

LEGAL DUTY AND JUDICIAL STYLE: THE MEANING OF PRECEDENT

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Senator Roman Hruska defended Nixon's nomination of G. Harold Carswell by saying that mediocrity was entitled to representation on the Supreme Court.¹ It was a remarkable statement, and the memory that Hruska made it indicates we shared his view that something was awry with the Warren Court's readings of the law. What we cannot recall (if indeed we ever knew it) is the argument Hruska made in support of his position: "We can't have all Brandeises and Cardozos and Frankfurters and stuff like that. I doubt we can. I doubt we want to."²

"Stuff like that" is not something of which Hruska approves, and it must therefore be distinguishable from mediocrity, which Hruska argues should be represented on the Court. The basis on which mediocrity deserves representation is presumably that the law should reflect the society it is designed to govern. The implied contrast with "stuff like that," therefore, is distance from the law, a separation between Justices and the society for which they make law, a separation that permits the law to reflect the Court's view of what ought to be.³

Law as a system that dictates the content of what ought to be, law that imposes itself on the judge, is the perception explicitly articulated by Justice Holmes. As is typical of Holmes' style, what is compelling is the graphic nature of the image in terms of which he expresses this perception of the judge as performing solely a ministerial function. Once the legislature has made a decision, argued Holmes, what a court should do is to enforce "the very meaning of a line in the law . . . that you intentionally may go as close to it as you can if you do not pass it."⁴ Like all graphic images, this vision of law as a clear line is at bottom an instructive simplification.

Holmes' perception of law can provide a justification for stopping obstruction of New Deal social experimentation, but it is not a

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1. C. EINSTEIN, WILLIE'S TIME 279 (1979).

2. This statement was made by Senator Hruska in the course of a television interview. *Id.*

3. See Hoeflich & Deutsch, *Judicial Legitimacy and the Disinterested Judge*, 6 HOFSTRA L. REV. 749 (1978).

4. *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 395 (1929).

view that is often expressed by those seeking to evoke respect for the law. In most controversies submitted to the judiciary, the judge must confront the possibility that the governing norms are either uncertain or overlap. In so doing, the judge is aware of his role as one requiring the creation of new rules on the peripheries of legislation. A rulemaking bureaucracy able, on a current basis, continually to fill the interstices left by legislative efforts simply shifts the law creative function to itself away from the judge.

What is troublesome about such a solution is not the expense (though maintenance of such a bureaucracy is not cheap), as much as the substitution of administrative fiat for judicial discretion. It is clear, therefore, that the contrast underlying the Hruska statement is at best applicable only to those situations not susceptible to administrative regulation; cases where a judge or bureaucrat left with no room to avoid a legislative directive is forced explicitly to confront his power to overrule such directives. The question remains, however, what it was about the three Justices which Hruska chose that raised the contrast between law as a reflection of what society wants to be and law as words used to force society to adhere to what sitting Justices regard as proper.

That the Hruska choices are inappropriate to raise this contrast, if one judges on the basis of written opinions, is clearest in the case of Felix Frankfurter. Frankfurter is best remembered for his debate with Hugo Black on the nature of the due process guarantee. Frankfurter's position in that debate was an insistence that failure to interpret constitutional words against the background of institutional and historical factors ran the risk of reading personal moral judgments into the constitutional text. Nor does Brandeis' view of the proper work of the Court support the claim implicit in Hruska's statement that the Warren Court was ignoring plain meanings of the law that would be apparent to the mediocre. What Brandeis argued, and what the Brandeis brief was used to demonstrate, was that New Deal social engineering, once it had been authorized by legislative directives, was sufficiently rational to permit the judiciary so to read the Constitution as to authorize it.

What both Brandeis and Frankfurter appealed to, however, were factors external to the dispute being litigated. Thus, Brandeis' preference for sociological fact rather than deductive reasoning as the context in terms of which one ascertained the meaning of legal language eventuated in the famous sociological footnote in *Brown v. Board of Education*.⁵ Holmes' use of the striking vignette and Black's reliance on the self-evident meaning of the word, on the other hand, give the appearance of being inextricably a part of the facts in dispute. The short of the matter is that, unlike either Black

5. 347 U.S. 483, 494 n.11 (1954).

or Holmes, both Frankfurter and Brandeis were drawing support from elements that could be perceived as separate and traditionally nonauthoritative: factors different from or legally irrelevant to the situations being judged.

The *rationale* for Hruska's choices can most profitably be examined in the case of Cardozo, who has been characterized as a "master of judicial ambiguity."⁶ Cardozo served only briefly on the Supreme Court, at the time when the federal government replaced states as the political institution that regulated the national economy. The constitutional provision relied on to prevent this transfer of power was the tenth amendment. In *Steward Machine Co. v. Davis*,⁷ for example, it was argued that, because Title IX of the Social Security Act⁸ provided federal funds only where its provisions were complied with, it "involv[ed] the coercion of the States in contravention of the tenth amendment or of restrictions implicit in our federal form of government."⁹ The argument was rejected. "[T]o hold that motive or temptation is equivalent to coercion," the Court held, "is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible."¹⁰

As Cardozo, whose opinion it was, hastened to note, however, disposition of the controversy was unaffected by the fact that the law did not in all circumstances "[assume] the freedom of the will as a working hypothesis."¹¹ "We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future."¹² This justification for upholding New Deal congressional action against constitutional objection, since it deprives the legislative line of the clarity with which Holmes endowed it, could indeed be characterized as a decision importing ambiguity into the law. A body of law that punishes fraudulent inducement, however, must necessarily recognize that circumstances can exist where "temptation is equivalent to coercion."¹³ The question becomes, therefore, whether what is ambiguous is the purpose served by the Justice's reading of the law or the nature of law itself.

In technical legal terms, Cardozo is doing no more than recognizing that because no single decision can take into account all situations in which a given legal principle might arguably be applicable,

6. G. GILMORE, *THE DEATH OF CONTRACT* 57 (1974).

7. 301 U.S. 548 (1937).

8. 49 Stat. 639 (1935) (current version at 42 U.S.C. §§ 1101-1108 (1976)).

9. 301 U.S. at 585.

10. *Id.* at 589-90.

11. *Id.* at 590.

12. *Id.* at 591.

13. *Id.* at 590.

the precedential effect of any given opinion is necessarily limited. The act of recognition may itself have consequences, however, even when what is recognized is true. Thus, *United States Trust Co. v. New Jersey*,¹⁴ involved a trial court's holding that state statutes repealing a prior statutory covenant applicable to certain bonds constituted a reasonable exercise of New Jersey's police power rather than a violation of the constitutional contract clause. The New Jersey Supreme Court affirmed *per curiam*,¹⁵ and the United States Supreme Court reversed in an opinion condemned by the dissent for "substantially distort[ing] modern constitutional jurisprudence governing regulation of private economic interests."¹⁶ What the majority held was that "[t]he trial court's 'total destruction' test is based on what we think is a misreading of *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935)."¹⁷

The dissent responded:

The Court, as I read today's opinion, does not hold that the trial court erred in its application of the facts of this case to Mr. Justice Cardozo's [total destruction] formulation. Instead, it manages to take refuge in the fact that *Kavanaugh* left open the possibility that the test it enunciated may merely represent the "outermost limits" of state authority. . . . This, I submit, is a slender thread upon which to hang a belated revival of the Contract Clause some 40 years later.¹⁸

To repeat, it is of course a self-evident legal truth that there are "outmost limits" to the applicability of any given legal precedent. The problem is that knowledge of this limitation is no longer restricted to legal circles. Once nonlawyers become aware of judicial law as a creative source rather than a guarantor or protector of pre-existing legislated rights, the response is to attempt to expand the applicability of favorable principles precisely to their "outmost limits." One example of such behavior is the planned campaign of litigation that led to *Brown v. Board of Education*,¹⁹ but it is important to remember that much New Deal legislation promulgated new sets of economic rights (e.g., the Wagner Act²⁰ guaranteed the right to strike and the Securities and Exchange Act²¹ the right of access to corporate information).

The statutory provision incorporating the right of access to corporate information was the Securities and Exchange Act's section

14. 431 U.S. 1 (1977).

15. 353 A.2d 514 (N.J. 1976).

16. 431 U.S. at 33 (Brennan, J., dissenting).

17. *Id.* at 26.

18. *Id.* at 56-57 (Brennan, J., dissenting).

19. 347 U.S. 483 (1954).

20. Labor-Management Relations Act, 29 U.S.C. §§ 151-168 (1976).

21. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976).

22. *Id.* § 78j(b).

10(b),²² but judicial interpretation was required to establish that the right it afforded could be enforced in a private action by the person who was defrauded as well as by the Securities and Exchange Commission. Section 16(b),²³ on the other hand, explicitly listed positions in companies whose securities were traded, and provided that persons occupying those positions could not retain profits realized within six months from purchases and sales of the securities of that company. In *Blau v. Lehman*,²⁴ Justice Black held that section 16(b) did not apply to securities trading by a partnership in the investment banking and stock brokerage business, despite the fact that one of the partners served in one of the listed positions (director) in the company on whose securities a profit had been realized.

Justice Black rested his holding on the fact that the words of section 16(b) did not explicitly include partnerships, and that lower court precedents addressing this issue all supported his view. Justice Douglas dissented on the basis that Hugo Black had misperceived the nature of the dispute being adjudicated.²⁵ Douglas, formerly head of the SEC, knew from experience that a refusal by the judiciary to make rules on the peripheries of legislation would lead to the substitution of administrative fiat for judicial discretion.

"At the root of the present problem," argued Justice Douglas, "are the scope and degree of liability arising out of fiduciary relations. In modern times that liability has been strictly construed. The New York Court of Appeals, speaking through Chief Judge Cardozo in *Meinhard v. Salmon*, held a joint adventurer to a higher standard than we insist upon today." Douglas quoted that opinion:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."²⁶

The words quoted are to a remarkable degree today's law of corporations, in that they are regularly cited as the standard applicable to those owing fiduciary duties in connection with a given corporate activity.

23. *Id.* § 78p(b).

24. 368 U.S. 403 (1962).

25. *Id.* at 419-20 (Douglas, J., dissenting).

26. *Id.* at 416-17 (Douglas, J., dissenting) (citations omitted).

In 1902 Walter J. Salmon leased the Hotel Bristol for a twenty year term, and, in order to finance the improvements he had agreed to make, entered into an arrangement with a friend whereby he was to manage the venture while Meinhard, the friend, was to supply the capital. The profits were to be divided on a sixty/forty basis for the initial five years and then equally, and all losses were to be shared equally. After initially faltering, the venture produced a rich return. In 1921, four months before the lease was to expire, the reversioner, Elbridge T. Gerry, approached Salmon with a development scheme that included the Hotel site, and Salmon, without telling Meinhard, established a realty company that got a new lease when the original one expired. The Appellate Division increased to one-half the quarter share awarded to Meinhard by a referee. Thus it came before Cardozo as a judge on the New York Court of Appeals.²⁷

Many of the opinions written by Cardozo while on that bench have become legal classics, for Cardozo's writing embodied a genius for shaping the common law, and his style was a tool in this creative process. In May 1928, for example, Chief Judge Cardozo handed down his classic opinion in *Palsgraf v. Long Island R.R.*²⁸ which occupied a scant five columns in the reporter.

In August 1924 Helen Palsgraf, a cleaning lady from Brooklyn, decided to take her children to the beach at Rockaway. Like thousands of others, they used the Long Island Railroad to get to Rockaway Beach. While standing on the platform in close proximity to some mail scales, she may or may not have noticed a commotion at the other end of the platform, resulting from a man who was running to catch an already departing train being pushed onto that train by two Long Island Railroad trainmen. While that was occurring, the brown paper parcel he was carrying fell. Inside that package, unknown to the trainmen, were firecrackers which exploded on impact. The shock dislodged the scales, which struck Helen Palsgraf. As a result, Helen Palsgraf developed a stutter.

Helen Palsgraf was poor. She earned about \$400 per year. The doctor's treatments were costly. The railroad was rich. She sued. At trial, she recovered \$6,000. The railroad, no stranger to such accidents, appealed the decision.²⁹

Cardozo speaks the speech magisterial in *Palsgraf*. The language is lean and hard. There is no ornament, only bone and tissue. The style is severe. So is the decision. To have negligence, one must have duty. On that hot summer's day in 1924, those trainmen owed no duty to Helen Palsgraf. Their negligence to the gentleman boarding the train was not the cause of her injury. The injury to her—and the

27. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928).

28. 162 N.E. 99 (N.Y. 1928).

29. See J. NOONAN, *PERSONS AND MASKS OF THE LAW* 111-151 (1976).

opinion never disputes that Helen Palsgraf was injured—must be uncompensated, for “[t]he risk reasonably to be perceived defines the duty to be obeyed, and *risk imports relation*”³⁰

Reversal must have meant a great deal to Mrs. Palsgraf. Six thousand dollars of *her* money was being taken away. She was in debt to her doctor and to her lawyer. And, to add insult to injury, Cardozo awarded costs equal to nearly her full year’s earnings to the Long Island Railroad. Not only did the innocent party go uncompensated, but she was penalized for bringing suit. Cardozo enunciated a principle and ruined a person.

Professor John Noonan, in his Holmes Lectures for 1972,³¹ treated the *Palsgraf* opinion as a model of judicial blindness, a sacrifice of an innocent victim at the altar of legal principle. Cardozo, according to Noonan, is manipulating the style magisterial, eliminating all that can be eliminated so as to leave only “The Rule.” It is, in short, an opinion that is written for the commentators, for neat characterization and simplistic categorization.

Almost seven months to the day after Cardozo handed down his opinion in *Palsgraf*, he again made legal history, this time in *Meinhard v. Salmon*. The style and rhetoric of *Meinhard* is, at times, nothing less than chivalric. Meinhard and Salmon were “co-adventurers”³² and “comrade[s],”³³ each to share “fair weather and . . . foul” and “for better or for worse.”³⁴ Each owed to the other the “finest”³⁵ and “undivided”³⁶ loyalty. The crux of the decision, the most often quoted passages, are even more rhetorical and florid:

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is . . . the standard of behavior. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.³⁷

In 1929 Justice Holmes wrote of Cardozo to John C. H. Wu: “[I] have noticed such a sensitive delicacy in him that I should tremble lest I should prove unworthy of his regard. . . . I believe he is a great and beautiful spirit.”³⁸ And yet Cardozo wrote *Palsgraf*.

30. 162 N.E. at 100 (emphasis added).

31. See J. NOONAN, PERSONS AND MASKS OF THE LAW 111-151 (1976).

32. 164 N.E. at 546.

33. *Id.* at 547.

34. *Id.* at 546.

35. *Id.*

36. *Id.*

37. *Id.*

38. Letter from Beverly Farms, Mass., (July 1, 1929) in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 201 (H. Schriver ed. 1936).

Palsgraf is a magisterial opinion. It opens on a stentorian note: "Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach."³⁹ Not once in that opinion does Cardozo write "Helen Palsgraf" or "Palsgraf." Always it is, "plaintiff" or "she." The parties are nameless and faceless; they exist only as the basis for expounding "The Rule." The law is speaking through its minister.

The lean hardness of the magisterial style has bowed in *Meinhard* to the rhetoric of personal feeling. Cardozo defined the magisterial style:

It eschews ornament. It is meager in illustration and analogy. If it argues, it does so with the downward rush and overwhelming conviction of the syllogism, seldom with tentative gropings towards the inductive apprehension of a truth imperfectly discerned. We hear the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power.⁴⁰

And that style is not *Meinhard*.

Meinhard begins: "On April 10, 1902, Louisa M. Gerry leased to the defendant Walter J. Salmon the premises known as the Hotel Bristol"⁴¹ Throughout the opinion the parties are called by name; Salmon is Salmon and *Meinhard* is *Meinhard*. The parties have names and personalities. They are real. The rule is relational. The judge is speaking.

Cardozo was a conscious stylist. Both cases presented the same question: had there existed a duty and had that duty been breached? In *Palsgraf* a faceless woman was ruined. In *Meinhard* a rich man was made richer.

The decisions reveal the intersection of judicial style and substance. *Palsgraf* was a transaction in the workaday world, in the marketplace. There, the "morals of the marketplace," of the "crowd," rule; and the crowd, of course, is faceless.

Meinhard was something else, something apart from the workaday world. Two men became coadventurers and comrades. They were bound one to the other, and this relationship was something apart from the marketplace in which it was formed. The style magisterial, as a result, lost its sparseness, and oracle of the law through whom the law spoke gave way to someone else. The criterion invoked was never explicitly stated, but the style said it all.

39. 162 N.E. at 99. This is a style Cardozo used frequently; cf. *Berkey v. Third Ave. Ry.*, 155 N.E. 58, 59 (N.Y. 1926): "The plaintiff boarded a street care at Fort Lee Ferry"; *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916): "The defendant is a manufacturer of automobiles."

40. Cardozo, *Law and Literature*, 14 THE YALE REVIEW, 699, 703 (1925).

41. 164 N.E. at 545.

In *Meinhard* the persons forced Cardozo to forget the context; in *Palsgraf* the context obliterated the persons.

The three Justices cited by Hruska, although having attained elevation to the Supreme Court, were aware of themselves as outsiders in the society which charged them with the task of being judges. Brandeis was a reformed Boston lawyer who grew rich defendant labor; Frankfurter, a Harvard Law School professor who devoted considerable time while on the Supreme Court to staffing the New Deal bureaucracy; and Cardozo, the son of a New York trial judge involved in struggles among nineteenth century railroad entrepreneurs who obtained judicial injunctions through bribery.⁴² Brandeis, Frankfurter, Cardozo, the justices cited by Hruska, were Jews—members of a religious minority who held official positions. Even in non-theocratic societies like the United States, such persons remain outsiders to the extent that the society served by their positions defines itself in terms of religious symbols.⁴³

An awareness of being “outside” the society in which one lives that enables one to perceive the restraints of social convention, of social convention being binding only in a formal sense, often makes innovation easier. Such innovations, however, function to loosen the conventional ties that bind society.⁴⁴

*Barnes v. Andrews*⁴⁵ involved a bill of equity attempting to hold a director liable on a theory of “general inattention to his duties as a director.”⁴⁶ Judge Learned Hand, while concluding that “I cannot acquit Andrews of misprision in his office,”⁴⁷ declined to hold the defendant liable because “I pressed [counsel] to show me a case in which the courts have held that a director could be charged generally with the collapse of a business in respect of which he had been inattentive, and I am not aware that he has found one.”⁴⁸ This refusal to assess liability because of the lack of the prior adjudication of a similar fact pattern clearly constitutes treatment of Andrews by Hand more fair than that accorded Salmon by Judge Cardozo. Even apart from the questions raised by *Meinhard*’s claims to fairness, however, it must be remembered that Judge Hand’s holding will itself constitute a precedent that general inattention does not violate legal standards.

In a society that minimizes the impact of administrative fiat, legal standards must necessarily be incorporated in judicial decisions, and those decisions are useful as precedent only if applicable to new fact

42. C. ADAMS & H. ADAMS, CHAPTERS OF ERIE (1871).

43. Cf. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

44. The term is taken from P. GAY, *WEIMER CULTURE: THE OUTSIDER AS INSIDER* (1968).

45. 298 F. Supp. 614 (S.D.N.Y. 1924).

46. *Id.* at 615.

47. *Id.* at 616.

48. *Id.*

situations. Since Hand did not regard Andrews' conduct in office as adequate, it is fair to assume he would characterize his precedent as unfortunate. It is, therefore, left unclear whether *Barnes* or *Meinhard* is better law, as it is left unclear whether we require the oversimplifications inherent in either graphic images or ideals "stricter than the morals of the marketplace."

What is clear is that both Holmes and Cardozo sat as Justices of the Supreme Court; Judge Learned Hand did not.