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The Rule of Law as a Law of Rules

Antonin Scalia†

Louis IX of France, Saint Louis, was renowned for the fair and evenhanded manner in which he dispensed justice. We have the following account from *The Life of Saint Louis* written by John of Joinville, a nobleman from Champagne and a close friend of the king:

> In summer, after hearing mass, the king often went to the wood of Vincennes, where he would sit down with his back against an oak, and make us all sit round him. Those who had any suit to present could come to speak to him without hindrance from an usher or any other person. The king would address them directly, and ask: "Is there anyone here who has a case to be settled?" Those who had one would stand up. Then he would say: "Keep silent all of you, and you shall be heard in turn, one after the other."[1]

The judgments there pronounced, under the oak tree, were regarded as eminently just and good—though as far as I know Louis IX had no particular training in the customary law of any of the

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† Associate Justice, United States Supreme Court. This essay was first delivered as the Oliver Wendell Holmes, Jr. Lecture at Harvard University on February 14, 1989.

[1] Jean de Joinville, *The Life of Saint Louis*, in Margaret R. B. Shaw, transl, *Joinville & Villehardouin: Chronicles of the Crusades* 163, 177 (Penguin, 1963).

counties of France, or any other legal training. King Solomon is also supposed to have done a pretty good job, without benefit of a law degree, dispensing justice case-by-case.

That is one image of how justice is done—one case at a time, taking into account all the circumstances, and identifying within that context the "fair" result. It may not be as outmoded an image as one might think, considering the popularity of Judge Wapner.

And yet what would Tom Paine have thought of this, who said:

> [L]et a day be solemnly set apart for proclaiming the charter; let it be brought forth . . . [so] the world may know, that so far we approve of monarchy, that in America *the law is king*. For as in absolute governments the king is law, so in free countries the law *ought* to be king; and there ought to be no other.[2]

As usual, of course, the Greeks had the same thought—and put it somewhat more dispassionately. In his *Politics*, Aristotle states:

> Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.[3]

It is this dichotomy between "general rule of law" and "personal discretion to do justice" that I wish to explore.

In a democratic system, of course, the general rule of law has special claim to preference, since it is the normal product of that branch of government most responsive to the people. Executives and judges handle individual cases; the legislature generalizes. Statutes that are seen as establishing rules of inadequate clarity or precision are criticized, on that account, as undemocratic—and, in the extreme, unconstitutional—because they leave too much to be decided by persons other than the people's representatives.

But in the context of this discussion, that particular value of having a general rule of law is beside the point. For I want to explore the dichotomy between general rules and personal discretion within the narrow context of *law that is made by the courts*. In a

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[2] Thomas Paine, *Common Sense*, in Nelson F. Adkins, ed, *Common Sense and Other Political Writings* 3, 32 (Liberal Arts, 1953).

[3] Ernest Barker, transl, *The Politics of Aristotle*, book III, ch xi, § 19 at 127 (Oxford, 1946).

judicial system such as ours, in which judges are bound, not only by the text of code or Constitution, but also by the prior decisions of superior courts, and even by the prior decisions of their own court, courts have the capacity to "make" law. Let us not quibble about the theoretical scope of a "holding"; the modern reality, at least, is that when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself. And by making the mode of analysis relatively principled or relatively fact-specific, the courts can either establish general rules or leave ample discretion for the future.

In deciding, for example, whether a particular commercial agreement containing a vertical restraint constitutes a contract in restraint of trade under the Sherman Act,[4] a court may say that under all the circumstances the particular restraint does not unduly inhibit competition and is therefore lawful; or it may say that no vertical restraints unduly inhibit competition, and since this is a vertical restraint it is lawful. The former is essentially a discretion-conferring approach; the latter establishes a general rule of law.

The advantages of the discretion-conferring approach are obvious. All generalizations (including, I know, the present one) are to some degree invalid, and hence every rule of law has a few corners that do not quite fit. It follows that perfect justice can only be achieved if courts are unconstrained by such imperfect generalizations. Saint Louis would not have done as well if he were hampered by a code or a judicially pronounced five-part test.

Of course, in a system in which prior decisions are authoritative, no opinion can leave *total* discretion to later judges. It is all a matter of degree. At least the very facts of the particular case are covered for the future. But sticking close to those facts, not relying upon overarching generalizations, and thereby leaving considerable room for future judges is thought to be the genius of the common-law system. The law grows and develops, the theory goes, not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time. Today we decide that these nine facts sustain recovery. Whether only eight of them will do so—or whether the addition of a tenth will change the outcome—are questions for another day.

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[4] Sherman Act, 15 USC § 1 (1982).

When I was in law school, I was a great enthusiast for this approach—an advocate of both writing and reading the "holding" of a decision narrowly, thereby leaving greater discretion to future courts. Over the years, however—and not merely the years since I have been a judge—I have found myself drawn more and more to the opposite view. There are a number of reasons, some theoretical and some very practical indeed.

To begin with, the value of perfection in judicial decisions should not be overrated. To achieve what is, from the standpoint of the substantive policies involved, the "perfect" answer is nice—but it is just one of a number of competing values. And one of the most substantial of those competing values, which often contradicts the search for perfection, is the appearance of equal treatment. As a motivating force of the human spirit, that value cannot be overestimated. Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions—no television in the afternoon, or no television in the evening, or even no television at all. But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed. The Equal Protection Clause epitomizes justice more than any other provision of the Constitution. And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*. When one is dealing, as my Court often is, with issues so heartfelt that they are believed by one side or the other to be resolved by the Constitution itself, it does not greatly appeal to one's sense of justice to say: "Well, that earlier case had nine factors, this one has nine plus one." Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.

The common-law, discretion-conferring approach is ill suited, moreover, to a legal system in which the supreme court can review only an insignificant proportion of the decided cases. The idyllic notion of "the court" gradually closing in on a fully articulated rule of law by deciding one discrete fact situation after another until (by process of elimination, as it were) the truly *operative* facts become apparent—that notion simply cannot be applied to a court that will revisit the area in question with great infrequency. Two terms ago, the number of federal cases heard by my Court repre-

sented just about one-twentieth of one percent of all the cases decided by federal district courts, and less than one-half of one percent of all cases decided by federal courts of appeals.[5] The fact is that when we decide a case on the basis of what we have come to call the "totality of the circumstances" test, it is not *we* who will be "closing in on the law" in the foreseeable future, but rather thirteen different courts of appeals—or, if it is a federal issue that can arise in state court litigation as well, thirteen different courts of appeals and fifty state supreme courts. To adopt such an approach, in other words, is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue.

This last point suggests another obvious advantage of establishing as soon as possible a clear, general principle of decision: predictability. Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. It is said that one of emperor Nero's nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress. As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability, or as Llewellyn put it, "reckonability,"[6] is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.

I had always thought that the common-law approach had at least one thing to be said for it: it was the course of judicial restraint, "making" as little law as possible in order to decide the case at hand. I have come to doubt whether that is true. For when, in writing for the majority of the Court, I adopt a general rule, and say, "This is the basis of our decision," I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. In the real world of appellate judging, it displays more judicial restraint to adopt such a course than to announce that, "on balance," we think the law was violated here—leaving ourselves free to say in

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[5] *Annual Report of the Director of the Administrative Office of the United States Courts* 4, 7, 15 (GPO, 1988).

[6] See Karl N. Llewellyn, *The Common Law Tradition* 17 (Little, Brown, 1960).

the next case that, "on balance," it was not. It is a commonplace that the one effective check upon arbitrary judges is criticism by the bar and the academy. But it is no more possible to demonstrate the inconsistency of two opinions based upon a "totality of the circumstances" test than it is to demonstrate the inconsistency of two jury verdicts. Only by announcing rules do we hedge ourselves in.

While announcing a firm rule of decision can thus inhibit courts, strangely enough it can embolden them as well. Judges are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will. Their most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of that popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will. Those are tasks which, properly performed, may earn widespread respect and admiration in the long run, but—almost by definition—never in the particular case. The chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases. It is very difficult to say that a particular convicted felon who is the object of widespread hatred must go free because, on balance, we think that excluding the defense attorney from the line-up process in this case may have prevented a fair trial. It is easier to say that our cases plainly hold that, absent exigent circumstances, such exclusion is a per se denial of due process.[7] Or to take an example involving the other principal judicial role: When the people are greatly exercised about "overregulation" by the "nameless, faceless bureaucracy" in a particular agency, and Congress responds to this concern by enacting a popular scheme for legislative veto of that agency's regulations—warmly endorsed by all the best newspapers—it is very difficult to say that, on balance, this takes away too much power from the Executive. It is easier to say that our cases plainly hold that Congress can formally control Executive action only by law.[8]

Let me turn, briefly, from the practical to the theoretical, to suggest that when an appellate judge comes up with nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engag-

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[7] *United States v. Wade*, 388 US 218 (1967).

[8] See *INS v Chadha*, 462 US 919 (1983).

ing in the less exalted function of fact-finding. That is certainly how we describe the function of applying the most venerable totality of the circumstances test of them all—the "reasonable man" standard for determining negligence in the law of torts. At the margins, of course, that determination, like every determination of pure fact or mixed fact and law, can become an issue of law—if, for example, there is no evidence on which any jury can reasonably find negligence. And even short of that extreme, the courts have introduced some elements of law into the determination—the rule, for example, that disregard of some statutorily prescribed safeguards is negligence per se,[9] or the opposite rule that compliance with all the requirements of certain statutes precludes a finding of negligence.[10] But when all those legal rules have been exhausted and have yielded no answer, we call what remains to be decided a question of fact—which means not only that it is meant for the jury rather than the judge, but also that there is no single "right" answer. It could go either way. Only, as I say, at the margins can an appellate judge say that this determination *must* come out the other way *as a matter of law.*

Why, one reasonably may wonder, should that not be the status of all questions that do not lend themselves to further principled resolution? Why should the question whether a person exercised reasonable care be a question of fact, but the question whether a search or seizure was reasonable be a question of law? The latter, like the former, lends itself to ordination by rule *up to a point.* We can say, as we have, that a search of a home is always unreasonable, absent exigent circumstances, if a warrant is not obtained,[11] and that it is always unreasonable (apart from the field of administrative searches)[12] where there is no probable cause to believe that a crime has occurred. But once those and all other legal rules have been exhausted, and the answer is still not clear, why is not what remains—the question whether, considering the totality of the circumstances, this particular search was unreasonable—treated as a question of fact, as to which the law should not expect, or seek to impose through de novo appellate review, a single, correct answer?

One conceivable answer to the riddle of why "reasonable care"

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[9] See W. Page Keeton, et al, eds, *Prosser and Keeton on the Law of Torts* § 36 at 229-31 (West, 5th ed 1984).

[10] Id at 233.

[11] *Steagald v. United States*, 451 US 204, 211 (1981).

[12] *Camara v. Municipal Court*, 387 US 523, 535 (1967).

is a question of fact but "reasonable search" a question of law is that we do not trust juries to answer the latter question dispassionately when an obviously guilty defendant is in the dock. If that is the reason, it is not a reason that we apply consistently. We let the jury decide, for example, whether or not a policeman fired upon a felon in unavoidable self-defense, though that also is not a question on which the jurors are likely to be dispassionate. Perhaps, then, the answer is that "reasonable search" is a *constitutional* standard, and whether such a standard has been met *must* be left to the judges. Again, however, if that is the reason it is not one that we apply consistently. Prohibition on restraint of "the freedom of speech" is also to be found in the Constitution, but we generally let juries decide whether certain expression so offends community standards that it is not speech but obscenity.[13]

I frankly do not know why we treat some of these questions as matters of fact and others as matters of law—though I imagine that their relative importance to our liberties has much to do with it. My point here, however, is not that we should undertake a massive recategorization, and leave a lot more of these questions to juries, but simply that we should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat—an acknowledgment that we have passed the point where "law," properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.

I stand with Aristotle, then—which is a pretty good place to stand—in the view that "personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement."[14] In the case of court-made law, the "difficulty of framing general rules" arises not merely from the inherent nature of the subject at issue, but from the imperfect scope of the materi-

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[13] See *Jenkins v Georgia*, 418 US 153 (1974).

[14] Aristotle's *Politics*, ch xi, § 19 at 127 (cited in note 3).

als that judges are permitted to consult. Even where a particular area is quite susceptible of clear and definite rules, we judges cannot create them out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided. It is rare, however, that even the most vague and general text cannot be given some precise, principled content—and that is indeed the essence of the judicial craft. One can hardly imagine a prescription more vague than the Sherman Act's prohibition of contracts, combinations or conspiracies in restraint of trade,[15] but we have not interpreted it to require a totality of the circumstances approach in every case. The trick is to carry general principle as far as it can go in substantial furtherance of the precise statutory or constitutional prescription. I say "substantial furtherance" because, as I suggested earlier, *no* general principle can achieve a perfect fit. It may well be possible to envision some divisions of territory between competitors that do not, in the peculiar circumstances, reduce competition—but such phenomena would be so rare that the benefit of a rule prohibiting divisions of territory far exceeds the harm caused by overshooting slightly the precise congressional goal. As we have correctly expressed the test for per se Sherman Act illegality, it is whether the type of conduct in question "would always *or almost always* tend to restrict competition and decrease output."[16] Such reduction of vague congressional commands into rules that are less than a perfect fit is not a frustration of legislative intent because that is what courts have traditionally done, and hence what Congress anticipates when it legislates. One can conceive of a statute in which Congress makes clear that the totality of the circumstances is always to be considered. (See, for example, § 2(b) of the Voting Rights Act.)[17] But unless such a statutory intent is express or clearly implied, courts properly assume that "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction."[18]

Of course, the extent to which one can elaborate general rules from a statutory or constitutional command depends considerably upon how clear and categorical one understands the command to

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[15] 15 USC § 1.

[16] *Broadcast Music, Inc. v CBS*, 441 US 1, 19-20 (1979) (emphasis added).

[17] Voting Rights Act of 1965 § 2(b), 42 USC § 1973(b) (1982) ("A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a). . ..").

[18] *United States Dept. of Justice v Reporters Committee*, 109 S Ct 1468, 1483 (1989).

be, which in turn depends considerably upon one's method of textual exegesis. For example, it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text. That explains the difference between me and most of my colleagues in *Michigan v Chesternut,*[19] a recent case involving the question whether a defendant had been "seized" for purposes of the Fourth Amendment. The defendant was running away from a police car, which initially followed him and ultimately drove alongside him. While thus engaged in what must have looked like a foot race with a police cruiser, he dropped a packet of illegal drugs, which the police recovered. If these events amounted to a seizure, and if probable cause was lacking, the evidence was inadmissible and the conviction for unlawful possession would have to be reversed. The Court specifically declined to hold either that a chase without a stop was a seizure or that a chase without a stop could not be a seizure. Rather, the Court consulted the totality of the circumstances to determine whether a person in the defendant's position would have felt that he was free to disregard the police and go about his business. That sets forth a rule of sorts—it is much more precise than asking whether, considering the totality of the circumstances, the defendant had been seized. But I thought that the law could properly be made even more precise. I joined Justice Kennedy's concurrence, which said that police conduct cannot constitute a "seizure" until (as that word connotes) it has had a restraining effect.[20]

Just as that manner of textual exegesis facilitates the formulation of general rules, so does, in the constitutional field, adherence to a more or less originalist theory of construction. The raw material for the general rule is readily apparent. If a barn was not considered the curtilage of a house in 1791 or 1868 and the Fourth Amendment did not cover it then, unlawful entry into a barn today may be a trespass, but not an unconstitutional search and seizure.[21] It is more difficult, it seems to me, to derive such a categorical general rule from evolving notions of personal privacy. Similarly, even if one rejects an originalist approach, it is easier to arrive at categorical rules if one acknowledges that the content of evolving concepts is strictly limited by the actual practices of the society, as reflected in the laws enacted by its legislatures.

It is, of course, *possible* to establish general rules, no matter

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[19] 486 US 567, 108 S Ct 1975 (1988).

[20] 108 S Ct at 1981 (Kennedy concurring).

[21] See *United States v. Dunn*, 480 US 294 (1987).

what theory of interpretation or construction one employs. As one cynic has said, with five votes anything is possible. But when one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation. If I did not consider my judgment governed by the original meaning of constitutional text, or at least by current social practice as reflected in extant legislation, I would feel relatively comfortable deciding case-by-case whether, taking into account all of the circumstances, the death sentence for this particular individual was "cruel and unusual"—but I would feel quite uncomfortable announcing firm rules (legitimated by nothing but my own sense of justice) regarding the relevance of such matters as the age of the defendant, mental capacity, intent to take a life, and so forth.

Since I believe that the establishment of broadly applicable general principles is an essential component of the judicial process, I am inclined to disfavor, without clear congressional command, the acknowledgement of causes of action that do not readily lend themselves to such an approach. In the area of the negative Commerce Clause, for example, it seems to me one thing to undertake uninvited judicial enforcement of the principle (never enunciated by Congress) that a state cannot overtly discriminate against interstate commerce. That is a general principle clear in itself, and there can be little variation in applying it to the facts. It is quite something else, however, to recognize a cause of action to challenge state laws that do not overtly discriminate against interstate commerce, but affect it to an excessive degree, given the value of the state interests thereby protected. The latter can only be adjudged by a standardless balancing, and so I am not inclined to find an invitation for such judicial enforcement within Article I of the Constitution.[22]

The last point suggests a parenthetical observation regarding the recent elimination of virtually all of the Supreme Court's remaining mandatory jurisdiction.[23] Until coming to the Court, I had never noticed what a high proportion of its Commerce Clause cases—so popular in the law school casebooks—involved appeals

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[22] See *Tyler Pipe Industries v Wash St Dept of Revenue*, 483 US 232, 254 (1987) (Scalia concurring and dissenting in part).

[23] Compare 28 USC § 1257 (1982) (providing for Supreme Court review, by appeal, of certain final judgments rendered by state supreme courts, including judgments concerning the validity of state statutes) with 28 USC § 1257 (1989 Supp) (eliminating review by appeal and providing for Supreme Court review by writ of certiorari).

rather than petitions for certiorari. The reason is understandable enough. To an inordinate degree, these cases involved state *statutes*, rather than administrative acts, that were challenged under the federal Constitution and upheld below—thus meeting the requirements for our former mandatory jurisdiction. It will be interesting to see whether our Commerce Clause jurisprudence will be as extensive in the future, when these cases can be avoided without determining that there is no substantial federal question involved. My guess (or perhaps it is just my hope) is that it will be considerably less extensive, particularly in the category of cases where we have called for a balancing of state interests against impairment of commerce—whether the good to the state done by the requirement of mud-guards on trucks,[24] or the limitation of truck lengths,[25] or whatever else, outweighs the burden on interstate commerce. For when balancing is the mode of analysis, not much general guidance may be drawn from the opinion—just as not much general guidance may be drawn from an opinion setting aside a single jury verdict because in that particular case the evidence of negligence was inadequate. Of course each opinion will straighten out the law of an entire state—but unless there has arisen a state-court federal-court conflict, I think we will be little tempted to intervene when the settled law below seems at least reasonable.

I may be wrong in that prediction. We certainly take, on certiorari, a number of Fourth Amendment cases in which the question seems to me of no more general interest than whether, in *this* particular fact situation, pattern 3,445, the search and seizure was reasonable. It is my inclination—once we have taken the law as far as it can go, once there is no general principle that will make this particular search valid or invalid, once there is nothing left to be done but determine from the totality of the circumstances whether this search and seizure was "reasonable"—to leave that essentially factual determination to the lower courts. We should take one case now and then, perhaps, just to establish the margins of tolerable diversity. But beyond that, just as we tolerate a fair degree of diversity in what juries determine to be negligence, I think we can tolerate a fair degree of diversity in what courts determine to be reasonable seizures.

Lest the observations in this essay be used against me unfairly in the future, let me call attention to what I have *not* said. I have not said that legal determinations that do not reflect a general rule

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[24] See *Bibb v Navajo Freight Lines*, 359 US 520 (1959).

[25] See *Kassel v Consolidated Freightways Corp.*, 450 US 662 (1981).

can be entirely avoided. We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them. All I urge is that those modes of analysis be avoided where possible; that the *Rule* of Law, the law of *rules*, be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law. I have not even tried to address the hardest question, which is: When is such a mode of analysis avoidable and when not? To what extent do the values of the Rule of Law, which I have described, justify the imprecision that it necessarily introduces? At what point *must* the Rule of Law leave off and the rest be left to the facts?

The difficulty of answering those questions is well enough demonstrated by the conflicting opinions of two of our greatest Justices, with which I will conclude. They come from the days when the Supreme Court had enough time that it even took diversity cases. In *Baltimore & Ohio RR Co v Goodman*,[26] a suit for wrongful death of a driver whose truck was struck by a train, the railroad had (of course) lost a jury verdict, and was trying to get the judgment overturned on the basis of contributory negligence as a matter of law. It succeeded. Justice Holmes wrote as follows:

> When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all

[26] 275 US 66 (1927).

by the Courts.[27]

Seven years later—after Holmes had left the Court—in *Pokora v Wabash Railway Co*,[28] another diversity case involving another truck driver struck by a train, Justice Cardozo wrote as follows:

> Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoitre is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him . . . .
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> Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury. The opinion in *Goodman's* case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly.[29]

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[27] Id at 69-70.

[28] 292 US 98 (1934).

[29] Id at 104-06 (citations omitted).