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A COMMENT ON "THE RHETORIC OF POWELL'S *BAKKE*"*

JAN DEUTSCH**

I

I think there is considerable value in the type of analysis undertaken by Professor LaRue in "The Rhetoric of Powell's *Bakke*."¹ I believe, moreover, that such analysis serves a particularly valuable function at this time, by focusing our attention on the fact that what we designate as law is simply a matter of printed words. It is, of course, true that the law does not consist of words at random, but words structured in a particular way; and it is the particular way in which Mr. Justice Powell structures the words of the law that Professor LaRue searchingly scrutinized.

It is likely that Mr. Justice Powell would designate the LaRue approach as overly technical and narrow. Mr. Justice Powell has, for example, argued that criticism of the Burger Court for failing to obtain even a plurality for a given holding fails to take into account that this state of affairs is preferable to a Court wholly dominated either by a single justice or by a set of beliefs concerning what the law should be rather than what it is.

On the surface, Mr. Justice Powell's defense of the law made by the Court on which he sits is simply that all relevant factors should be taken into account. The argument is only applicable, however, insofar as something exists about which all relevant considerations can be taken into account, something that both limits, and therefore transcends, personal visions of reality and that is accessible today rather than only in historical perspective. Such a defense of the Burger Court, moreover, rests on an implicit contrast with the Warren Court, whose willingness to develop legal theories can be viewed as an unwillingness to be bound by existing precedent. If one is comparing the Warren and Burger Courts, it is true that the latter has surprised many observers by its imposition of severe limits on law enforcement activities when it regarded such holdings as required by precedent. It is equally true, however, as exemplified in cases such as *National League of Cities v. Usery*,² that the Burger Court will, when it regards it as necessary, apply a constricted reading even to a relatively long and unbroken line of prior decisions that point toward a different result.

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¹ 38 WASH & LEE LAW REV. 43 (1981).

² 426 U.S. 833 (1976).

Yet, more important in assessing the validity of the Powell argument is the fact that many perceived the Warren Court as the only branch of the national government willing to formulate rules concerning such matters as desegregation and reapportionment. So long as the states defined separate economic and political societies, it was of course true that there were sources of effective social rules even in the absence of action by the national branches of government. Every society, after all, simply by existing, develops indicia that permit its members to identify themselves as different from members of other societies. The Civil War taught, however, that the price of preferring regional interests to national ones is prohibitive. The Supreme Court implemented this lesson in Commerce Clause decisions which sacrificed the interests of existing economic institutions whenever those interests conflicted with the functioning of a national market. Those whose institutions were supplanted by this process were recompensed by the economic benefits made possible by the development of a continental market, but the result was a society in which state boundaries functioned, not as social borders, but to delimit legal entities which retained certain political powers. In economic terms, moreover, the country produced by these decisions was dominated by corporate institutions too powerful to be controlled effectively by any but the national government.

It thus seems appropriate, in assessing the value of the LaRue analysis of Powell's judging, to focus on the Powell dissent in the Burger Court's most recent Commerce Clause decision, *Reeves v. Stake*.³ Justice Powell argues, "The South Dakota Cement Commission's order that in times of shortage the state cement plant must turn away out-of-state customers until all orders from South Dakotans are filled . . . represents precisely the kind of economic protectionism that the Commerce Clause was intended to prevent."⁴ The footnote to this description of the sales policy followed by the state-owned plant defines "protectionism" as "state policies designed to protect private economic interests within the state from the forces of the interstate market" and excludes from that term "subsidy programs like the one at issue in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)."⁵ Justice Powell wrote the *Alexandria Scrap* opinion, a decision specially concurred in by one, and dissented from by two of the three Justices who joined Mr. Justice Powell's dissent from *Reeves v. Stake*. Mr. Justice Powell's analysis rests on the proposition:

The threshold issue is whether South Dakota has undertaken integral government operations in an area of traditional governmental functions, or whether it has participated in the marketplace as a private firm. . . . If a public enterprise undertakes an

³ 100 S. Ct. 227 (1980).

⁴ *Id.* at 2282 (Powell, J., dissenting).

⁵ *Id.* at 2283 & n.1.

'integral operation in areas of traditional governmental functions,' *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), the Commerce Clause is not directly relevant. If however, the State enters the private market and operates a commercial enterprise for the advantage of its private citizens, it may not evade the constitutional policy against economic balkanization.⁶

In economic terms, there is no difference between the benefit conferred by a subsidy itself and one resulting from provision of a good at a price lower than the market price by the amount of the subsidy. As a result, Powell's attempt to distinguish the majority opinion he wrote in *Alexandria Scrap* from the dissent in *Reeves* succeeds only if government's public and private functions are qualitatively different. A clear line between public and private functions may be meaningful in a society in which the benefits of economic growth permit ignoring demands for the public supervision of such growth. Once such regulation comes into existence, however, the distinction between public and private with regard to economic growth becomes a valid one only in particular circumstances. As a result, if we treat Powell's majority and dissenting Commerce Clause opinions as a unit, his justification for reliance on the public/private distinction, like his argument in defense of the Burger Court, must ultimately reduce to the proposition that, when all things are considered, this is the best that can be done.

There is also, however, as indicated *supra*, the argument that Powell *is* in history, and that the reason rhetorical distinctions are the best that can be done is a situation traceable to the excesses of the Warren Court. It may be, the argument would run, that LaRue's criticisms are well taken, but unless LaRue can show that Powell could write a structurally different opinion in the same situation, he has demonstrated only that no judge is perfect. To argue convincingly that the *Bakke* opinion is inadequate requires at least a demonstration that it is possible to structure the words of the law in ways that meet the requirements established by LaRue.

It was Hugo Black who argued that words were sufficient, and that as a result historical or institutional considerations cannot temper the mandates embodied in the constitutional commands; and if any single justice dominated the ideology of the Warren Court, it was Hugo Black. One could, of course, argue that the words, even of the Constitution, simply do not embody a sufficiently definite meaning to constitute an effective means for deciding cases. Such a position, however, would significantly undercut Powell's defense of the Burger Court, which stressed the significance of adhering to the words of the law contained in precedents. The alternative, therefore, is to focus on the difference in the substantive positions taken by the Burger and Warren Courts, and

⁶ *Id.* at 2284-85, 2284.

to see Black's position as a rationalization used to justify manipulation of precedent in an attempt to make the law become what the Warren Court believed it should be.

II

Senator Roman Hruska defended Nixon's nomination of G. Harold Carswell by saying that mediocrity was entitled to representation on the Supreme Court. It was a remarkable statement, but we remember that Hruska made a statement, and that fact seems to me to indicate that we shared the 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." What makes "stuff like that" different from mediocrity is distance from the law, a separation between justices and the society for which they make law. This separation permits the Court to make the law reflect its view of what ought to be.

The implied contrast is with a legal system that dictates the content of what ought to be, a law that imposes itself on the justice. This was a view explicitly articulated by Mr. Justice Holmes, and is typical of Holmes' style; what is compelling is the graphic nature of the image in terms of which he expresses his position. 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."⁷ Like all graphic images, this vision of law as a clear line is at bottom an instructive simplification. Holmes' view is useful in that it prevents judicial obstruction of the type of social experimentation that characterized the New Deal, but it is not a view that is often expressed by those seeking to evoke respect for the law.

In most legal situations, the location of at least one of the relevant lines is uncertain; and it is most difficult to prevent circumvention of legislative directives without expenditures sufficient to create and maintain an organization of the magnitude of the Internal Revenue Service. Only in areas such as tax law is the legal system so comprehensive, so explicitly defined, and relatively so easily adjusted to changing economic conditions that it is realistic to prevent the possibility of manipulation of formal requirements from subverting the system. It is clear, therefore, that the law does not, in fact, dictate what ought to be. The question remains, however, what it was about the three justices chosen by Hruska that raises the contrast between law as a reflection of what society wants to be and law as fiat used to force society to adhere to what sitting justices regard as proper standards.

Neither Frankfurter nor Brandeis are appropriate choices to raise

⁷ Superior Oil Co. v. Mississippi, 280 U.S. 390, 395 (1930).

this contrast if one judges on the basis of written opinions. Frankfurter is best remembered for his debate with Hugo Black on the nature of the due process guarantee. In that debate, he insisted 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. Brandeis argued, and the Brandeis brief was used to demonstrate, that New Deal social engineering, after authorization by legislative directives, was not so irrational that it should be held to contravene what the judiciary could justifiably read the Constitution to require, so long as other readings of that text were possible.

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 resulted in the famous sociological footnote in *Brown v. Board of Education*. 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 issue they are resolving. The short of the matter is that, unlike either Black or Holmes, both Frankfurter and Brandeis were drawing support from elements that one could perceive as separate, and therefore different from or foreign to, the situations being judged.

Cardozo, characterized as a "master of judicial ambiguity,"⁸ is the most profitable case for examining the *rationale* for Hruska's choices. 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*,⁹ for example, the argument was that because Title IX of the Social Security Act 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."¹⁰ The Court rejected this argument. "[T]o hold that motive or temptation is equivalent to coercion," according to the Court, "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."¹¹

As Cardozo, whose opinion it was, hastened to note, however, disposition of the controversy was unaffected by the fact that the law

⁸ G. GILMORE, *THE DEATH OF CONTRACT* 57 (1974).

⁹ 301 U.S. 548 (1937).

¹⁰ *Id.* at 585.

¹¹ *Id.* at 589-90.

did not in all circumstances "assume the freedom of will as a working hypothesis."¹² According to Cardozo, "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."¹³ 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 recognition of ambiguity. A law that punishes fraudulent inducement, however, must necessarily recognize that circumstances can exist where "temptation is equivalent to coercion." The question becomes, therefore, whether what is being recognized as ambiguous is the purpose served by the Justice's reading of the law or the nature of the 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, there is a limitation on the precedential effect of any given opinion. The act of recognition may itself have consequences, however, even when what is recognized is true. This is made clear in *United States Trust Co. v. New Jersey*,¹⁴ which involved state statutes repealing a prior statutory covenant applicable to certain bonds. The trial court held that the legislative action constituted a reasonable exercise of New Jersey's police power rather than a violation of the Contract Clause, and the New Jersey Supreme Court affirmed *per curiam*. 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."¹⁵ 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)."¹⁶ 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.¹⁷

¹² *Id.* at 590.

¹³ *Id.* at 591.

¹⁴ 431 U.S. 1 (1977).

¹⁵ *Id.* at 33 (Brennan, J., dissenting).

¹⁶ *Id.* at 26.

¹⁷ *Id.* at 57 (Brennan, J., dissenting).

To repeat, it is of course a self-evident legal truth that there are "outermost 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 non-lawyers become aware of the law as a source rather than a guarantor or protector of rights, the response is to attempt to expand the applicability of favorable principles precisely to their "outermost limits." Examples of such behavior are the planned campaign of litigation that led to *Brown v. Board of Education*, and cases resulting from New Deal legislation that promulgated economic rights such as the Wagner Act's right to strike and the Securities and Exchange Act's right of access to corporate information.

The statutory provision incorporating that right of access to corporate information is section 10(b), but judicial interpretation was required to establish that a private action by the person defrauded, as well as an action by the Securities and Exchange Commission, could enforce that right. Section 16(b), 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*,¹⁸ Mr. Justice Black held that section 16(b) did not apply to securities traded 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 that had issued the securities and despite the fact that the trading resulted in a profit. Mr. Justice Black rested on the facts that the words of section 16(b) did not explicitly include partnerships, and that lower court precedents addressing this issue all supported his view. Mr. Justice Douglas dissented on the basis that Hugo Black had misperceived the nature of the dispute being adjudicated.

At the root of the present problem 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*, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1, held a joint adventurer to a higher standard than we insist upon today:

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

¹⁸ 368 U.S. 403 (1962).

of courts of equity when petitioned to undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions (*Wendt v. Fischer*, 243 N.Y. 439, 444, [154 N.E. 303]). 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. 249 N.Y., at 464, 164 N.E., at 546.¹⁹

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. *Salmon v. Meinhard*²⁰ involved a real estate joint venture at the end of which, Salmon, the manager, obtained a large amount of land. The land obtained by Salmon individually included the smaller plot that had been the subject of the joint venture in which he was engaged with Meinhard, the financier. As the dissent noted, however, the existing law did not prohibit Salmon's act:

There was no general partnership, merely a joint venture for a limited object, to end at a fixed time. The new lease, covering additional property, containing many new and unusual terms and conditions, with a possible duration of 80 years, was more nearly the purchase of the reversion than the ordinary renewal with which the authorities are concerned.²¹

The ambiguity raised by the citation of *Meinhard* in a corporate context cannot, therefore, be restricted to the question whether what is clearly dicta can itself be law, but also asks whether resolving a dispute by invoking the seductive portrayal of an ideal represents any less an oversimplification than reaching a judgment in terms of the compulsion exercised by a graphic image:

All of the justices cited by Hruska were Jews. There is an ambiguity inherent in the Jewish insistence that their ideal—the Messiah in which they believe—has at no time been made known to them. The position occupied by Jews in the non-Jewish societies in which they lived mirrored this tension between ideal and historical reality. Because they were not full members of those societies, Jews could treat the restraints of social convention as binding only in a formal sense, and the resultant freedom permitted innovative artistic, intellectual, and economic developments. Because Jews both perceived themselves and were perceived as political and social “outsiders,” however, their presence by definition constituted a loosening of the ties that bound the society in which they lived. If we define precedent as the social bond of a legal society, it is clear that

¹⁹ *Id.* at 414, 416-17 (Douglas, J., dissenting).

²⁰ 249 N.Y. 458, 164 N.E. 545 (1928).

²¹ *Id.* at 473, 164 N.E. at 550 (Andrews, J., dissenting).

precedent must continue to be applicable to new fact situations. The question presented, however, is whether such applications do not necessarily involve an ambiguity that opens the law to the charge that judges who administer it are manipulating precedent.

*Barnes v. Andrews*²² involved a bill of equity attempting to hold a director liable on a theory of "general inattention to his duties as a director."²³ Judge Learned Hand, while concluding that "I cannot acquit Andrews of misprision in his office,"²⁴ 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."²⁵ Hand's refusal to impose liability, premised on the absence of clear precedential support, constitutes treatment of Andrews more fair than that accorded Salmon by Judge Cardozo. Apart from the questions raised by Meinhard's claims to fairness, however, remember that Judge Hand's holding itself constitutes precedent that general inattention does not violate legal standards. Since Hand did not regard Andrews' conduct in office as adequate, it is fair to assume that he would characterize the precedent as unfortunate. It is therefore unclear whether *Barnes* or *Salmon* is better law, just as it is unclear whether the oversimplifications inherent in the successful use of graphic images, or other-wordly ideals, or both, can be characterized as manipulations of the law. What is clear is that both Holmes and Cardozo sat as Justices of the Supreme Court; Judge Learned Hand did not.

²² 298 F. Supp. 614 (S.D.N.Y. 1924).

²³ *Id.* at 615.

²⁴ *Id.* at 616.

²⁵ *Id.*

