

1978

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Recommended Citation

Hoeflich, M. H. and Deutsch, Jan G. (1978) "Judicial Legitimacy and the Disinterested Judge," *Hofstra Law Review*. Vol. 6 : Iss. 3 , Article 15.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol6/iss3/15>

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JUDICIAL LEGITIMACY AND THE DISINTERESTED JUDGE

M. H. Hoeflich and Jan G. Deutsch***

INTRODUCTION

For an individual playing a social role to behave responsibly requires participation in a process that is perceived by society as having symbolic as well as operational significance. What our society calls law is the result of a process of judicial decisionmaking resolving individual controversies. The best of the opinions in which such decisions are embodied attain a precedential value transcending the facts of the specific disputes they resolve. Public acceptance of the legal profession, however, rests precisely on the ability of the professional to blur this possible distinction between the operational and symbolic function of a judicial opinion: to explicate, for the lay public, the mysteries of precedent as though what was involved was a rigorously logical set of propositions derived from a limited set of socially approved presuppositions. Thus, fundamental to this acceptance is the public's belief that when the lawyer argues the law, he is focusing on something other than his client's purposes. How such a belief is maintained in connection with a system in which lawyers perceive their duty as that of manipulating the law so as to maximize the client's satisfaction is the subject of this essay.

The symbols of our law are heavily weighted towards the concepts of blindness, impartiality, and disinterestedness. Built into our whole legal structure is the appearance of detachment. Seated behind bench and bar, the judge is set physically apart from the other actors in the drama being enacted in the courtroom. In personal terms, moreover, the judge's detachment is symbolized not only in terms of physical separation, but also in terms of the denial

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of individual characteristics. In the United States, it is the judge and the judge alone who is swathed in dark, shapeless robes and addressed by an honorific rather than by name.

In his 1972 Holmes Lectures, published as *Persons and Masks of the Law*,¹ Professor John Noonan decries the use of masks in the legal process. It is his argument, presented as a study of such a formidable judicial *persona* as Oliver Wendell Holmes, that the failure of the legal system is exemplified by the fact that, obsessed with the appearance of impartiality, its judgments produce both injustice and inequity.² Professor Noonan traces the roots of this phenomenon to the legal system's refusal to see individuals as individuals, treating them instead as fungible entities—³ a concept familiar to every law student who has pondered the questions whether A's words to B constituted a binding contract, or whether X's behavior towards Y should be classified as a tort or a crime. Both a lawyer and a church historian, Professor Noonan concludes that a just and equitable jurisprudence can be founded only on the basis of respect for individuality and personality.⁴

It is our contention that the role of the disinterested judge, blind and to that extent impartial with respect to differences that distinguish persons from each other, is a crucial component of our societal stock of myths, and that it is social acceptance of this notion of blind judging that legitimates and therefore maintains the judicial process. That process, in other words, is, in societal terms, no more nor less than a morality play, the thematic unity of which consists in the disinterestedness of the author of the play. What this argument is based on is that the instrument of judicial power is the opinion deciding the case before the court. It is that opinion, and not the individual personality of its author, that must be perceived as successful in having imposed justice upon the controversy being adjudicated.

Yosal Rogat, in his study of Justice Holmes, *The Judge as Spectator*,⁵ comments: "Uninvolved with the life of his society, Holmes affected it profoundly. The apotheosis of Holmes defeats understanding. . . . [I]t is possible to take another view of the praise intended by Holmes' most distinguished follower: '[T]he sig-

1. J. NOONAN, *PERSONS AND MASKS OF THE LAW* (1976).

2. *See id.* at 6-28.

3. *See id.* at 150-51.

4. *See id.* at 152-67.

5. 31 U. CHI. L. REV. 213 (1964).

nificance of his genius would evaporate in any analysis of specific decisions.'"⁶

The opinions in which those decisions are contained may be viewed from another perspective than Rogat's, a perspective suggested by the paradigmatic story of Solomon's judgment.⁷ It is not the wisdom of the judgment, nor the equity of the result, that is central to the paradigm; it is, rather, the judgment itself. Solomon the judge orders that an infant, an innocent guilty of *no* transgression, be cut in half. In our view, the wisdom of Solomon, the knowledge that the true mother will not allow her child to be torn asunder, is less significant than the fact that only a man totally detached from the controversy being adjudicated could order that decree into execution. It is not the man Solomon who decrees the child's death; it is the judicial actor in the morality play. It is the disinterestedness which legitimates the judicial role.

In cultural terms, moreover, what is crucial to the knowledge on which the Solomonic judgment is based is that the Israelites were so small and cohesive a tribe that Solomon could act with relative assurance concerning the accuracy of predictions about the behavioral responses of the participants in the controversy before him. That assurance is necessarily denied to those who attempt to exercise authority over larger and more diverse groups. Professor Walter Ullman has written that the essence of theological kingship is the selection and elevation of the monarch by God, and that the legitimacy of royal authority arises from its divine origins.⁸ And Paul Tillich is known for having clearly articulated for the lay audience the fundamental nature of the distinction between the human and the Divine that can be derived from Christian theology.⁹

Justice Holmes abjured his Unitarian background. Yosel Rogat masterfully delineates, in connection with the life of Justice Holmes, the individual and social currents that eventuated in a view of human behavior structured in terms of conscious calculation—¹⁰ a world view characterized by the impersonality deplored by Professor Noonan.

6. *Id.* at 256 (footnote omitted).

7. 1 *Kings* 3:16.

8. See W. ULLMAN, *PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES* (1961); Ullman, *Schranken der Königsgewalt im Mittelalter*, 1971 *HISTORICHES JAHRBUCH* 1; cf. Hoeflich, *Celasius I and Roman Law: One Further Word*, 26 *J. THEOLOGICAL STUD.* 114 (1975) (divine origin of papal power).

9. See P. TILlich, *BIBLICAL RELIGION AND THE SEARCH FOR ULTIMATE REALITY* (1955).

10. Rogat, *The Judge as Spectator*, 31 *U. CHI. L. REV.* 213, 221 (1964).

The consequences of such a position are made apparent in Justice Holmes's opinion in *Bates v. Dresser*,¹¹ concerning "a bill in equity brought by the receiver of a national bank to charge its former president and directors with the loss of a great part of its assets through the thefts of an employee of the bank while they were in power."¹² The particular fraud at issue "was a novelty in the way of swindling a bank so far as the knowledge of any experience had reached [the town in which the bank was located]."¹³ Despite the existence of "[a] by-law that had been allowed to become obsolete or nearly so [which was] invoked as establishing their own standard of conduct,"¹⁴ Justice Holmes held that the directors "were not bound by virtue of the office gratuitously assumed by them . . . until the event showed the possibility . . . that their failure . . . opened a way to fraud."¹⁵ The president, however, was treated differently: "In accepting the presidency," held Justice Holmes, he "must be taken to have contemplated responsibility for losses to the bank, whatever they were, if chargeable to his fault. Those that happened were chargeable to his fault, after he had warnings that should have led to steps that would have made fraud impossible,"¹⁶ "[h]owever little the warnings may have pointed to the specific facts."¹⁷

The sense in which this result might be viewed as unjust and inequitable, as a product of the rigid application of technical legal categories, is clear from the fact that Justice Holmes, before spelling out the basis on which the president is being held liable for all the losses suffered by the bank, holds that "[w]e do not perceive any ground for applying in this case the limitations of liability *ex contractu* adverted to in *Globe Refining Co. v. Landa Cotton Oil Co.*"¹⁸ *Globe Refining*,¹⁹ a Holmes opinion, was premised on the theory that:

It is true that as people, when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established

11. 251 U.S. 524 (1920).

12. *Id.* at 526.

13. *Id.* at 529.

14. *Id.*

15. *Id.* at 530.

16. *Id.* at 531.

17. *Id.*

18. *Id.* (citation omitted).

19. *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903).

what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. The extent of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind.²⁰

An opinion by Judge Learned Hand adjudicating an analogous controversy demonstrates, however, that a disinterested judge can in fact calculate what an individual should be held liable for having foreseen without focusing either on the office of director or president or on the individuals occupying those offices. *Barnes v. Andrews*²¹ involved a bill of equity to hold a director liable for misprision of office on the theory of his "general inattention to his duties as a director."²² While Judge Hand concluded that "I cannot acquit Andrews of misprision in his office,"²³ he 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."²⁴

The argument can be made that precedent is oracular in nature, and that a capable judicial interrogator could interpret any response by counsel compatibly with the result desired in the case being decided. Judge Hand disagreed with this solely instrumental view of the common law process:

For many ages, for thousands of years indeed, mankind lived along without being able to change at all the traditional codes which regulated the details of their lives. Custom had the sanction of the gods and being divine, men feared to meddle with it. In civilized times we have indeed acquired that power and it is upon it that we must rely if we are to say that we are governed by our common consent. In one way or another we set up officials who innovate, and when they do, we call it our common will at work. This we have made the cornerstone of our structure. Our common law is the stock instance of a combination of

20. *Id.* at 543.

21. 298 F. Supp. 614 (S.D.N.Y. 1924).

22. *Id.* at 615.

23. *Id.* at 616.

24. *Id.*

custom and its successive adaptations. The judges receive it and profess to treat it as authoritative, while they gently mould it the better to fit changed ideas. Indeed, the whole of it has been fabricated in this way like a coral reef, of the symmetry of whose eventual structure the artificers have no intimation as they labor.²⁵

And it is well to remember, in assessing the exercise of judicial authority, that our attitude towards Oedipus changes, and that his status leads us to feel that his words represent solely a search for the just and the equitable, precisely when he is blind at Colonus.

25. Hand, *Is There a Common Will*, 28 MICH. L. REV. 46, 49-50 (1929).