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JUDGE-MADE LAW: CONSTITUTIONAL DUTIES & OBLIGATIONS UNDER THE SEPARATION OF POWERS DOCTRINE

*The Hon. Gregory Kellam Scott**

"Justice is the end of government. It is the end of civil society."¹

"The First cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."²

May I begin by complimenting Dean Teree Foster, Professor Stephan Landsman, and the DePaul University College of Law for hosting this impressive assemblage of thoughtful academics and two lonely jurists, under the auspices of the Clifford Symposium. If I may borrow from President Kennedy's reference to the intellectual power and revolutionary force of Thomas Jefferson, from the list of young scholars participating here today, I doubt that greater future influence on tort law has been gathered in one room since Judge Cardozo or Judge Posner dined alone.

My comments shall be brief. Perhaps Judge Keeton will agree that, while I have choices, looking around the room, I note that we jurists are outnumbered, and brevity has its place! I begin, then, as I must, with two caveats that will take us from Hamilton and Madison to Cardozo.

First, in addition to compensating one who has suffered harm, a primary purpose of our tort law is to modify human behavior. That is, our crafters of the common law and our statutes recognize what real world experience instructs. People can be induced to act in ways that they would not otherwise choose but for incentives and disincentives imposed by law.³ Stated more succinctly, incentives do matter.

* Justice, Colorado Supreme Court. The author wishes to thank Christine Biretta, James Candelaria, and Christine Ramos for their assistance in the preparation of this article.

1. THE FEDERALIST NO. 51, at 265 (James Madison) (G. Willis ed., 1982).

2. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

3. I do not profess to have been representative of most law students during my first year in law school or today. However, I do recall very clearly the impact that reading negligence cases had on me. After reading the standard of care prescribed by then Professor Keeton and Professor Prosser, I had some difficulty engaging in what once were simple tasks while taking my Torts class. You may not recall similar trepidation. However, I especially remember the great caution I employed in backing my vehicle out of any driveway, including my own, in a manner intended to avoid doing so negligently. I confess to looking both ways too often and generally taking too

The incentives and disincentives are found in legislation and within our common law. Hence, this “channeling” function in our law is laid in the hands of judges and legislators, both of whom should therefore understand predictable human behavior and the implications of alternative outcomes of our judgments. At the same time, of course, judges must recognize the limits of economic analysis when confronted by ethical and moral implications of choice—or at least the actors’ collective sense of right and wrong.

Second, but foremost, as it is implicit in the first caveat, judges do make, are duty bound by, and are obligated under our republican form of government, to make law, including our “products liability law.” Of that I am certain—at least every time I write a dissent! As a judge, that duty is what I have always understood our republican form of divided government to contemplate for our courts. Our constitutional license, however, has limits. While this license is freely exercised in molding and developing our common law, its grant is limited when construing legislative enactments that reflect the intent of the political branches of government. For state jurists who are the principal arbiters of tort law, the obligation to make law is consistent with that duty to do so when developing the common law.

The source of this duty and official obligation is the United States Constitution, as well as our various state constitutions. This mandate is brought about by our republican form of government that results in the division or separation of government authority among three coordinate departments or branches of government. As the political branches, the executive and legislative reflect the majoritarian will. Between the legislative and the judicial branch, which Alexander Hamilton aptly referred to as the “least dangerous,”⁴ there is, in fact, often a repartee. When engaged in statutory construction over time, the reasoned operation of both the legislative and the judicial branches will, through legislative amendments in response to the judgments of our courts, lead to a more permanent rule that may be applied generally.⁵ Nonetheless, while the legislative branch is charged with crafting statutes that announce our public policy as well as our

much time to efficiently repeat a task I had long performed without incident—all because I was attempting to act with the care and prudence of a “reasonable person”!

4. THE FEDERALIST NO. 78, at 393 (Alexander Hamilton) (G. Willis ed., 1982).

5. It is often forgotten that after the judiciary construes a statute, the legislature may still have the next word. If dissatisfied with the court’s judgment, a new bill can be introduced to alter the outcome by amending the statute. Thus, in this way, the legislature can have the next, if not the last, word.

laws, it is the judiciary that determines what the law is at any given time.⁶

Therefore, the question, it seems, is not whether judges are still making law—product liability or otherwise—but, rather, whether “justice” should be done whenever a legal rule develops from a court’s judgment. Due to our separation of powers doctrine,⁷ the answer is an obligatory, yet emphatic, “yes!” Hence, when called to construe statutory language and divine legislative intent, judges often must traverse an uncharted course. This process requires a measured pace beginning with the text, but not always ending there.

By way of example, I remind all of the oft-recounted dinner meeting between Oliver Wendell Holmes and Learned Hand⁸ on the occasion of Holmes’s elevation from the highest court in the Commonwealth of Massachusetts to the highest court of our land. If you recall, as Holmes’s carriage was departing, Hand beseeched Holmes to: “Do justice, sir, do justice!” It is reported that Holmes immediately stopped his carriage and admonished Hand: “That is not my job. It is my job to apply the law.”⁹ No version of the conversation between these two giants of the law has, to my knowledge, ever included a retort by Hand. However, some conversant with Holmes’s own mark on our law might suggest that his application of the law was by a method that at first blush might cause one to question his fidelity to his own advice.¹⁰ After all, it was Holmes who informed us that “[t]he life of the law has not been logic; it has been experience.”¹¹

6. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is, emphatically, the province and duty of the judicial department, to fay [sic] what the law is.”); *THE FEDERALIST* NO. 78, at 395 (Alexander Hamilton) (G. Willis ed., 1982) (“The interpretation of the laws is the proper and peculiar province of the courts.”).

7. See generally *THE FEDERALIST* NOS. 49, 50, and 51 (James Madison) (discussing the doctrine).

8. Learned Hand should also be remembered for his analysis of the computation of damages described in *United States v. Carroll Towing Co.* 159 F.2d 169, 173 (2d Cir. 1947) (holding that liability for negligence depends upon whether the burden of adequate precautions is less than the probability of injury).

9. See H. SHRIVER, *WHAT GUSTO: STORIES AND ANECDOTES ABOUT JUSTICE OLIVER WENDELL HOLMES* 10 (1970).

10. See generally *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931) (holding that a statute permitting suits against corporations in any county in which the action occurred was constitutional, and stating “[w]e must remember that the machinery of government would not work if it were not allowed a little play in its joints”); *Buck v. Bell*, 274 U.S. 200 (1927) (holding that state law authorizing sterilization of “mental defectives” was not unconstitutional and did not deny persons sterilized under that law due process or equal protection); *Steinfeld v. Zeckendorf*, 239 U.S. 26 (1915) (holding that when reviewing a judgment entered pursuant to Supreme Court’s order, the only question in a subsequent appeal is whether the judgment below is inconsistent, not whether the Supreme Court’s order is correct).

11. See *OLIVER WENDELL HOLMES, III, THE COMMON LAW* 1 (1881).

In his comments yesterday, Robert Keeton suggested that Andrew Kaufman's recognition of a major message, that judges make law, and a minor message, that judges make law and do justice, are not separate but rather coordinate and complementary themes. Not surprisingly, I agree with Judge Keeton's assessment. However, my agreement is based upon the understanding that each proposition is both a presumption and a conclusion.

In his introduction to *The Nature of The Judicial Process*, Cardozo states: "I am not concerned to inquire whether judges ought to be allowed to brew such a compound [considerations to deciding a dispute] at all. I take judge-made law as one of the existing realities of life."¹² It is this "realit[y] of life" upon which Cardozo, the judge, labored. In each case, as duty commands, judicial officers labor today. Moreover, where appropriate, a judge must take into account his or her constitutional duties, state and federal, and when confronted by statutes, rely upon legislative intent, precedent, and logical consistency before deciding which choice will resolve the dispute at hand.

Nonetheless, as we have been admonished by Judge Cardozo, judge-made laws do not lead to "final truths," but to "working hypotheses, continually retested in those great laboratories of the law, the courts of justice."¹³ Cardozo spoke principally to the common law, however.

Applying our trade to the work of a coordinate branch of government clearly places greater limitations upon the work of judges. While the political branches of government derive their power from the will of the people, the judicial branch obtains power from logic and experience—and, as Alexander Hamilton suggests in *The Federalist Papers*, without resort to the sword or the purse, the judiciary is only empowered, if at all, "merely [by its] judgment."¹⁴

Our judgment, however, is the result of the brew or the compound that mixes legal text¹⁵ and legislative intent or purpose¹⁶ with historical doctrine and factual nuances. To this mix, of course, we bring the canons of statutory construction.¹⁷

12. CARDOZO, *supra* note 2, at 10.

13. *Id.* at 23.

14. THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (G. Willis ed., 1982).

15. See COLO. REV. STAT. § 2-4-101 (1998) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage.")

16. See *id.* § 2-4-201(1)(a) ("In enacting a statute, it is presumed that . . . [c]ompliance with the constitutions of the state of Colorado and United States is intended.")

17. See *id.* § 2-4-203. If a statute is ambiguous, the courts may look to the object sought via the statute, the circumstances under which it was enacted, the legislative history, the common law, and the legislative declaration.

I now would like to briefly illustrate the workings of the foregoing by way of the governmental immunity statute in Colorado, which is grounded in tort law. In doing so, I refer to *Evans v. Board of County Commissioners of the County of El Paso*.¹⁸ That case was the seminal decision of the Colorado Supreme Court altering the common law notion of governmental immunity.

Until 1971, we recognized sovereign or governmental immunity. Of course, as part and parcel of earlier notions of sovereign immunity, it was believed that the King could do no wrong and could not be compelled to remedy a wrong resulting from the state's conduct. Therefore, a citizen injured by the conduct of the sovereign had no recourse—at least until *Evans*. The *Evans* decision altered Colorado common law by abolishing sovereign immunity, but not without substantial opportunity for mischief. Wisely, I think, the court recognized the limits, not of its jurisdiction, but of judicial competence to develop a comprehensive rule from a single case. Hence, the court called upon the state legislature to adopt, prospectively, a scheme of governmental or sovereign immunity that, consistent with our new common law, acknowledges governmental liability.

From the common law notion of sovereign immunity, long affirmed by precedent, the court intentionally strayed from that principle. The court found “a result which [it] felt to be unjust, [and therefore,] the rule [was] reconsidered.”¹⁹ That *ratio decidendi*, or the underlying principle of its analysis, was that absolute sovereign immunity is no longer workable in a world in which the state had become a frequent actor and cause of harm to its citizens.

Prudentially, with the same stroke of its judicial pen, our court sought the assistance and will of the legislature. Thus, the responsibility of developing the contours of governmental immunity and broad principles of public policy was left to the political departments, where it more properly should lie.

We now have, by statute, exceptions to the 1971 common law notion that there no longer is a place for governmental immunity in the common law of Colorado. The General Assembly constructed a notion of governmental immunity which, being a statute in derogation of the common law, is strictly construed.²⁰ Over time, the court, by its construction of that statutory scheme, and the legislature, through

18. 482 P.2d 968 (Colo. 1971).

19. *Id.* at 970.

20. See COLO. REV. STAT. §§ 2-4-203, 24-10-102 (1998); *Bertrand v. Board of County Comm'rs of Park County*, 872 P.2d 223, 225 (Colo. 1994) (holding that statutes in derogation of common law and our statutes enforcing governmental immunity are to be narrowly construed).

timely amendments, have engaged in a dialogue of checks and balances leading today to our Colorado Governmental Immunity Act.²¹

My second example I only mention. I leave it, then, for your contemplation. Recall, if you can, and I am certain you are able, *International Shoe Co. v. Washington*,²² *Pennoyer v. Neff*,²³ and other cases regarding the concept of *in personam* jurisdiction and the rule recognizing the necessity of a sufficient nexus or relationship of minimum contacts for the exercise of jurisdiction over the person. With the advances of technology, including the Internet, no longer does one's sense of geography or spatial relationships necessarily place a limitation upon the analysis that this legal concept demands. Like the telephone before it, the Internet represents a technological advancement that will require judges to make adjustments in logic based upon experience. By way of final example, a seller of investment securities sitting in Chicago and making a telephone offer for sale of the securities to a person in Peoria, Illinois, would, I suggest, be subject to the jurisdiction of the Illinois courts. Can the same Illinois courts reach, with a very long arm, the individual sitting in Munich, Germany, who places an advertisement to sell the securities of his French corporation on the Internet? (You might ask whether the fact that our seller in Munich receives an electronic hit or offer from our Illinois purchaser should, itself, sell in Peoria?)

Yesterday we heard mention of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,²⁴ raising the specter, in my mind, of litigation without statutes of limitation or at least permitting the litigation of the cause of action to occur at a much later time. As I understood the discussion, it was posited that courts should delay the trial in order to permit the state of the art or technology of science to catch up with a plaintiff's need to meet his or her burden of proof in a court of law. While I have not had time to digest this provocative suggestion, it is worthy of contemplation—the absence of evidence is not always the evidence of absence. Nonetheless, while religion, unlike plaintiffs, may of necessity rely upon faith, i.e., the belief in something for which there is no proof, I raise the flag of caution in front of the notion that we should develop some process in tort litigation that suggests meeting

21. COLO. REV. STAT. § 24-10-101 (1998).

22. 326 U.S. 310 (1945).

23. 95 U.S. 714 (1877).

24. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (allowing children to sue pharmaceutical company for birth defects sustained as a result of mothers' ingestion of anti-nausea drugs during pregnancy under the premise that "general acceptance" is not a necessary precondition to admissibility of scientific evidence and that the trial judge must ensure that the expert's testimony rests on a reliable foundation and is relevant to the task at hand).

the burden of proof can be delayed, if not altered. Certainly, it seems that we judges must not be expected to devise a means by which a trial is stayed to permit a plaintiff to obtain the ability to prove what is not then ascertainable.

Finally, I close with this. I confess my hesitancy to alter precedent.²⁵ I believe precedent to be of great importance to our system of justice and to allow citizens to plan their lives and business affairs with confidence. Therefore, hesitancy to alter precedent is, I believe, an attribute that every good judge must have or obtain. It is, in fact, that deference to precedent by which we judges acknowledge our own subservience to the law—as represented by prior judgments of our courts. Precedent serves, in my estimation, as the judicial officer's analogue to our expectation that parties and the public, too, will comply with judicial decrees and our judgments.

Alas, and truly finally, I wish to address Judge Robert Keeton's reference to the short life of a trial judge's rulings when subjected to appellate review. We appellate judges know all too well the *power* of a single trial judge when compared to the *influence* of a single judge of a multi-judge appellate court. While an appellate court may have the opportunity to reverse any individual trial judge once every few years, I know that trial judges, in their numerous workday rulings, reverse appellate courts every day!

25. By no means do I suggest that the doctrine of *stare decisis* is an ironclad rule. A court of final resort announcing a rule by its decision may later modify or alter that rule. (Of course the binding effect of the rule upon lower courts is a different question. Lower courts are not free to ignore the judgments of their court of last resort; otherwise uncertainty and the resultant chaos would undermine the rule of law.) By this statement, however, I assert my agreement with portions of Justice Lewis Powell's concurrence in *Mitchell v. W.T. Grant Co.*:

To be sure, *stare decisis* promotes the important considerations of consistency and predictability in judicial decisions and represents a wise and appropriate policy in most instances. But that doctrine has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation. Where the Court errs in its construction of a statute, correction may always be accomplished by legislative action. Revision of a constitutional interpretation, on the other hand, is often impossible as a practical matter, for it requires the cumbersome route of constitutional amendment. It is thus not only our prerogative but also our duty to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand.

416 U.S. 600, 627-28 (Powell, J., concurring) (footnote omitted). Today, I certainly do not question the wisdom of the Court's disposal of its 58 year-old doctrine of "separate but equal" by reversing *Plessy v. Ferguson*, 163 U.S. 537 (1896), in its landmark decision of *Brown v. Board of Education*, 347 U.S. 483 (1954). I only suggest a healthy prudence, but not an unwillingness to overrule precedent or *stare decisis* under proper circumstances.

