conflicting policies at stake are considered by the court to be roughly offsetting, should he collect half?

At least three general kinds of objections may be made to division of loss or benefit in one or both of these or similar cases. There will, of course, be other special problems in particular cases. The three general objections are (1) the invitation to anti-social conduct; (2) the corruption of the trier of fact in cases presenting factual issues; (3) the erosion of law's function as a standard of morality.

The first is fairly obvious. The establishment of rules directing an equal division of loss or benefit in defined situations would, under some circumstances, invite the creation of that very situation. This would be particularly true where a benefit is involved as in the example of the insurance taken on the life of one as to whom the insurable interest is not clear. Even if the policies involved are thought to be in balance, the division of benefit in the insurance case would create more difficulties than it mitigates. It would discourage honest insurance in such cases by, in effect, doubling the rates. It would retain the temptation to homicide mitigated only by the extra premium needed to double the face value. The only answer in such a case is all-or-nothing.

The deterence aspect of the breach of contract example is less clear. Will parties to improvident bargains be encouraged to breach by the hope of halving their liability? Or would fidelity be encouraged by increasing the danger that the party terminating will be responsible for half

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the injury? If one has already abandoned performance, will the prospects for settlement of the dispute be enhanced by the possibility of an imposed compromise, or will litigation be encouraged? This last issue seems essentially akin to that raised by imposed compromise in factual impasses and is equally difficult to assess. In any event the degree of encouragement given to undesirable conduct by a rule of compromise would have to be assayed for each situation type.

The second objection—the temptation to the judge or jury—resembles that arising in cases of fact indeterminacy with one difference. In factual disputes the question for the fact finder would be the balanced probability of the occurrence of an event. In cases of rule indeterminacy, the question would be whether the events proved bring the case within the category for compromise defined by appellate precedent or statute. The jury instruction would read in effect "If you find fact X, you must render your verdict for neither party." Fact indeterminacy would involve the form "If you find fact X is no more probable than improbable, render your verdict for neither party." There is an interesting theoretical enigma that would appear in a jurisdiction recognizing both forms of doubt-compromise. It would arise from a finding of factual indeterminacy as to an event the proved existence of which would satisfy the conditions of a rule imposing compromise. Would the half be halved again?

In any event rule-compromise would present to judge and jury the same centripetal invitation to bend into the middle or compromise category the insecure fact at either end. If there were any doubt about the good faith of the BFP, for example, it would tend to be resolved on the high side. On the basis of these objections it is arguable that the use of rule compromise should be confined to bench trials or even to cases involving no issues of fact susceptible of resolution in this fashion. In my own judgment such a limitation would exaggerate the significance of this danger.

The third objection to rule-compromise is most difficult to articulate but quite possibly the most important. I have called it the threat to law as a standard of morality. It is best seen by comparing the case types represented by the grain elevator, general average, circuity of lien, and BFP examples on the one hand with the example of the contract in need of interpretation. Assume that what is at issue in the contract litigation is a ripe question of breach. What the court may face, if it is to split the losses, is the seeming bestowal of its partial benison upon a wrongdoer. Suppose X refuses performance claiming Y's breach of a material aspect of their bargain, and Y is the only injured party. Suppose further that the court finds Y's construction of the written agreement as convincing as X's and X is made to pay half Y's injury. Unless the logic of indeterminacy is wholeheartedly accepted, the appearance is one of material breach by X with an unjustified commutation of sentence. If X is in breach, he is in
fault—or at the very least has deliberately created, and now frustrated, Y’s expectations. On this logic he should replace these expectations in full without amnesty for his fault. The civil wrongdoer must meet the demands of commutative justice. These emotional complications do not arise in the general average, grain elevator, BFP, and circuity cases. Here there is no issue of fault, no ethical overtones. The litigation is a combat of innocents. The real villain is not amenable to process.

Of course there is doubt about the reality of the supposed ethical aspect used to sustain the all-or-nothing result in the contract example. In a tight issue of construction where the question is whether X or Y is in breach, the morality seems to be more a product of the judgment than its cause. X is not bound by the law to pay Y’s injury on the theory that X is already morally bound by his agreement. By hypothesis the meaning of the agreement is indeterminate. X can only be morally bound in the sense that the judgment against him is the judgment of an authority he is obligated to recognize. Nevertheless, I think the desire to identify and punish fault and to reward virtue plays some part in the instinctive reaction to a proposal for compromise in such cases. Ultimately such feeling may be an aspect of the immense importance unconsciously accorded the teaching function of law. Even in seemingly unique instances such as the construction of written documents, and certainly in more generalized problems such as negligence, we tend to expect the law to enunciate a standard of conduct having relevance to all men. However shabby the syllogisms that support the final judgment, men can cling to it as to a plank in a shipwreck. It may seem all that separates them from the descent into the Maelstrom of uncertainty. For the law to callously recognize its own bafflement in a compromise judgment would appear a form of treason to its constituents. Anyone who has ever hugged a blanket will recognize the feeling. Judge Frank talked about it in terms of father and mother images. Compromise no doubt is riddled with maternalism. It would appear to snatch the security blanket from the public and bestow it upon the children of the litigation.

We will speak again of this emotional aspect in a concluding section exploring the sources of winner-take-all. In evaluating it here as a practical objection to imposed compromise I confess impatience with such an objection if the reform is otherwise sound. Yet it would probably exercise a strong influence on the course and practical prospects of doubt-compromise and would have to be conceded some weight. Law, after all, is for the happiness of men, and some men will always be happier with the appearance of justice.

Suppose, however, that we eliminate all cases that raise any of the three objections noted. There would remain considerable room for the

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15 Frank, Courts on Trial 384 (1949).
approach suggested to operate if confined to cases involving neither (1) need for deterrence, (2) issues of fact, (3) culpability of either party. Consider first the ancient conundrum posed by the contract for sale of improved realty where the improvements burn before the deed passes. Who bears the risk, absent agreement on the point? The contortions of "equitable conversion" for the most part favor the vendor. Illinois and others, however, protect the purchaser. The Uniform Vendor and Purchaser Act asks who was in possession. The existence of insurance of either vendor or purchaser or both is likely to hammer the risk question completely out of shape. Here is a viable compromise situation. Neither party is at fault, even constructively, as in the contract breach case discussed. There is no invitation to anti-social conduct. Both parties stand to lose by the destruction as long as the insurance doctrines are sensibly handled. There is no policy reason to prefer one over the other. A compromise is easily effected by either giving the purchaser an abatement in price of half the damage or, if the vendor retains the property, requiring the purchaser to pay half the loss.

A more generalized problem amenable to compromise is the distribution of losses after discharge of contracts for impossibility of performance or frustration of purpose. Where such relief has been granted, the issues of reliance injury and restitution are often complex.

[1]n dealing with those losses which are not coupled with gain to the other party, a court normally cannot resort to damage principles of assumption of risk or fault. Because the occasion for discharge is ordinarily an externally caused, unknown, or unanticipated event, neither party will have assumed the risk in the vast majority of cases and neither party will be a "wrongdoer" to whom the court can easily assign responsibility for loss. Thus, only innocent parties will bear losses resulting from a contract discharged as burdensome, and therefore equitable considerations further suggest that at least some non-benefiting losses should not be sustained by one party, but should be evenly shared.

The quotation is taken from a remarkable comment in the Yale Law Journal, Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution16 by Phillip D. Weiss. Mr. Weiss has in a careful and scholarly fashion outlined a variety of situations all of which may satisfy our three requirements—no fault, no temptation, no issue of fact. A repairman may have half completed his work on a house which is destroyed by fire. A liquor distributor may have prepared displays under contract for a customer who because of a change in the law is unable to obtain a license. In either case the contract does not specify who bears the risk of loss. Should either the repairman or owner be required to bear the whole cost of the destroyed improvements? Should the distributor or dealer be

required to take the entire loss for the useless displays? There is no point in restating the complexities. Mr. Weiss has already done so, exemplifying what seems to me the desirable general concern to determine those situation types in which winner-take-all is an unnecessary and injurious formalism. The conclusion of Mr. Weiss that only a statutory solution is viable is not one that I share, however. The common law is not yet so ossified. The rationale offered here would be sufficient to justify compromise in most impasses of this kind.

A third type of dispute in which imposed compromise violates none of the three conditions is exemplified by the ambiguous will problem earlier noted. The testator intended to benefit either $A$ or $B$. There is no greater probability that he intended one than the other. No question of fault exists. We can assume that no fact is in doubt other than the ultimate fact of intention. Further, a rule dividing the res under such circumstances appears to provide no incentive to anti-social conduct. There is, of course, the objection that the testator's intention is violated by 50 per cent. The alternative of being 100 per cent correct half the time might be preferred, since it can be easily disguised under rules of construction. Basically the issue is closer to the problem of indeterminacy of "fact" than of "rule". There is no reason, however, completely to exclude this situation from consideration without a fuller analysis than can be attempted here. It represents one instance of the general problem posed by ambiguity in written instruments creating rights by gift. There may or may not be types within this area in which imposed compromise might prove highly serviceable.

Finally, it is by no means clear that doubt-compromise based upon rule indeterminacy should be limited by the strict conditions outlined. Whether the existence of issues of fact should prevent its application or limit it to bench trials depends on the degree of confidence the appellate court has in its triers of fact. Secondly—in each type of policy collision considered—whether winner-take-all constitutes a desirable deterrent to potential malefactors and to litigants ought to be weighed in the general scale of convenience. Finally, to the extent resistance to compromise represents an emotional response to a make-believe "fault," each court must strive to appraise the social value, if any, represented in comforting fiction.

**Conventional Types Compared: Compromise as Discretion and Policy**

Thus far we have seen compromise as a solution for cases in which an all-or-nothing result favoring either party is not supported by a preponderance of fact or reason. At the risk of belittling what has been offered we may sum it up by saying that when reason can produce no other conviction it ought to produce compromise. Now we turn to consider cases in
which compromise is not the by-product of a balance of doubt but rather
the calculated preference of a sufficiency of reason. Here we meet common
forms, and less elaboration will be necessary.

The conventional compromises are of two types which we may re-
spectively designate as discretion and policy oriented. The discretion-
compromise is represented by comparative negligence. As we have noted
this rule of torts purports to effect a precise expression of the value of the
actors' conduct. The trier of fact is seen as performing a cognitive act
which perceives relations inherent in that conduct. Compromise is not
here a judicial construct supplying a substitute for cognition. The quanti-
tative rights seem to exist waiting to be discovered and are discoverable.
We may say then that compromise here represents an effort at exact
justice or perfect adjustment according to reason. For that very reason it
may be objected that this form of decision is no compromise at all. Never-
theless, it is a form of "apportionment of right and duty between litigants
by a court according to a quantitative measure" and so fits our original
description, which I would like to preserve. Further, although the theory
may be one of perfect adjustment, the realities of such an approach make
the compromise label apropos. "Discretion-compromise" seems fitting
because of the broad range of results which are possible under such an
approach. No fixed extrinsic standard is imposed beyond the broad scope
of the "reasonable man" test to limit freedom of action by judge or jury.

Mr. Weiss' statutory scheme for cases of impossibility and frustration
contains an element of discretion-compromise. In addition to his carefully
defined categories permitting a fifty-fifty split, he would bestow a broad
residual power upon the court to... "evaluate and apportion the loss in
any manner it deems just..." with certain exceptions.7 Here again the
court's judgment is in theory to be based upon a reasoned perception.
Reason, however, is left to range through a broad pasture of equitable
considerations which cannot be exhaustively predicted within a fixed
principle. In some respects this discretionary power is reminiscent of Sec-
tion 2-302(1) of the Uniform Commercial Code and the power it creates
to modify unconscionable contract provisions.

The second conventional type is what will be called "policy-compro-
mise". As an example we may again examine the rule of proration among
general creditors. Earlier I suggested that this rule may be viewed as a
form of doubt-compromise based upon dissatisfaction with alternatives
which prefer one creditor over another. It is possible, however, to view the
same rule as the expression of a policy encouraging the extension of credit
by guaranteeing a partial protection for all general creditors. This effect
being so clearly beneficial, winner-take-all is set aside. Policy-compromise

7 Id. at 1086.
is then seen as nothing other than the effort to achieve a specific public advantage by a rule of apportionment.

No doubt the general average cases in Admiralty and the grain elevator rule also could be rationalized in such a fashion. The proration of grain destroyed without fault saves serious problems of proof of ownership. Under any other rule the decision would have to be left to those esoteric brethren LIFO and FIFO. The result also spreads the loss which otherwise would threaten either individual farmers or the warehouseman. The general average may similarly constitute a perception of the happy social consequences deriving from proration, though I still suspect that, in explaining both these rules, the argument that all-or-nothing is inconceivable is as potent as the argument that there is a special policy advantage in proration.

There are cases, however, in which proration seems based solely upon perceived positive policy advantage. Certain insurance rules appear so oriented. Suppose the vendor and purchaser under an executory real estate sales contract each has insurance on his interest when the improvements burn. The risk in the jurisdiction is on the vendee, but he is given the benefit of the vendor’s insurance. Vendee sues both companies for the full coverage, which result would represent a windfall. The court may well decide to let vendee have only a prorated claim against each company, measured relatively according to each policy. As against vendor’s insurer the supporting rationale is not the absurdity of the alternatives of all or nothing. It is rather the very strong policy against encouraging arson, plus perhaps other policy considerations perceived by the court. Compromise, in other words, achieves a sounder result from the point of view of the most important policies at stake than could be realized by total victory for either party.

The primary difference between discretion-compromise and policy-compromise is in the level of generality involved. Comparative negligence and its kin are oriented to the demands of the unique situation before the court. Basically they aim at justice between the individual parties, creating the “perfect adjustment” which is itself the primary justification for the comparative negligence rule. On the other hand, insofar as the rule of proration among creditors is intended to stimulate credit, it is publicly oriented. Of course, it also produces a neat adjustment among the flesh and blood creditors in each individual case, but that adjustment is purely mechanical and is foreordained by the mathematical character of the rule itself. The Admiralty rule and the grain elevator rule also have this quality of performing well at two levels—the level of general policy and the level of the individual litigant. The reason for this is the same in all three

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types of cases. The claimants have each contributed to the production or preservation of an existing entity now the subject of litigation, the shares in which can be evaluated mathematically. No discretion is necessary to achieve perfect adjustment at the individual level. It is automatic. Nevertheless these rules also have their distinctly public aspect.

Both discretion-compromise and policy-compromise differ from doubt-compromise in the premises upon which they are grounded. Doubt-compromise always proceeds from the same premise which is perplexity. The conventional compromises are grounded upon whatever general or particular advantage may appear in apportioning justice in the type of case involved. The approaches are not mutually exclusive, however. The decision that winner-take-all would be absurd obviously may co-exist with the judgment that compromise also will have happy policy consequences. Seeing this is important, for it helps to remove another difficulty about doubt-compromise.

The problem is posed by those conventional rules which divide rights between parties upon other than a fifty-fifty basis. The grain elevator rule, the rule establishing rights of creditors inter sese, and the others already noted apportion rights according to a scheme of proration that may produce any conceivable fraction, fifty-fifty being no more likely than any other. As far as I know, no fifty-fifty rule exists in the common law. Does this not demonstrate that the "indeterminacy-equality" concept is functionless in these cases, and that there is no single instance of its effect in all the law? Are not all existing rules of apportionment examples of either discretion or policy-compromise? Not necessarily, for it becomes an unanswerable question of psychology whether we would have any instances of apportionment whatsoever without some sense of the absurd in winner-take-all. Would the chancellors have striven for

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19 Professor Brunson MacChesney has pointed out that, in collision cases under American Maritime Law, property damage ordinarily has been evenly divided where both vessels were in substantial fault. The rationale underlying the numerous decisions and its relation to theories of compromise deserve fuller treatment than can be given here. The original Supreme Court decision stated that equal division would tend "to induce care and vigilance on both sides...." The Schooner Catherine v. Dickinson, 58 U.S. 170, 178 (1854). The language is suggestive of "policy compromise." However, the older English cases and some of the American decisions seem to suggest the fifty-fifty rule to be in part a reflection of the court's despair of any accurate assessment of fault. Thus, the rule in part may represent the only example of doubt-compromise based upon indeterminacy—here as to fact, but incorporated in a rule of law. See Torondoc-Dearborn Street Bridge, 1962 Am. Mar. Cas. 2215 (D.C.N.D. Ill.) and cases cited therein. One common law example may exist in the equal division of a mass of fungibles or unidentified goods, portions of which belong to two contesting owners, where the cause of the confusion is unknown or is the act of a third party and neither owner can prove his contribution to the mass. Again indeterminacy is as to fact. See e.g., Van Liew v. Van Liew, 36 N.J. Eq. 637 (Ct. of Err. and App. 1883).
proration among creditors without the negative spur of the all-or-nothing eccentricity? Was a sensitivity for the folly of polarized justice necessary—but of itself insufficient—to bring about each departure? We don’t know the answer. However, we can point out that in cases involving indeterminacy, where reasons exist for apportionment according to some other standard than fifty-fifty the equality concept does not stand in the way. For example, to suggest that all general creditors stand as "equals" and should therefore receive the same share would amount to a mere play on words. When there is a res at stake to which the litigants have each contributed in differing amounts, proration is the only method of achieving true equality of treatment. In nearly all existing instances of proration—creditors, general average, grain elevators—a product of their individual contributions is being divided.

The distinct but consistent natures of doubt-compromise and the conventional modes of judicially imposed compromise ought to be taken into account in developing the justifying rationale for any suggestions of reform. In dilemmas of theory such as Owner v. BFP and Vendor v. Purchaser cases the discovery of positive policy advantages in a rule of divided loss would render compromise more attractive to the court than would sole dependence upon the argument from indeterminacy. It might be persuasively argued, for example, that the division of reliance damages arising from the wreck of an impossible or frustrated contract might increase the availability of risk capital for important but chancy enterprises. It would always seem more satisfying to be positively for an identifiable public benefit than merely against the evils of polarity.

At the same time, it should be emphasized that doubt-compromise is not itself a mere negativism. In cases of rule-indeterminacy it provides the mechanism whereby policies which are irreconcilable in an either-or decision happily may achieve simultaneous recognition. Neither policy is permitted to devour the other to the consequent distortion of the value system at stake. In truth nothing is lost of either policy under a rule decreeing an even division, for all that is truly compromised is individual interests. Each value involved is given expression and remains intact—a goal that must inevitably elude any black-or-white disposition of the dilemma. For example, a split between owner and BFP would accord full recognition to the importance of both "security of acquisitions" and "security of transactions." Under present approaches one or the other is necessarily sacrificed.

Doubt-compromise then represents a mode of both preserving conflicting policies and treating fairly the parties to the litigation. This raises inevitably the question, why stop at fifty-fifty in rule-indeterminacy? We have just noted that the equality notion does not stand in the way where the matter at stake is the proration of contributions to a res. Is it an impediment where policies collide but one is superior in importance?
Must any rule of decision in such a case enunciate only the weightier policy? Suppose areas of conflict to exist in which competing policies realistically can be assigned varying values on a quantitative scale. What objections other than those already noted would oppose the elaboration of eight part or ten part rules recognizing proportional rights and responsibilities in categories of fifty-fifty, sixty-forty, eighty-twenty, and 100 per cent, according to the value calculus adopted? Wherever the subject matter is amenable to reasonably clear description in abstract terms such rules would not seem logically to differ from the fifty-fifty approach already suggested. Each value would be given expression according to its importance. The only essential requirement would be that the division be effected by a rule that is clear and non-discretionary. Yet I recognize that a multitude of new and unforeseen objections may become relevant, and the question would require more extended elaboration than can be indulged here.

In any event I would mistrust the power to apportion beyond the bounds of a reasonably specific rule, with the possible exception of comparative negligence. Departures from carefully delimited categories of compromise ought to be viewed with suspicion. This conclusion exposes my own uneasiness with most forms of discretion-compromise. The advantages of and objections to broadly drawn discretion are a matter of common debate and will not be elaborated in detail here. We should note, however, that the objectionable features inhere in that basic quality already noted which distinguishes compromise by discretion from compromise by rule; that is, they are a function of the low level of generality of such devices as comparative negligence. Policy-compromise does—and doubt-compromise would—confine the power of the court to a limited number of alternatives by imposing rules of a high level of generality. Discretion makes each case unique. I hope it is obvious that these reservations are in harmony with the views already expressed. If the rationale for compromise suggested above is largely grounded in scepticism about the precision of human judgment, it should not be surprising that any broad license to the trial court to apportion rights as it deems fit raises apprehensions. Even compromise ought to be by rule of law and not of men.

Paradoxically one obstacle to the development of rules for compromise is the seductive ease of saying “give the judge discretion.” It is often easier to get more reform than is needed or is desirable. What is called for is the difficult reform of the rules at a fair level of generality, not their easy and drastic elimination by the substitution of discretion. The need for compromise is significant but may be obtained within a framework of predictable judicial behavior. The practical difficulty for the prospects of compromise is not so much the inherent weakness and inflexibility of rules as two false indentifications. The first is the identification of rules with winner-take-all. The second is the identification of compromise with
broad judicial discretion. Compromise confined by rule is a neglected idea.

**SOME EXOTIC COMPARISONS—COMPROMISE FOR THE COMMUNITY’S SAKE**

The resources of comparative jurisprudence sometimes yield insights on basic questions of the kind at issue. The comments on this paper provide a more eclectic perspective than I can offer. I content myself with some generalized observations on indigenous African process and a brief comment upon a thesis of Professor Northrop with respect to Oriental forms. Neglect of the civil law countries is regrettable, but, on the other hand, the sharper contrast provided by non-western law may be more revealing than any other possible comparison. In addition, the European forms are so thoroughly codified their relevance is greatly attenuated. The abundant power of German courts to rewrite private contractual obligations in harsh circumstances represents a form of discretion-compromise.\(^\text{20}\) I would prefer, however, to confine attention to judicially created forms.

**Compromise African Style**

The African judicial scene reveals—or, more accurately, suggests—a fourth form of compromise fitting our original definition of a quantitative apportionment of rights of individual litigants. The useful data are imbedded in large measure in anthropological reports, though more recently the lawyers have taken an important research role. Much effort has been given over to the general question of flexibility in the customary decision-making processes, but, unfortunately, very little bears directly on the issue of the compromise of individual interests. The major writers do emphasize the “individualized” character of the proceedings. At the same time they often record an apparently fixed scale of compensation for customary offenses. Seldom discussed is the likelihood of departure from those standards in the litigation process. Another difficulty of interpretation is posed by the often perplexed question whether the particular tribunal has authority to bind without consent of the parties to the dispute. As Elias notes, the customary process of dispute settling is frequently described as arbitral in character without any clear definition of that term.\(^\text{21}\) The nature of the phenomena under study is so diffuse, at least at the more informal local level, that the difficulty of precision is understandable.

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Gluckman's description of the basic function of the Lozi judge in courts of fairly general and officially recognized jurisdiction is quite typical:

The judges try to prevent the breaking of relationships, and to make it possible for the parties to live together amicably in the future. Obviously this does not apply in every case, but it is true of a large number, and it is present in some degree in almost all cases. Therefore the court tends to be conciliating; it strives to effect a compromise acceptable to, and accepted by, all the parties. This is the main task of the judges.

The flexibility of Lozi justice is carefully documented by Gluckman in dozens of cases. Most of them, however, are situations in which multiple issues are at stake and the decision makers are effecting the compromise by “trading off” claims rather than dividing a particular loss or a benefit between plaintiff and defendant.

In his Nature of African Customary Law and elsewhere Elias emphasizes that, “...African law strives consciously to reconcile the disputants in a law suit...” Later he adds:

[T]he general atmosphere of the African judicial process is... one of peaceful debate of the issues dividing the litigants in the sure belief that some kind of acceptable solution will be found out of the elder’s fund of wisdom and sense of justice...

Even here, however, he gives no examples of the apportioning of a unitary claim, but rather notes:

[N]o adjustment is possible where it is the full restoration of a chattel or a parcel of land that is decreed, for it is not a 'crumb of right' but 'the whole loaf' that in such cases properly belongs to the rightful owner.

The flexibility seems to be exemplified more in the process than in the judgment on any single claim.

Nevertheless, it seems reasonably plain that compromise of some nature is in fact being achieved, particularly at the local levels and in a manner that is so organically imbedded in the process it is nearly indistinguishable. It is as inaccessible to direct observation as those compromises effected by a sequestered jury. It is in the air. Certain aspects of dispute settling common to most African peoples make this inevitable.

Note first the heightened importance of the mere resolution—any resolution—of the case. With few exceptions the dispute will have arisen in a close-knit agricultural or herding society organized upon a relatively

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23 ELIAS, op. cit. supra note 21, at 268.
24 Id. at 271.
25 Id. at 271 n. 1.
static framework of family relationships. Plaintiff and defendant are not only likely to know each other but even to be kin. Propinquity and/or kinship means the inescapability of a continued relationship by the parties. Survival of the dispute will constitute a threat to the commonwealth because of the broad web of loyalties and mutual obligations affected. To such a society serious personal dispute may mean the equivalent of a threatened rail strike in our own. Analogous pressures tend to dictate a mode of decision irenic in tone and consequence.

Secondly, this decision will be reached in customary practice by dispute settlers likely to be related to or know the individuals and even the facts of the dispute. Whether the particular society is hierarchically or democratically organized, opinion will be widely and publicly sought concerning the proper disposition of the dispute, and every fact of remotest relevance will be considered. According to Bohannan and others the decision of the tribunal will probably amount in fact to a decision of the entire vicinage and, indeed, of both litigants, or else it will be regarded as no decision because forced. Further, if the decision thereafter proves harsh or unwieldy, no res judicata threatens to freeze the situation and prevent adjustment by community action, unless perhaps ownership of a chattel is involved and/or the court has become sufficiently Europeanized to forget its administrative and social role. This last is, of course, an observable trend in much of Africa. Conversely the European aspects of some African systems may in part account for the continuing vitality of bootleg justice passed out by unofficial ad hoc tribunals.

All of these influences and others tend to make indigenous African justice at the local level so thoroughly infused with compromise as to make the nature of the compromise itself difficult to articulate. Simple clear-cut issues between Smith and Jones no longer serve to illustrate the problem. Division of the value of a disputed cow between the litigants seems a petty consideration in the context of a judgment of the whole community upon a public issue. Yet here we put our finger on an important ambiguity in the concept of compromise within a "primitive" jurisprudence. Compromise in this context does not denote merely commutative justice between two parties. Rather it is also and emphatically an expression of what western law would call the policy considerations in a jural situation. Judgment in such a society is normally community judgment, and it is so because community issues are at stake. The judgment has all the earmarks then of ad hoc legislation, and the individuality of the claim tends to be submerged in a general social readjustment. To what extent adjustments made as a matter of justice between the parties can be separated from the broader "policy" aspects is immeasurable, but, it seems to me that the designation of African justice as "individualized"

28 Bohannan, Justice and Judgment Among the Tiv 64-68 (1957).
is potentially misleading, unless that term is taken to mean merely that each dispute is handled as a unique problem. To the extent that it suggests sole or central concern for the individual litigants its validity is questionable. Before the advent of Europeanized courts it was clearly the exceptional African society in which the machinery of justice had focused more narrowly upon the activities and deserts of the individual litigants. The modern change in emphasis appears as a function both of a nascent western style individualism and a radical alteration in political structure in many African societies. The essence of that political mutation was the novel separation of judicial power from what was formerly an undifferentiated political-judicial authority either resident in the chiefs or—in some societies—in an amorphous collection of individuals.

In 1962 I had the opportunity to interview dozens of East African trial judges administering “customary law” in the official courts. These were for the most part men who were leaders in their tribal community and as such had participated broadly in the settlement of disputes in traditional informal procedures that still flourish. Some were from tribes long led by chiefs, such as the Baganda. Some were from loosely organized democracies such as the Kikuyu. In discussing difficult issues many of the judges drew a distinction between the proper approach to disputes when presented to ad hoc unofficial customary forums and the attitude toward those same disputes appropriate to their role as state officials. Every conceivable technique including apportionment of rights appeared to them apt for employment at the non-official level. As judges, however, they would enforce the law. What law? Customary law. But the traditional informal process also enforces customary law, and in those forums compromise is common; why not in the courts? Here we are judges. But you apply customary law? Yes, but here it’s different. Why is compromise indulged at the informal level? It is better for everybody; it is also fair.

All due scepticism must be preserved about the implications of such conversations. However, taken in conjunction with the views of leading authority three matters seem reasonably clear. First, even in areas where the customary law is “certain” (i.e. in most cases, recorded by an anthropologist) the give and take of the substantive law in indigenous “courts” was and probably is substantial. Second, compromise of individual “rights” was an inherent part of the policy making function of indigenous jural process. Probably it was also, but less so, a technique of commutative justice operating with an immense discretion. Third, the ascent of the official bench by an African often stultifies (and sometimes reverses) his native zeal for compromise.

The imposition of a theoretical matrix on the “African style” of compromise is perhaps risky. If, however, the perspective given above is in general realistic, it is possible to construct a rationale additional to those already described. It would share with policy-compromise and discretion-
compromise the notion that judgment is based on some form of reasoned conviction—that the court perceives and weighs foreseen effects or individual deserts and then selects the best course. It departs from policy-compromise, however, in two marked respects. The first is its level of generality. That is, the African style aims at the settlement of a single dispute not at the development of a rationalized principle of public policy. In this sense it is narrower than policy-compromise. Secondly it differs in the broad license it grants the court to effect whatever judgment it wills between the parties. It is not rule-oriented. In this respect, of course, it resembles discretion-compromise.

In one very important sense, however, it is broader than either policy or discretion-compromise for it takes into account the effects of the particular judgment upon the whole community of persons affected by the individual dispute and not merely the litigants. It might even be said in this respect to establish "policy", but note carefully that this is only in the nature of a transient ad hoc social adjustment without a commitment to the future through stare decisis. Such a mode of compromise finds its counterpart in our own system in the family court. Here each limited "community" of inter-related human beings is treated by the law as a unique problem. The decision rendered is more an arrangement than a judgment, and the winners and losers can not always clearly be identified. Quantitative apportionment of "rights" plays a frequent part in such proceedings—divided custody of children is merely one example—but the supporting rationale is broader than commutative justice between man and wife. Like labor or commercial arbitration the process strives to save all it can of a continuing pattern of relationships involving others besides the individual litigants. This is also the distinguishing style of the African compromise which we will generally entitle "community interest-compromise."

I have said that the advent of western style courts has threatened to stifle the flexibility of indigenous forms. An interesting exception has been called to my attention by Mr. Gerald Caplan. It is contained in a 1953 decision of the Court of Review of Kenya which I quote in full:

... The facts are undisputed and the issue is one of Customary Law. Although by the Customary Law prevailing there is no limitation to a claim to land, as has been laid down in E.A.C.A. Civil Appeal 52/49, natural justice requires that there should be some limitation. We are reluctant to lay down any specific limitation period and would hesitate to say that Wakhina is time barred, because he delayed for 14 years from the time of his marriage before claiming the land. On the other hand, natural justice also leads to the conclusion that Saulo, by reason of 27 years of uninterrupted occupation of the land, has acquired some right. In these circumstances, we have concluded that the decision of the African Appeal Court and the District Officer, i.e. to divide the land, is the most equitable solution, especially in view of
the fact that the land is described by the District Officer as "extensive." The appeal is, therefore, dismissed with costs.27

The case raises several intriguing questions. First, what was the rationale of compromise adopted by the lower courts? It is a fair bet that neither the trial court nor the African Appeal Court mentioned "natural justice". Was the division of the land thought of as a modus vivendi for the families involved, in conformity with the community interest rationale; or was it justice between the parties; or was it perceived as the creation of new principle to guide in future cases? Hardly the last, I suppose, though at the Court of Review level the judges may have had this in mind. But, if so, why was the minimum period of limitation left unsettled? And what, by the way, did the Court of Review conceive "natural justice" to mean? Would natural justice have supported a judgment giving the whole lot to the squatter, or is half the land exactly what he deserved? If the latter, is this some principle of indeterminacy expressed in terms of natural justice, or is natural justice a fifth rationale for compromise? Perhaps the most revealing fact is the "extensive" character of the land. In a country plagued by both land shortages and land fragmentation the trial judge would not wish to encourage either excessive acquisition by an individual or the reduction of a family plot below an efficient minimum. I strongly suspect this to be a very typical "community interest-compromise."

At the very least the decision suggests vitality of the old ways even within official African courts in 1953. Whether they have survived the intervening decade is a question. The doctrine of this case has not been further developed by the Court of Review. Whether its decision has ever been seen or read by any of the lower judiciary is doubtful. For a variety of practical reasons stare decisis has not been a prominent feature of African jurisprudence.

I would like to note here a suggestion of Professor Nathanson that the grand scale American constitutional battle be viewed as a frequent arena of compromise. Brown v. Board of Education27a is a classic example of such an engagement. The multiplex compromises are evident, particularly in the willingness of the court explicitly to indulge those persons affected by its order a sufficient time in which to comply with the altered view of their duties. Note that this is not merely the development of a formalized principle by which to guage and predict future judicial action. Even more importantly it was a modus vivendi for the community. I have discussed it here because in this respect it is so patently of a kind with the community interest-compromise in the African style. In one sense it is the logical ultimate of this type, for it completely ignores the interests of the very parties who conduct the litigation. The theoretical rights of

successful individual Negro claimants to attend non-segregated schools are, rather frequently sacrificed for the sake of larger interests of the community.

Professor Northrop and the East

Professor Northrop's judgments about the character of Oriental jurisprudence are relevant to the question of compromise. The immense scope of his thesis makes it difficult to handle analytically in this narrow context, but I can at least hope to narrate the essence and make one or two obvious applications. His view of Oriental justice is easiest to understand in its contrast to the highly rationalized character of western jurisprudence which he styles the "abstract contractual type." The Oriental he labels "the intuitive mediational type", which preferably dispenses with codes and which attempts the following:

To bring the disputants into a warm give-and-take relationship, usually by way of a mediator, so that previously made demands can be modified gracefully, and a unique solution taking all the exceptional circumstances of the case into account is spontaneously accepted by both disputants. Codes there may be, but they are to be used only as a last resort, and even the recourse to them brings shame upon the disputants. The moral man, Confucious teaches, does not indulge in litigation.

He elaborates further with an example I will quote at length:

In Buddhist Bangkok in 1950 I found the Chief Justice of its Supreme Court and a former Chief Justice of its next highest court, the Court of Appeals, who ostensibly were applying the most abstract of Western law, the French Continental Code, assuring me that they refused often to hear the case and urged the disputants, if Thais, to settle their differences by themselves in the approved Buddhist manner. In one instance after two such refusals and two failures of the disputants to reach agreement by themselves, the judges declined a third time to proceed in the Western manner, with the result that the intuitive mediational way succeeded.

Note its distinguishing characteristic: Not only is there no resort to a legal rule; there is also no judge. Even the mediator refuses to give a decision. Instead, the dispute is properly settled when the disputants, using the mediator merely as an emissary, come to mutual agreement in the light of all the existential circumstances, past, present, and future.

The existential particularity of the concrete problematic situation, in all its ramifications—familial, village, present, past and future—is the criterion of the just.

The similarity to the African "community interest-compromise" is obvious, and it is interesting to see its application in a society considerably

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29 Ibid.
removed from the bucolic insularity of Africa tribal life, even if not essentially individualistic. It is also an ethic of decision that would find no difficulty of assimilation in an American family court.

Northrop provides an explanation for the intuitive mediational attitude that may assist in the understanding of African legal phenomena. It amounts to a highly sophisticated analysis of Oriental epistemology. Stressing the essentially nominalistic view of human knowledge common to its philosophies, Oriental jurisprudence regards each dispute as a unique human encounter that cannot realistically be captured in its essence by universalistic forms dependent upon abstraction from sense data. Each conflict is understandable only in terms of itself. It is irreducible to any rationalized form. Let the author state it:

[B]ehind this intuitive, mediational type of law in Asia there is a Confucian, Buddhist and pre-Aryan Hindu epistemology which affirms that full, direct and exact empirical knowledge of any individual, relation or event in nature reveals it to be unique, and from this observation infers that to treat any individual, such as a person, or any event, such as a dispute between persons, as an instance of a non-nominalistic class concept or a universal legal rule is to act contrary to fact and hence to falsify human nature.30

Now the significance of this for compromise may be stated in two ways. It may be thought that compromise as an idea is simply eliminated logically, since there is no conceivable formal polarized result from which the law could move centrally to a division of rights. That is, the idea of compromise implies alternatives, but if each dispute is unique there is but one solution.

On the other hand it may be said that compromise is in fact emphasized in such a view since neither party is to be preferred by application of any formula producing winner-take-all. Practically speaking this seems the more realistic view. Its harmony with the African style of compromise seems probable. Unfortunately, our notions of African epistemology are insufficiently developed at this point to support any clear judgment about the analogy.

We might add that the Oriental attitude emphasizing the uniqueness of each dispute would find and has found a warm reception in those quarters of American legal life inhabited by realists such as the late Jerome Frank. In his Courts on Trial, Judge Frank lavishly praised the Oriental attitude as a healthy antidote to the daily overdose of rule hypnotism.31

I would like, however, to note one difficulty that has struck me about the relevance of Professor Northrop's brilliant thesis. He speaks of the intuitive mediational type as a "legal procedure." Yet the examples that he employs are of non-official settlements. Indeed, the whole point of the

30 Id. at 186.
31 FRANK, op. cit. supra note 15, at 378.
Thai example is that the law refused to have anything to do with the matter and private settlement was resorted to. The implication is that the law was too rigid, too "abstract", to provide a compromise result. Unfortunately, it is the law that we are talking about and not private dispute settling devices. As far as the intuitive mediational type is concerned, western society has it in abundance in its private dispute settling.

The real question then becomes, why do oriental societies avoid their own law? Can it be because the law is in fact sufficiently rigid that it does not represent what can fairly be called an intuitive mediational system, and that what does represent such a system is not law? Now, of course, Professor Northrop notes that the Thai code is abstract because of its French origins, but the same phenomenon of court avoidance and emphasis on private procedures is testified to in other Oriental systems as a phenomenon antedating or independent of European influence. It was clearly part of the Confucian ethic as Northrop himself notes. Wigmore described it as an attitude of moral repugnance to litigation itself.

An unyielding insistence upon principle, and a rigid demand for one's due, are almost as reprehensible as vulgar physical struggle.... Hence... the universal resort to mediation or arbitration, precedent to going to law, and usually removing that necessity.\textsuperscript{32}

It is hardly clear from all this that the Oriental judge when finally pressed to decide will feel free to act as if there were no principles of general applicability. Of course, his flat refusal to decide may have that very effect, but it would be important to know how frequently this occurs and in what kinds of cases. I certainly do not know the answer. This problem about the relevance of Professor Northrop's thesis does not occur on the indigenous African scene, for in general there was no formal legal mechanism existing apart from the system of dispute settling described above. The line between law and private settlement was in general quite indistinct.

\textbf{TAP ROOTS OF WINNER-TAKE-ALL}

The sources of the common law's commitment to polarized justice are by no means obvious. On the surface the law serenely assumes the inevitability of winner-take-all. Meanwhile commentators remark subterranean efforts of judge and jury to apportion justice. What is the underlying ethos driving the law to equivocation? Conceding that most legal disputes ought to have a one-sided decision, why is that form of result erected as the nearly universal facade for the system?

At the outset it would be well to emphasize that much of the reluctance to indulge in candid compromise probably arises from the menacing

\textsuperscript{32} Wigmore, Panorama of the World's Legal Systems 150 (1936).
identification of compromise with discretion. While tolerating clandestine compromise in isolated cases our law has been officially wary of unbridled judicial authority over individuals and of encroachments upon the separation of powers. The authority of civil law courts to alter contract terms strikes the Anglo-American as chancy, and challenges deep seated convictions of the free enterprise ethic. The African approach—except in a familiar family court or constitutional setting—gives us ethnocentric nightmares. The generality of law is accorded central importance, and judicial power to dispense an infinite variety of results destroys that generality. With generality gone much is lost of whatever certainty has been achieved—a certainty that was a real or supposed bulwark against oppression. These fears are intelligible and potent. As we have noted, however, they have only limited relevance to compromise. The objections are minimal where compromise is effected through non-discretionary rules based upon a rationale either of indeterminacy or policy. The generality and predictability of results are as easily protected by clearly enunciated non-discretionary principles of compromise as by any principle requiring a polarized result. Yet I strongly suspect that the alarms of discretion have played a major role in obscuring the essential security and conservatism of compromise by rule.

In searching for the other sources of the all-or-nothing bias, there is a temptation that must be avoided. This is the urge to attribute too much weight to factors which explain only the emphasis upon conceptualism in Western law. For example, exaggerated conceptualism in our law may well be explained as the reflection of the unique development of Western epistemology. Either the sensually grounded abstractions of the Aristotelian branch, or the postulated concepts of the Kantian branch of our philosophies would serve to explain the legal experience of the West. But legal abstractionism in either form does not in itself explain polarity in the disposition of legal disputes. A relation between conceptualism and polarized justice may exist, but it is not a relation logically deducible. As we have just noted, compromise is itself quite amenable to conceptualization within rules. Proration among creditors is an example of compromise by concept. There is, however, one aspect of conceptualism, borrowed from the physical sciences and mathematics which may assist indirectly in the understanding of winner-take-all. This is the emphasis upon simplicity as a criterion of validity. It is a habit of Western mind as old as Euclid. This factor will be considered somewhat later.

For the moment I would prefer to avoid the high road of philosophy for the low road of interest. Much of the all-or-nothing attitude can be seen simply as a reflection of the egocentric dialectic of the adversary system. The thought does not require much elaboration. The combative aspects of the search for reality in our courts obviously puts a premium upon the assertion of polarized persuasions. Indeed, many would doubt
the professional morality of anything less from an advocate. With the argumentation almost exclusively in these terms, the development of rules of decision of a like complexion is not surprising. Judges depend upon lawyers, and lawyers become judges. Note that the polarizing effect does not arise merely from the development of legal professionalism. A cohesive and educated bar encourages merely the esoteric conceptualizing of the law it serves. It is the addition of the adversary element that supplies the centrifugal influence tending to disperse the art of reason to its boundaries. The attenuation of the adversary factor may in part account for a greater willingness on the part of the civil law to candidly adopt apportioned justice. I am confident that the presence of a professional coterie of adversary pleaders in indigenous African courts would have profoundly reduced the possibilities for compromise as it is likely to do in the courts of the new nations in the years to come.

It would be surprising if the adversary context of our trials were not related to the “fighting instinct.” Much cynical acid has been spilled over adversary techniques designed to win rather than elicit truth. Much reform has been enacted and more attempted, and the trial continues to resemble in some measure a duel. Even taking litigation at its combative worst, however, there is no doubt that its very ferocity is in one respect its virtue. It would not take a Freud to recognize within the shock and uproar of the legal rumpus a white collar equivalent of the primordial shindy. If medieval man loved the tournament as an echo of a darker wish, modern man may love litigation. The sublimation of battle is a high office of law. What cathartic shall replace it if the battle is drawn? Most men love to win. Some even love to lose, and others simply enjoy the fight. The romance of the duel (as of marriage) is in the extremity of the gamble. Any attenuation of the risks of litigation is a thrust at the Romantic spirit and at the sportive vendettaism it promotes. A little of both lurks in the best of men. That I would regard reform as felicitous is irrelevant. The contribution of l'esprit de guerre to the preservation of winner-take-all may be greater than we realize.

Having embarked upon amateur psychology I would add to the fighting instinct the need for truth. The expression is irony. My meaning is rather that all men feel the desire for conviction and, as earlier noted, many look to the law as a womb of security. All of us have experienced the phenomenon of the emotionally distressed law freshman whose quest for certitude has come to grief. He may be but the errant outrider of a vast army of the happily credulous, and I am not so certain I exclude myself. The puzzling part is that this need for conviction should lend support to winner-take-all. I have been at pains to emphasize that compromise can be and ought to be contained within defined principle and not simply left to become the whim of judge and jury. Why does the enunciation of such principles fail to provide the comforting conviction
expected of the law? Why is the appearance of truth soothing only if it is one-sided? Rather, one might suppose it often less consoling because less convincing. My answers are the sheerest speculation, but my fascination with the question stultifies any instinct for prudence.

For many men the "right" answer to a legal question is an answer that attributes fault and virtue respectively to the parties. Vindication and condemnation are emotionally satisfying for more than the winning party. It is important for many of us to suppose that some objective "official" standard exists for the identification of heroes and villains. The attitude is at least as ancient as the Fifth century which saw Christianity locked in conflict with what eventually was condemned as the Manichaean heresy. The followers of the Persian Manes held a view of creation which was dualistic from top to bottom, including a doctrine of the Elect or Pure—those of the spiritual elite who stood in a proximate relation to God distinct from the common herd. Manichaeanism in its multiplex forms has flowed through and through the intellectual veins of Europe. It has been blamed (or praised) as the source of such phenomena as the double standard, war, pre-destination, and unbridled capitalism. Max Weber argued that the transplanted doctrine of the Elect provided free enterprise with its strongest ethical prop by the development of the notion that material success was the emblem of the spiritually chosen. Perhaps this accounts for that curious and absurd expression, "a poor but honest man."

It is not my intention to blame the excessive polarity of common law justice on Persian dualism. Such a use of the plural would be singular indeed. I cannot, however, reject the counsel of my own experience which confirms the frequency of the attitude if not the doctrine of the Elect. Most men seek the standards of salvation, whatever salvation may mean to them. For many of them especially in a secularized society the standards for identification of the Elect may tend to be the standards of the law. But a law that is unwilling to sort sheep and goats in polarized judgment is not only of no assistance in this respect, but strikes at the dualism that provides the foundation of consoling clarity. Compromise is feared fundamentally as an assertion of moral indeterminacy. That such a view confounds law and morality makes it no less potent. Indeed it is the very identification of the legal and the ethical that makes such an attitude possible. This identification has all too often been a distinguishing feature of our social and political life, providing a pseudo-justification for economic and social privateering as rank as the law will abide. Its implica-

tions for the lawyer are immense. His acceptance of the ethic tends in our system to increase the efficiency of his advocacy, for it erases the tension between legal man and moral man by abolishing the distinction. Such a lawyer has little doubt of the proper course for his client. It is the doubter for whom the discord of the legal and the moral poses the ulcerating problems.

The final point in explanation of the all-or-nothing bias relates to the preference for simplicity of concept in western science and philosophy. The influence of science upon jurisprudence has of course been immense. I do not refer to practical applications such as crime detection. I mean rather that science has contributed modes of conceiving reality which have profoundly affected the form and substance of law. The transition from "Thou shalt not kill," to "Murder is the unlawful killing of a human being with malice aforethought" is an intellectual revolution involving a generality and abstraction of a high order. Its roots are deep in scientific epistemology:

When... as in the classical West, the Greek mathematical physicists discovered formally constructed imageless cognitive concepts for which esse est non percipi and this way of thinking passed over through Greek philosophy to the Roman Stoic lawyers... then the constructs which make Western law unique were created...\textsuperscript{34}

It is Professor Northrop speaking. He, Lawson, and many others have shown the relation of legal principle to the "concept by postulation" which has fructified Western science from Pythagoras to Einstein.

Now the relevance of this for our purpose lies in an assumption indulged throughout our science. Galileo phrased it that "Nature... doth not that by many things which may be done by few."\textsuperscript{35} Newton elaborated the idea as follows: "Nature does nothing in vain, and more is in vain when less will serve; for nature is pleased with simplicity, and affects not the pomp of superfluous causes."\textsuperscript{36}

The virtues of simplicity in concept are a scientific article of faith involving also an undefined esthetic element which is apparent in the quotation from Newton. Ptolemaic astronomy with its geocentric foundation did not fail because "false" but because it became too awkward an explanation of the phenomena. Given a sufficient number of assumptions, geocentric cosmology could today "save the appearances" revealed by the latest astronomical research. Einstein's vision of reality is appealing because it accounts for the same phenomena with the fewest assumptions.

I suspect that the scientific penetration of legal attitudes has carried

\textsuperscript{34} Northrop, op. cit. supra note 28, at 215.


\textsuperscript{36} Id. at 218.
with it this ideal of simplicity. It is an obvious influence in the works of scholars of a wide variety of persuasions. Kocourek's comment upon a rule for the solution of circuity problems is revealing:

This formula must be regarded as a construct of formidable ingenuity, of great subtlety, and of remarkable esthetic beauty. The beauty of the formula exceeds in interest the difficulty of the problem itself. The Dixon formula, because of its simplicity and beauty of form, lends itself readily to symbolic representation.3

Morris Cohen distinguished "primitive law" from other systems by the fact that it is "uninfluenced by Greek science." In our own law he says:

We utilize . . . that most wonderful discovery, or invention, of the Greeks—the rational deductive system. We try to reduce the law to the smallest number of general principles from which all possible cases can be reached, just as we try to reduce our knowledge of nature to a deductive mathematical system.8

Elsewhere he adds:

[W]ith the advent of a class of professional jurists, the regard for logical simplicity of the legal system becomes one of the most constant and powerful factors in the transformation of the legal system and the juridical regulation of life. Legal maxims become accepted because of their apparent simplicity . . . .59

Cardozo made his obeisance to the same attitudes when he stated: "I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason . . . ."40

None of these observations was directed to the specific issue of compromise versus the all-or-nothing approach. Each indeed assumes the latter. Yet the sentiment—professional and popular—which is manifested or explained by these writers tends to promote a type of esthetic conservatism analogous to the simplicity mystique in science that may regard apportioned justice as a baroque anomaly. By multiplying the categories of the law we seem to adorn it with an unlovely complexity.

In a recent article Eric Larabee describes the amazing resistance with which Velikovsky’s now credited cosmology was greeted by scientists in 1950, because it postulated realities requiring the complication of currently

37 Comment, 29 ILL. L. REV. 952, 954 (1935).
38 COHEN, LAW AND THE SOCIAL ORDER 167 (1933).
39 Id. at 143.
40 CARDozo, THE NATURE OF THE JUDICIAL PROCESS 33 (1921). When "sufficient reason" compelled the introduction of anomaly in the celebrated "Pipe" decision, Cardozo again noted but now criticized excessive concern for form: "Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines are so wavering and blurred." Jacobs and Young, Inc. v. Kent, 230 N.Y. 239, 242 129 N.E. 889, 891 (1921).
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popular views. If the demands of symmetry and simplicity have a hypnotic effect upon sages of science who deal with physical fact beyond their control, we can understand its influence in the law where the symmetry lies in phenomena which are the very creation of man and must take the form that he chooses.

The Strength of Our Weakness

The general theme of this series of conferences is “Philosophy from Law.” It seems appropriate to suggest the relevance in the larger picture of the one element in this paper which has any pretensions to novelty, the indeterminacy-equality concept. This may be done very briefly, for the idea appears compatible with most general systems of legal thought. However, I think it may have special significance for certain styles of natural law thinking, largely because of its candid emphasis upon fallibility. Indeed, the natural law approach and the doubt-compromise technique may prove mutually invigorating.

The agony of the metaphysically oriented natural lawyer has been the contrast between the firmness of fundamental principle and the quivering insecurity of judgment in particular cases. The range of conclusions demonstrable from the “brute data” of human potential is narrow and of limited utility. Natural equality no doubt played a distinct role in Brown, and fundamental postulates about human rights of survival might or might not have been serviceable in stemming tyranny in Nazi Germany. There is, however, little in the conclusions that follow from fundamental data about man that is of specific utility in discovering the good result in complex civil matters. The spirit of the basic ideas may leaven the entire structure but only in a most inexplicit and largely emotional manner that is nearly as dangerous as it is helpful.

The narrow scope of certitude in the law of nature is a scandal to some and a temptation to others. It is hard to decide which is worse—the total rejection of metaphysically oriented ethics or the fantastic invocation of natural law to support the most contingent propositions of a particular social or economic viewpoint. The latter seems a powerful urge among reformers as well as conservatives. Where demonstration fails, nature will fill the gap. It is a dialectical fungible that fits the necessities of any argument. In the process natural law loses its identity.

The antidote, of course, is to limit our expectations about demonstrations from nature. Paradoxically we may find that intellectual modesty itself may serve to reveal a broader relevance of nature to our conflicts than we had supposed. The recognition of fallibility as a fundamental fact of human experience may improve in a practical way the handling of

concrete problems for which no finalistic solution is possible. I hope that what was said at the beginning of this paper suggests the plausibility of such an approach to the question of compromise through the indeterminacy-equality concept. A view of nature which accepts fallibility as an operative datum drawn from our most elemental experience may see in compromise an expression of the underlying relation of fact to value in many concrete situations. Obviously fallibility is not a "brute datum" of nature in the same sense as the elements of "potentiality" commonly cited by natural law philosophers. Seminal inclinations of humanity such as the drives for survival, knowledge, and society are active, positive, and teleological. None of these qualities is shared by fallibility. Yet fallibility in one sense is more important a datum than any other, for it is the limiting environment in which all potentiality must exist. It has classically been regarded as the problem rather than the solution. The occasional inversion of this perspective may provide new insights. In any event its frank emphasis in natural law speculations may serve as a healthy counterweight to the temptation to over-extend our claims concerning what has been demonstrated.

As a final caprice let me add that it is a common error to draw dismal conclusions from man's obvious intellectual limits. Too keen a disrelish for fallibility drives some men to false mysticism, some to despair or cynicism, and others to an *a priori* pretentiousness. This last, I fear, is the besetting sin of winner-take-all. These responses altogether mistake the matter. Most men, I hope, sense in our weakness both freedom and challenge. I do not wish to reverse the biblical observation by arguing that ignorance shall make us free, but in a paradoxical manner our very limitation is truly a condition of freedom. Scripture itself provides an example of the point. It has been observed that the truth of Scripture is sufficient to convince but never to overpower—that it requires an active assent that would be both superfluous and impossible if its meaning had been totally explicit. The preservation of the opportunity to doubt is the preservation of the freedom to deny. The overwhelming of man's reason would terminate that freedom. The truth that frees us would itself enslave us, if it were not also freely chosen.

The voice of nature too has a Delphic quality. If it spoke with a clarity that permitted no doubt of the good, all men would obey and no man would be free. To tease with probability but to torture with doubt is nature's guarantee that we may neither despair nor presume but struggle.