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JUDGE FRIENDLY'S CONTRIBUTIONS TO SECURITIES LAW AND CRIMINAL PROCEDURE: "MODERATION IS ALL"

FRANK I. GOODMAN†

At the close of his Oliver Wendell Holmes Lectures in 1958, Judge Learned Hand, nearing the end of his career, paid tribute to his mentors at the Harvard Law School: "In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none."¹ The great judge might as well have been speaking of himself. He might have been speaking also of the man, great-judge-to-be, who was soon to join him on the bench of the Second Circuit and who would eventually succeed him as the Sage of Foley Square. For no judge of our time has waged a more unrelenting war against what he once called "the reign of King Absolute" than Henry Friendly.²

The bracketing of the two names, Hand and Friendly, is inevitable. Despite great differences in age, background, and personality, the two had much in common. Both were masters of the language:³ no judge has ever surpassed, and few have equalled, Hand as a writer of expository prose, but Friendly probably comes as close as anyone now on the bench. Both lifted judicial craftsmanship to the level of high art. Both were great "balancers" and great formulators of balancing tests. Both possessed an astonishing versatility, an at-homeness in a wide range of subjects and levels of complexity. Both were keenly aware of the limitations of the judicial office and the deference due other decisionmaking institutions. Both, moreover, as members of an "inferior" federal tribunal, labored under a similar set of constraints. Bound, often tightly, by the decisions of the Supreme Court, hemmed in by the proliferating precedents of their own circuit, rarely exposed to the great constitutional issues of the day, lacking discretionary control over their dockets and therefore condemned to a diet of routine cases presenting narrowly technical or factual issues, both Hand and Friendly had far less room to stretch their wings than high court justices in Washington

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¹ L. HAND, *THE BILL OF RIGHTS* 77 (1964).

² H. FRIENDLY, *A Postscript on Miranda*, in *BENCHMARKS* 277 (1967). Where Judge Friendly is concerned, I cannot pretend to objectivity. My wife, Joan Friendly Goodman, is the Judge's daughter, and no one as near and dear to her as he could help but be a favorite of mine.

³ I speak of both men in the past tense to avoid stylistic atrocity. At a vigorous 82, Judge Friendly has lost none of his powers.

or in many of the states. That they so often soared is all the more remarkable. Friendly, it might be added, was further handicapped by having to write on a slate already crowded with the indelible inscriptions of Hand himself and his formidable colleagues Augustus Hand, Thomas Swan, Jerome Frank, and Charles Clark.

I shall not press the comparison further, though it might be revealing to do so. Instead, I propose to discuss certain aspects of Judge Friendly's work in two areas—securities law and criminal procedure—in the hope of conveying some of his distinctive qualities as a judge and legal scholar.

I. JUDGE FRIENDLY AND SECURITIES LAW

In terms of judicial output alone, perhaps the most sustained demonstration of Judge Friendly's essential qualities is to be found in his opinions interpreting the federal securities statutes. The Second Circuit, of course, has played a major role in the development of this body of law, and Friendly has probably written more opinions (over 100) than any other federal appellate judge. Those noted below are only a small fraction of the total, and they do not include the one he himself considers the best.⁴

From the beginning, Judge Friendly left no doubt as to how he felt about this class of white collar crimes. He introduced one of his early securities cases by describing it as "another of those sickening financial frauds which so sadly memorialize the rapacity of the perpetrators and the gullibility, and perhaps also the cupidity, of the victims."⁵ (How like him not to ignore the victim's moral warts!) The convicted coconspirators, an accountant and a lawyer, pleaded ignorance. Friendly, unimpressed, replied:

In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar. . . . Congress . . . could not have intended that men holding themselves out as members of these ancient professions should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess.⁶

⁴ *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973).

⁵ *United States v. Benjamin*, 328 F.2d 854, 856 (2d Cir. 1964).

⁶ *Id.* at 863.

*Rosenfeld v. Black*⁷ evoked a more controversial application of fiduciary ethics to the behavior of the street. The shareholders of a mutual fund sought an accounting by its retiring investment advisor, Lazard Freres, for payments Lazard had received from its successor in compensation for arranging the substitution. Undaunted by the fact that the "succession fee" was standard practice in the industry and the means by which investment advisors often cashed in their chips, Judge Friendly, writing for the panel, held the plaintiffs entitled to their accounting under the well-established equitable principle, impliedly incorporated by Congress in the Investment Company Act, that a fiduciary may not sell or transfer her office for personal gain.

A fiduciary endeavoring to influence the selection of a successor must do so with an eye single to the best interests of beneficiaries. Experience has taught them that no matter how high-minded a particular fiduciary may be, the only certain way to insure full compliance with duty is to eliminate any possibility of personal gain.⁸

It was "understandable that, under the morals of the marketplace," Lazard should see no objection to receiving market value for the opportunity it was conferring. "But equity imposes a higher standard."⁹

Such decisions, standing alone, might suggest a rectitude not of this world. The Judge's moral compass, however, has not always pointed to liability. He vigorously dissented, for example, in *Pearlstein v. Scudder & German*,¹⁰ a decision holding a brokerage firm liable in damages to its client, an experienced investor, to whom, and at whose urging, it had overextended credit in violation of statutory margin requirements. Friendly protested that the majority's conclusion "shocks the conscience and wars with common sense"¹¹ and that "permitting the customer to shift the risk of market decline to the broker"¹² was neither a necessary nor desirable means of furthering the primary purpose of the margin requirements—not to protect investors, but to regulate the flow of credit into the securities markets. "This case," he said, "illustrates the need for putting some brakes on the onrush of civil obligations for violation of the securities laws if that doctrine is to be an instrument of justice rather than the opposite."¹³

⁷ 445 F.2d 1337 (2d Cir. 1971).

⁸ *Id.* at 1342.

⁹ *Id.* at 1343.

¹⁰ 429 F.2d 1136, 1145 (2d Cir. 1970) (Friendly, J., dissenting).

¹¹ *Id.* at 1145.

¹² *Id.* at 1147.

¹³ *Id.* at 1145-48. This decision proved stronger medicine than the industry was

Pearlstein was not the first occasion on which Judge Friendly had spoken of the need for caution in shaping private remedies under the securities laws. The use and abuse of such remedies has long been a dominant issue in the field. The securities statutes call for public enforcement by the SEC but, with few and narrow exceptions, do not expressly provide for private civil liability. Since 1946, however, the federal courts have consistently held a private right of action to be implicit in section 10(b) of the Securities Exchange Act of 1934¹⁴ and the SEC's implementing regulation, Rule 10b-5¹⁵—the key provisions relating to securities fraud—a conclusion confirmed by the Supreme Court in 1971.¹⁶ Even earlier, in *J.I. Case Co. v. Borak*,¹⁷ a proxy solicitation case, the Court had authorized the federal courts "to be alert to provide such remedies as are necessary to make effective the congressional purpose."¹⁸ So instructed, the lower federal courts rushed headlong to find implied civil liability whenever they believed that would further the statutory purpose. In the mid-1970's, however, the Supreme Court began to take a more guarded view of implied remedies¹⁹ and by the end of the decade, in decisions such as *Touche Rosse*

willing to take, and four years later it secured "clarifying" legislation permitting an investment advisor to profit from the sale of its business on certain, not very onerous, conditions. See 15 U.S.C. § 80a-15(f) (1982); see also S. REP. NO. 75, 94th Cong. 1st Sess. 71 (1975).

¹⁴ Section 10 of the Securities Exchange Act of 1934, codified at 15 U.S.C. §78j (1982), provides in relevant part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange . . .

(b) to use or employ, in connection with the purchase of any security registered on a national securities exchange or any security not so registered, a manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

¹⁵ 17 C.F.R. § 240.10b-5 (1983) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary to order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

¹⁶ Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971).

¹⁷ 377 U.S. 426 (1964), *overruled*, *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); see *infra* note 20 and accompanying text.

¹⁸ *Borak*, 377 U.S. at 433.

¹⁹ See, e.g., *Cort v. Ash*, 422 U.S. 66 (1975); see also *infra* note 20 and accompanying text.

& Co. v. Redington²⁰ and *Transamerica Mortgage Advisors, Inc. v. Lewis*,²¹ had adopted a fairly strong presumption against them, rebuttable only by affirmative evidence of congressional intent.

The shift in the Supreme Court's attitude from the green light of *Borak* to the reddish light of *Redington* and *Transamerica* found little reflection in Judge Friendly's opinions; these, throughout the entire period, flashed a cautious yellow light. *Colonial Realty Corp. v. Bache & Co.*²² posed the issue whether violation of a New York Stock Exchange rule calling upon members to observe "just and equitable principles of trade"—a provision required by statute to be included in the rules of registered exchanges—was the basis for a judicially implied damage remedy. Friendly concluded that the question of federal civil liability for violation of exchange or dealer association rules

cannot be determined on the simplistic all-or-nothing basis urged by the two parties; rather, the court must look to the nature of the particular rule and its place in the regulatory scheme, with the party urging the implication of a federal liability carrying a considerably heavier burden of persuasion than when the violation is of the statute or an SEC regulation.²³

A rule providing "what amounts to a substitute for regulation by the SEC itself" or imposing "an explicit duty unknown to the common law" would be a strong candidate for implication.²⁴ The rule immediately at issue, however, was near the opposite pole, and the Judge found "little reason to believe that by requiring exchanges and dealers' associations to include such provisions in their rules Congress meant to impose a new legal standard on members different from that long recognized by state law"²⁵ or "contemplated judicial creation of a new body of federal broker-customer law whenever the complaint in what would otherwise be an action under state law alleged conduct inconsistent with just and equitable principles of trade."²⁶

Similar caution marked Friendly's influential concurring opinion in *Securities Exchange Commission v. Texas Gulf Sulphur Co.*,²⁷ a

²⁰ 442 U.S. 560 (1979).

²¹ 444 U.S. 11 (1979).

²² 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

²³ *Id.* at 182.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 183.

²⁷ 401 F.2d 833, 864 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969).

seminal public enforcement action under Rule 10b-5, in which one of the found violations was the issuance by the corporation of a misleadingly pessimistic press release concerning its oil exploration activities. The Judge suggested that while a corporation's negligent misstatement in violation of Rule 10b-5 might warrant injunctive relief, liability for damages in the absence of scienter would indirectly burden a major segment of the class intended to be protected and work directly counter to the interest of public disclosure of important business and financial developments:

If the only choices open to a corporation are either to remain silent and let false rumors do their work, or to make a communication, not legally required, at the risk that a slip of the pen or failure properly to amass or weigh the facts—all judged in the bright gleam of hindsight—will lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers, most corporations would opt for the former.²⁸

If Judge Friendly's approach to private remedies was more cautious than that of most federal judges, and of the Supreme Court itself, during the "ebullient stage"²⁹ that followed in the wake of *Borak*, the opposite appears to be true in the recent period of Supreme Court retrenchment culminating in *Redington* and *Transamerica. Leist v. Simplot*³⁰ and *Goldberg v. Meridor*³¹ are the salient examples.

In *Leist*, Judge Friendly, writing for a divided panel, found an implied private right of action in the Commodity Exchange Act, as amended in 1974. The basis for this holding was that the lower federal courts, prior to the 1974 amendments, had consistently recognized a private remedy; that Congress was well aware of this state of the law when it deliberated the amendments; and that its failure to eliminate the private remedy implied a willingness and even a desire to retain it.³² The Supreme Court narrowly affirmed.³³

²⁸ *Id.* at 867. The opinion was written for the guidance of district judges in the numerous private actions then pending against Texas Gulf. It may raise eyebrows that Judge Friendly, a critic of the Supreme Court's "guideline opinions," should have been guilty of this exercise in obiter. There seems, however, a world of difference between the separate opinion of a single judge on an issue not presented and an authoritative opinion of the Court itself prescribing an elaborately detailed set of rules to govern future cases.

²⁹ See L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 1058 (1983).

³⁰ 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982).

³¹ 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978).

³² Standing alone, this reasoning might not have been compelling. The formidable

[Footnote 33 appears on page 16.]

*Goldberg v. Meridor*³⁴ was equally expansive and perhaps even more controversial. The immediate background was the Supreme Court's holding six months earlier in *Santa Fe Industries v. Green*³⁵ that "a breach of fiduciary duty by majority stockholders, without any deception, misrepresentation, or nondisclosure" does not violate section 10(b) or Rule 10b-5.³⁶ Hence minority shareholders of a Delaware corporation, complaining of the gross undervaluation of their shares in a stock-for-stock exchange forced upon the corporation by its controlling parent, had failed to state a cause of action under the statute or the rule. The Court based this conclusion not only on the words of the statute, but also on "additional considerations"—most notably, that breach of corporate fiduciary duty was a cause of action traditionally relegated to state law, much of which would be displaced by the adoption of federal fiduciary standards. The plaintiffs' alternative argument—that failure to give them advance notice of the merger was a material nondisclosure under Rule 10b-5—was rejected, in a famous footnote fourteen,³⁷ on the narrower ground that since Delaware provided no injunctive remedy, and prior notice would therefore have done the minority shareholders no good, its absence was not material.

In *Goldberg*, too, a minority stockholder alleged that the controlling parent had engineered a one-sided exchange—in this instance, an exchange of the corporation's stock for the parent's overvalued assets—and had issued press releases that failed to disclose material facts

counterargument was that a few lower court cases, erroneously decided under current Supreme Court doctrine, cannot become binding on the Supreme Court and the lower federal courts merely because of the inaction of Congress in failing to override them; that congressional inaction is equally consistent with an intent merely to leave the question of private remedies to the courts; that *Redington* and *Transamerica* created a strong presumption against implied rights of action that can be overcome only by powerful evidence of affirmative congressional intent; and that Judge Friendly's contrary view creates the anomaly that statutes enacted prior to *Borak* in 1964 or subsequent to *Redington* and *Transamerica* in 1979 afford no private rights of action while those enacted during the intervening period do. In my view, what tips the scales in favor of implication is that here the legislative history disclosed more than merely congressional awareness and silence. Congress specifically focused on a problem it knew to be a consequence of the existence of private rights of action—namely, that the commodity exchanges, fearing civil damage liability for failure to enforce their own regulations, were declining to adopt such regulations—and solved that problem not by abolishing the private cause of action, as the exchanges urged, but instead by directing them to engage in rule-making. Thus, whatever inference may appropriately be drawn from congressional silence per se, the circumstances in *Leist* warranted the conclusion that Congress had made a deliberate choice.

³³ *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982).

³⁴ 567 F.2d 209 (2d Cir. 1977).

³⁵ 430 U.S. 462 (1977).

³⁶ *Id.* at 476.

³⁷ *Id.* at 474 n.14.

about the transaction. No doubt to the surprise of many observers familiar with his respect for federalism, Judge Friendly, for a divided panel, ruled that this latter nondisclosure allegation distinguished the case from *Santa Fe Industries* and brought it within section 10(b); here, moreover, the undisclosed facts *were* material because New York, unlike Delaware, did afford minority shareholders an injunctive remedy. While conceding that a federal cause of action requires more than mere "internal corporate mismanagement," the Judge insisted that

a parent's looting of a subsidiary with securities outstanding in the hands of the public in a securities transaction is a different matter; in such cases disclosure or at least the absence of misleading disclosure is required. It would be incongruous if Rule 10b-5 created liability for a casual "tip" in the bar of a country club . . . but would not cover a parent's undisclosed or misleadingly disclosed sale of its overvalued assets for stock of a controlled subsidiary with securities in the hands of the public.³⁸

Goldberg has been much followed³⁹ and much criticized.⁴⁰ The gist of the criticism is that since corporate power wielders rarely announce their breaches of fiduciary duty in advance, or at all, the practical effect of *Goldberg's* disclosure requirement is to sweep within section 10(b) and Rule 10b-5 nearly all instances of corporate mismanagement or fiduciary breach and thereby to "federalize the substantial portion of the law of corporations that deals with transactions in securities"⁴¹—the very result that *Santa Fe Industries* sought to avoid. This criticism does not persuade me. Had the transaction in *Goldberg* required the unanimous approval of the shareholders, few would have disputed the defendants' federal duty to disclose all facts that might significantly influence the minority shareholders' decision; the conclusion should be no different merely because the only self-protective measure open to the minority shareholders is a state-court injunction suit. More broadly, it is not clear why the issuance of stock without accurate disclosure of the corporation's liabilities or business risks should be more vulnerable to attack under section 10(b) than the issuance of stock without disclosure of the directors' current practice and continuing intent to loot the corporation, or why the officers of a

³⁸ 567 F.2d at 221.

³⁹ See, e.g., *Healey v. Catalyst Recovery, Inc.*, 616 F.2d 641 (3d Cir. 1980); *Kidwell ex rel. Penfold v. Meikle*, 597 F.2d 1273 (9th Cir. 1979).

⁴⁰ See, e.g., R. JENNINGS & H. MARSH, *SECURITIES REGULATION* 951-52 (5th ed. 1982).

⁴¹ *Santa Fe Industries*, 430 U.S. at 479 (1977).

corporation should be liable under section 10(b) when they misrepresent the value of the corporation's assets to the stockholders of a potential merger partner but not when they misrepresent the value of the merger partner's assets to the minority stockholders of the corporation itself.

The answer cannot simply be that breach of fiduciary duty is violative of state law and a federal remedy for its concealment therefore unnecessary. That reasoning would strip Rule 10b-5, at least in private damage actions, of virtually its entire coverage, since fraud, misrepresentation, and (in some jurisdictions) even misleading nondisclosure are generally actionable at state law.⁴² Moreover, the Supreme Court's concern in *Santa Fe Industries* that a federal cause of action for breach of fiduciary duty per se would require federal courts to fashion a nationally uniform law of fiduciary obligation, displacing established state law,⁴³ does not apply to a *Goldberg*-type cause of action for nondisclosure, a claim that does not depend on breach of fiduciary standards, whether state or federal.⁴⁴

⁴² That § 10(b) is no mere residuary clause, applicable only to conduct not otherwise unlawful, was recently underscored in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), in which the Supreme Court unanimously held that "the availability of an express remedy under § 11 of the 1933 Act does not preclude defrauded purchasers of registered securities from maintaining an action under § 10(b) of the 1934 Act." *Id.* at 387.

⁴³ See *Santa Fe Industries*, 430 U.S. at 479.

⁴⁴ Other, more technical criticisms of *Goldberg* are equally wide of the mark. The assertion of Professors Jennings and Marsh that circuit courts following *Goldberg* "seized upon" footnote 14 of the *Santa Fe Industries* case and "treated it as though it were the entire opinion," R. JENNINGS AND H. MARSH, *supra* note 40, at 951, clearly does not apply to *Goldberg* itself. Judge Friendly claimed no affirmative support from footnote 14, alluded to it only to distinguish it on the ground that New York, unlike Delaware, did provide an injunctive remedy to minority shareholders in *Goldberg*'s position, and indeed put forward an alternative test of materiality that made footnote 14 and the existence of a state premerger remedy altogether irrelevant: namely, that a deception practiced on the corporation by all its directors must be considered "material" if the facts undisclosed or misleadingly disclosed to the shareholders *would* have assumed significance in the deliberations of a hypothetical reasonable and disinterested director (clearly the case in *Goldberg*, where a disinterested director of the subsidiary, if aware of the facts alleged in the complaint, might well have voted against the transaction).

Professor Louis Loss, without disapproving of *Goldberg* in general, has observed that it "does produce an anomaly with its rationale that a state law remedy for breach of fiduciary duty, far from foreclosing a 10b-5 action, is precisely the foundation of a theory of deception in that inadequate disclosure lulls stockholders into foregoing their state law remedies." L. LOSS, *supra* note 29, at 943.

The "anomaly," however, is more aptly attributed to *Santa Fe Industries* and its footnote 14, which held the absence of a Delaware injunctive remedy to be a reason—the only stated reason—to reject the plaintiff's lack-of-prior-notice claim. Nor would the "anomaly" disappear if *Goldberg* were reversed and a 10b-5 action made dependent on the unavailability of a state remedy at the time of trial. A minority shareholder in *Goldberg*'s position might get her foot in the federal door by showing that she

No summary of the Judge's contributions to securities law would be complete without some attention to his important decisions regarding the transnational application of the Exchange Act. With increasing frequency, securities transactions have international dimensions. Negotiations in one country may lead to the sale in another of securities listed in yet a third, issued by a corporation organized in a fourth, to purchasers scattered among these and other countries. A critical threshold issue is whether the American ingredients of the transaction bring the case within section 10(b) of the Securities Exchange Act (or any other relevant substantive provision) and therefore within section 27 (vesting district courts with subject matter jurisdiction over an action "to enforce any liability or duty created by this chapter or the rules and regulations thereunder").⁴⁵ Neither the statute itself nor its legislative history offers the slightest guidance, and the SEC has issued no pertinent regulations. In a series of decisions in the early 1970's, Judge Friendly blazed a trail through this largely uncharted terrain.

His starting point was the recognition that while international or "foreign relations" law permits the United States to legislate with respect to acts either committed or producing effects within its territory, "it would be . . . erroneous to assume that the legislature always

currently had no state remedy (for example, because the facts concealed from her did not amount to a breach of fiduciary duty) but would still lose her case for want of "materiality" if she could not establish that state injunctive relief would earlier have been available but for the deception.

The only way to eliminate the anomaly would be to hold that the presence or absence of a state pretransaction remedy is immaterial to "materiality"—either because a deception does not become material merely by lulling stockholders into foregoing an available remedy or, on the contrary, because it can be material even in the absence of such a remedy. The former view would mean that a minority shareholder could be lied to with federal impunity on the ground that the truth would have done her no good; the latter, in effect Judge Friendly's alternative ground of "materiality" in *Goldberg*, seems to offer the better escape.

In much the same vein as Professor Loss, Judge Aldisert, in a dissenting opinion, has suggested that the *Goldberg* approach "provides federal relief to plaintiffs who have state remedies, but denies federal relief to plaintiffs who have no state remedy." *Healey v. Catalyst Recovery, Inc.*, 616 F.2d 641, 648 (3d Cir. 1980). What Judge Aldisert overlooks is that the focus of inquiry under footnote 14, and in *Goldberg*, is not whether the plaintiff has a state law remedy at the time of bringing her 10b-5 action, or indeed whether she ever had one at a time when she was in a position to take advantage of it; rather, the state injunctive remedy whose presence or absence permits or precludes a 10b-5 action is the remedy that hypothetically would (or would not) have been available had plaintiff been aware of the facts that were concealed from her. Lacking such a remedy, and therefore unable to act under 10b-5, a plaintiff may still (as in *Santa Fe Industries*) have a state post hoc appraisal remedy. Conversely, a plaintiff who *would* have had a state injunctive remedy may *not* be eligible for post hoc relief (as, apparently, in *Goldberg* itself), in which case her federal cause of action is not a second string in her bow, but the only string.

⁴⁵ 15 U.S.C. §78aa (1982).

means to go to the full extent permitted." When "a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."⁴⁶

In *Leasco Data Processing Equipment Corp. v. Maxwell*⁴⁷ an American company seeking damages under section 10(b) alleged that its purchase in Britain of the securities of a British corporation listed on the London Stock Exchange had been induced in part by misrepresentations made by the British defendant in the United States. Judge Friendly wondered whether "if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad," and concluded that "[w]hile . . . impact on an American company and its shareholders would [probably not] suffice to make the statute applicable if the misconduct had occurred solely in England, . . . it tips the scales in favor of applicability when substantial misrepresentations were made in the United States."⁴⁸

*ITT v. Vencap, Ltd.*⁴⁹ established that a foreign purchaser, too, could invoke section 10(b) when duped into buying foreign securities abroad by misrepresentations made in America, since

[w]e do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners. This country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States.⁵⁰

This ruling, however, was "limited to the perpetration of fraudulent acts themselves and does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries."⁵¹ The distinction was admittedly "a fine one," but

the line has to be drawn somewhere if the securities laws are not to apply in every instance where something has happened in the United States, however large the gap between

⁴⁶ *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975).

⁴⁷ 468 F.2d 1326 (2d Cir. 1972).

⁴⁸ *Id.* at 1337.

⁴⁹ 519 F.2d 1001 (2d Cir. 1975).

⁵⁰ *Id.* at 1017.

⁵¹ *Id.* at 1018.

the something and a consummated fraud and however negligible the effect in the United States or on its citizens.⁵²

Thus, in *Bersch v. Drexel Firestone, Inc.*,⁵³ a companion case considered by many the leading decision in the transnational field—a class action involving a public offering outside the United States of stock in a foreign corporation, based on an allegedly fraudulent prospectus produced and distributed abroad to purchasers of whom few were Americans—the claims of the foreign purchasers were held not to be governed by section 10(b) merely because an American underwriter conducted meetings in New York to plan and organize the offering.⁵⁴ Those same activities, however, were enough to trigger the application of section 10(b) when the injury was suffered by American purchasers residing abroad.⁵⁵ Meanwhile, the few American residents to whom false prospectuses were mailed from abroad could ground their claims on the principle that a state may punish, in Justice Holmes's words, "acts done outside [its] jurisdiction, but intended to produce and producing detrimental effects within it."⁵⁶ But that principle did not support subject matter jurisdiction over the claims of the foreign plaintiffs merely because the fraud and subsequent collapse of the offered shares had produced "an adverse effect on this country's general economic interests or on American security prices. Moderation is all."⁵⁷

The last phrase captures the spirit of Judge Friendly's approach, not only to transnational and other securities matters, but to judging in general. There is no denying, however, that his opinions in these cases represent "judicial legislation" in very nearly its purest form. The Judge "freely acknowledge[d]" that

if we were [challenged] to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond. The Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of offshore funds thirty years later.⁵⁸

He conceded also that

reasonable men might conclude that the coverage was

⁵² *Id.*

⁵³ 519 F.2d 974 (2d Cir. 1975).

⁵⁴ *Id.* at 987.

⁵⁵ *Id.* at 992.

⁵⁶ *Id.* at 988 (quoting *Strassheim v. Daily*, 221 U.S. 280, 284-85 (1911)).

⁵⁷ *Id.* at 989.

⁵⁸ *Id.* at 993.

greater, or less, than has been outlined in [the *Bersch* and *Vencap* opinions.] Our conclusions rest on case law and commentary concerning the application of the securities laws and other statutes to situations with foreign elements and on our best judgment as to what Congress would have wished if these problems had occurred to it.⁵⁹

The judge was too modest: "case law" did not speak directly nor commentary authoritatively to the issues before the court in *Bersch* and *Vencap*, and Congress left no clue as to what it "would have wished." One can only assume, therefore, that the subtle pattern of inclusion and exclusion sketched above reflected in large part what the *judges* "would have wished" had they been members of Congress—reinforced, no doubt, by the recognition that Congress itself, when confronting controversial issues of public policy, in which the contending political forces are of equal or indeterminate strength, usually eschews the extremes and hews to a middle course. The dilemma that might arise when a judge's sense of the desirable is at odds with his sense of the politically possible was not presented to Judge Friendly in the transnational cases, and rarely would be to one of his instinctive moderation.

Friendly could not have been comfortable in attributing his policy preferences to a Congress that had neither expressed nor implied its own. The predicament of the judge forced to read a statute in the dark had troubled him from the very beginning of his tenure. An essay written two years after he came to the bench endorsed Learned Hand's view that a judge who has exhausted inconclusively all other processes of statutory interpretation, and is forced at last to consider the relative desirability of the alternative results, must even then "always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him" and if in doubt "must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be."⁶⁰ Friendly added that the judge "must endeavor to puzzle out what the legislature would have deemed desirable, not what he would have thought. Attempt this he must; yet we cannot reasonably expect that fallible human beings will always be capable of selflessness so sublime."⁶¹

In the transnational securities cases, even the sublimely selfless

⁵⁹ *Id.*

⁶⁰ H. FRIENDLY, *Reactions of a Lawyer-Newly-Become-Judge*, in BENCHMARKS, *supra* note 2, at 18 (quoting L. HAND, *THE SPIRIT OF LIBERTY* 109 (1952)).

⁶¹ *Id.*

judge might find it difficult to avoid reading her thoughts into the legislative mind, for the Hand prescription—"When in doubt, stop!"—arguably does not yield a determinate answer as to which of several reasonable limits should be placed on the extraterritorial application of section 10(b). It could mean that section 10(b) stops at the water's edge since a court cannot be sure Congress would have wished to go further; or, no less plausibly, that section 10(b) goes to the limits permitted by foreign relations law, since a court cannot be sure Congress would have wished to stop short of that natural point. Whether it is controversial extensions or controversial exceptions that are to be avoided depends on one's initial baseline, and this in turn may not be determinable without resort to one or another of the familiar but often conflicting canons of construction—"Read criminal statutes narrowly!" or "Read remedial statutes broadly!" It is to Judge Friendly's credit that he did not seek refuge in such spurious objectivity.

II. JUDGE FRIENDLY AND CRIMINAL PROCEDURE

In the field of criminal procedure, Judge Friendly's most notable contributions have come from the lectern rather than the bench. In a series of lectures at the University of Cincinnati in 1968, entitled "The Fifth Amendment Tomorrow: The Case for Constitutional Change,"⁶² he delivered one of the most powerful critiques ever made of the privilege against compulsory self-incrimination. Reexamining the policies traditionally thought to justify the privilege and finding none of them adequate to support some of the Court's modern extensions, he proposed amending the amendment so as to limit its application or prevent its further extension to areas such as noncustodial questioning, compulsory production of goods and documents, and judicial comment on refusal to testify.

Two years later, in the 1970 Ernst Freund Lectures at the University of Chicago Law School, he offered an equally challenging reappraisal of modern developments relating to collateral attack on criminal judgments and advanced the thesis that, with a few important exceptions, "convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence."⁶³ Significantly, both of these fundamental, and in some ways even radical, critiques were accompanied by a detailed formula-

⁶² Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

⁶³ Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970).

tion of what Judge Friendly would have substituted. This sense of responsibility to produce a better mousetrap, rather than negative criticism alone, is a hallmark of Friendly's nonjudicial writings and an expression of his essential pragmatism. In an age when critics, particularly radical critics, of existing legal doctrine and institutions frequently disclaim any obligation to provide constructive alternatives, the specificity of Judge Friendly's prescriptions is a breath of fresh air.

An earlier and more general statement of Friendly's philosophy of criminal procedure was the 1965 Morrison Lecture to the State Bar of California.⁶⁴ There he urged that

in applying the Bill of Rights to the states, the Supreme Court should not regard these declarations of fundamental principles as if they were a detailed code of criminal procedure, allowing no room whatever for reasonable difference of judgment or play in the joints. The "specifics" simply are not that specific.⁶⁵

Noting the current "great debate" on criminal procedure in legal and law enforcement circles, and the codification projects of the American Bar Association and American Law Institute, he expressed the fear that these efforts might

die aborning, if, instead of questions subject to fair debate being decided by Congress and the state legislatures, the most significant issues should already have been settled for all time by the casting vote of one or two respected men in a stately building in Washington, without the fact-finding resources of the legislature—very likely in "hard cases" where the full consequences of decision may have been clouded by understandable outrage over the facts at hand.⁶⁶

Applying these generalizations, he took issue with the proposition—thought to have been established, or at least foreshadowed, by the recent decision in *Escobedo v. Illinois*⁶⁷—that the sixth amendment's assistance of counsel guarantee is available to the suspect the moment she is arrested or brought to the station house. The amendment, he said, does not so provide in terms and "in sharp contrast to the assistance of counsel at trial or plea, the problem is too complex for sound

⁶⁴ H. FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure*, in BENCHMARKS, *supra* note 2, at 235, 262-264.

⁶⁵ *Id.* at 262-63.

⁶⁶ *Id.* at 235-36.

⁶⁷ 378 U.S. 478 (1964).

solution by a constitutional absolute⁶⁸—especially where questioning may be necessary to retrieve stolen property, recover a kidnap victim, or apprehend now alerted confederates.⁶⁹

A subsequent Postscript⁷⁰ to the lecture took account of the Supreme Court's intervening decision, in *Miranda v. Arizona*,⁷¹ that in-custody interrogation without suitable warnings violates, not the sixth amendment's right to counsel, as *Escobedo* had seemed to say, but the fifth amendment's privilege against compelled self-incrimination. *Miranda* precisely exemplified the constitutional absolutism against which the lecture had counseled. It was predicated, Friendly argued, on the empirically unfounded generalization that all in-custody interrogation is inherently coercive, a proposition refuted by "countless instances" in which answers to custodial questioning are given without the slightest pressure. "To say that such answers are 'compelled' is to indulge in Humpty Dumpty's free-wheeling use of words. . . . The Court deserves its great role as vindicator of the Bill of Rights when it constructs from plainly inadequate data a generalization refuted by the common experience of mankind."⁷² The *Miranda* majority had also departed from logic "by inflexible across the board requirements with respect to waiver."⁷³ Granting that knowledge is indispensable to waiver, Friendly failed to see

just what in the Constitution authorized the Court to say to the fifty states that although the defendant in fact was fully aware of his rights and knowingly and intelligently forwent them, his action must be held for naught unless the police followed a particular Court-prescribed ritual, which apparently must be repeated whenever questioning is recommenced.⁷⁴

Both in the lecture and in the Postscript Judge Friendly challenged the uncompromising rigidity of the exclusionary rule (whether under the fourth, fifth, or sixth amendments), the assumption the "the Constitution demands that convictions be automatically set aside in every instance in which material evidence obtained in violation of some

⁶⁸ H. FRIENDLY, *supra* note 64, at 250.

⁶⁹ *Id.* at 257.

⁷⁰ H. FRIENDLY, *A Postscript on Miranda*, in BENCHMARKS, *supra* note 2, at 266.

⁷¹ 384 U.S. 436 (1966).

⁷² H. FRIENDLY, *supra* note 70, at 273.

⁷³ *Id.* at 273-74.

⁷⁴ *Id.* at 274.

'specific' of the Bill of Rights was received."⁷⁵ He argued that "[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by . . . outlawing evidence obtained by flagrant or deliberate violation of rights"⁷⁶ and in any event should not automatically be extended to the "fruits" of such evidence.⁷⁷

While Judge Friendly's case for judicial restraint in matters of criminal procedure contains elements of pragmatism, federalism, and democratic theory, the latter two themes are distinctly subordinate to the first. Friendly's federalism is not, primarily, the philosopher's devotion to decentralized government or the historian's reverence for the role the states have played in our political system—though the Judge would not, perhaps, disavow either characterization; above all, it is the pragmatist's faith in the efficacy of experimentation. Justice Brandeis's belief that it is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory"⁷⁸—lives on in his former law clerk. No doubt this has much to do with Friendly's opposition to the Supreme Court's selective incorporation doctrine under which "once a particular provision of the Bill of Rights makes the grade for absorption [into the fourteenth amendment], it comes over to the states with all the overlays the Court has developed and may develop in applying it to the federal government."⁷⁹ A procedural requirement applicable exclusively to the Congress shuts off only one of the nation's fifty-one sources of legislative experimentation; applicable to the states as well, it forecloses all fifty-one.

As for democratic theory, Friendly makes surprisingly little of the nonelected character of the judiciary in assessing its institutional competence. At times he seems to favor legislative action not so much because of its greater responsiveness to the vox populi as because of its potential receptiveness to proposals from the American Law Institute. At other times he appears to associate "the democratic tradition" itself with the capacity for self-correction through trial and error.

Given Judge Friendly's penchant for balancing, it is not surprising that he should prefer the due process clause to the delusive "specifics" of the Bill of Rights as the chosen instrument for adjusting the competing social and individual interests in the criminal justice system.⁸⁰ In particular it is due process by which he would measure the acceptabil-

⁷⁵ H. FRIENDLY, *supra* note 64, at 260.

⁷⁶ *Id.* at 262.

⁷⁷ H. FRIENDLY, *supra* note 70, at 279-80.

⁷⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion).

⁷⁹ H. FRIENDLY, *supra* note 64, at 242.

⁸⁰ *See id.* at 262-65.

ity of the means used to obtain information from a suspect in custody. Where the judicial scales tip in favor of the suspect—especially if the reliability of the evidence is in doubt—there is reason to think Friendly would be quite unstinting in his protectiveness, even though reasonable others, including reasonable state legislators, might differ.

A striking illustration of this is the Judge's approach to the problem of the exclusionary rule with respect to evidence obtained through the out-of-court identification of a suspect by an eyewitness. In *Stovall v. Denno*,⁸¹ the Supreme Court held that an eyewitness identification, obtained through a confrontation procedure "unnecessarily suggestive and conducive to irreparable mistaken identification," is inadmissible under the due process clause.⁸² Later language in *Neil v. Biggers*,⁸³ however, strongly implied that such an identification might after all be admissible if in the "totality of the circumstances" it appeared to be reliable.⁸⁴ In *Braithwaite v. Manson*,⁸⁵ Judge Friendly rejected this interpretation of *Biggers*; he held that its flexible approach applied only to pre-*Stovall* identifications; that post-*Stovall* identifications unnecessarily obtained through impermissibly suggestive procedures must be excluded without regard to their probable accuracy in the particular case; and that no rule less stringent "can force police administrators and prosecutors to adopt procedures that will give fair assurance against the awful risks of misidentification."⁸⁶ The Supreme Court in turn reversed this decision, holding that reliability in all the circumstances is the "linchpin" in determining admissibility both for pre- and post-*Stovall* confrontations.⁸⁷

At first blush, this seems a remarkable reversal of roles: Judge Friendly, the arch-critic of per se exclusionary rules, practicing what he had long preached against, only to be corrected by a Supreme Court newly wary of procedural absolutism. The Judge's reliance on the deterrence rationale is the more incongruous in that here, unlike in the fourth amendment area, the police-conducted confrontation of witness and suspect is not itself unconstitutional; due process is violated only by the later introduction of the evidence.⁸⁸

⁸¹ 388 U.S. 293 (1967).

⁸² *Id.* at 302.

⁸³ 409 U.S. 188 (1972).

⁸⁴ *Id.* at 198-99.

⁸⁵ 527 F.2d 363 (2d Cir. 1975), *rev'd*, 432 U.S. 98 (1977).

⁸⁶ 527 F.2d at 371.

⁸⁷ *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977).

⁸⁸ An unreasonable search or seizure, of course, is a completed violation of the fourth amendment whether or not the evidence is later introduced at trial. It is unclear whether station house questioning without a *Miranda* waiver is similarly a completed violation of the fifth amendment. See H. FRIENDLY, *supra* note 70, at 279-80. Post-

On further reflection, however, Friendly's decision becomes less mysterious. For one thing, the misleadingly described "per se" exclusionary rule came into play only after a prior determination that the confrontation procedure was both unduly and unnecessarily suggestive. Had the exclusionary rule in the custodial interrogation context been similarly conditioned, the Judge would have found it far more palatable, for he has never taken the position that inculpatory statements obtained by truly coercive means should be admissible in evidence merely because the statements themselves are circumstantially corroborated or otherwise reliable. More important, the balance of social benefits and costs was far more favorable to exclusion in the identification than in the interrogation context. On the benefit side, there are far stronger empirical grounds for distrusting eyewitness identifications than for doubting the self-incriminating statements of suspects under normal police questioning even in the station house setting. As the Supreme Court has observed, the "vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."⁸⁹ Indeed, in the view of one commentator, "The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor," more perhaps "than all other factors combined."⁹⁰ Thus Judge Friendly's sensitivity to the "awful risks of misidentification" was entirely in keeping with his larger conviction that the accurate determination of guilt or innocence is the foremost objective of criminal procedure. Given the ready availability of more neutral confrontation procedures, and the ease with which a flexible exclusionary rule can be watered down in practice, nothing less than a per se rule might have been thought adequately protective. On the cost side of the equation, compliance with the *Miranda* rules, by encouraging suspects to clam up, often deprives the authorities of reliable evidence vital not only to the conviction of a guilty suspect but also to other law enforcement objectives—the apprehension of confederates, the prevention of ongoing or future crime, and the recovery of stolen goods or kidnapped persons. Such consequences would rarely flow from the use of a proper identification procedure, especially when exception is made, as in *Stovall*, for emergency situations. Here, moreover, in contrast to the *Miranda* situ-

arraignment questioning in the absence of counsel is clearly not a completed violation of the sixth amendment if the information gathered is not subsequently used against the arraigned defendant at trial. See *Massiah v. United States*, 377 U.S. 201, 206-07 (1964).

⁸⁹ *United States v. Wade*, 388 U.S. 218, 228 (1967).

⁹⁰ P. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 26 (1965), quoted in *United States v. Wade*, 388 U.S. 218, 229 (1967).

ation, the constable's blunder will seldom set the criminal free; the tainted identification can be replaced by a later one, usually in court, provided only that the latter is known, in all the circumstances, to be reliable.

Another example of Judge Friendly's due process analysis, albeit in a somewhat different context, is worth some discussion, not only because the decision has been widely followed, but also because it contrasts with the Supreme Court's approach to the same general problem. *Johnson v. Glick*⁹¹ was a section 1983 action by a prisoner against a guard who allegedly attacked him without provocation and detained him for lengthy periods in a holding cell.⁹² Friendly, writing for the panel, held that although the complaint did not state a claim of cruel and unusual punishment under the eighth amendment, "quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law," and the same principle extends "to acts of brutality by correctional officers, although the notion of what constitutes brutality may not necessarily be the same."⁹³ The opinion is notable for its formulation of the standard to be used in distinguishing "constitutional batteries" from the common law variety.

The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.⁹⁴

Despite some unresolved difficulties,⁹⁵ the approach adopted in

⁹¹ 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

⁹² *Id.* at 1029-30.

⁹³ *Id.* at 1032, 1033.

⁹⁴ *Id.* at 1033.

⁹⁵ The *Johnson* opinion does not adequately explain why the standard for "constitutional battery" must be higher than for its state law counterpart. It is not enough to say that prison guards in disciplinary situations may need greater latitude in the use of force than ordinary people in ordinary situations; this may be the basis for a defense of

Johnson seems less problematic than the Supreme Court's quite different approach to the problem of "constitutional torts" under the due process clause. In *Ingraham v. Wright*,⁹⁶ the Court held that corporal punishment in public schools "implicates a constitutionally protected liberty interest."⁹⁷ But rather than measuring the teacher's conduct by a constitutional yardstick of the sort fashioned by Judge Friendly for the prison guard, the Court concluded instead that in view of the existence of a "common-law privilege permitting teachers to inflict reasonable corporal punishment" and the "availability of [state judicial] remedies for abuse," due process was satisfied and a federal remedy therefore unavailable.⁹⁸ In a similar vein, it held in *Parratt v. Taylor*⁹⁹ that the loss of a prisoner's hobby kit through the negligence of the warden was not actionable under the fourteenth amendment—not as Justice Powell, and doubtless Judge Friendly, would have had it, because the triviality of the misconduct and the injury did not rise to the level of an unconstitutional "deprivation" but because, given the availability of state judicial remedies, the deprivation was not "without due process."¹⁰⁰

This approach, carried to the limits of its logic, makes the fourteenth amendment both overinclusive and underinclusive: overinclusive when applied to situations in which there has clearly been a "deprivation of liberty" in the dictionary sense but no state remedy is available (for example, the personal injury inflicted on a jaywalking pedestrian by a nonnegligently driven police car in the midst of a chase); underinclusive in the converse situation, involving truly egregious misconduct (for example, the brutal behavior of the police in *Monroe v. Pape*)¹⁰¹ fully actionable in the state courts.

No one imagines, of course, that the Court *will* press the *Ingraham-Parratt* logic to the limit. In the case of overinclusiveness, it will

privilege under state law as well. Perhaps all Judge Friendly meant was that there must be a nationally uniform federal standard under the due process clause rather than state-to-state variation. But the Judge's repeated references to *Rochin v. California*, 342 U.S. 165 (1952), and its famous "conduct that shocks the conscience" test suggest that no ordinary excess will suffice. See *Johnson v. Glick*, 481 F.2d at 1033. This conclusion, however, is clearly not compelled by the *language* of the due process clause, and Judge Friendly does not spell out the policy considerations (fear of trivializing the Constitution, preservation of federal judicial resources, reluctance to displace state authority) upon which he means it to rest.

⁹⁶ 430 U.S. 651.

⁹⁷ *Id.* at 672.

⁹⁸ *Id.* at 674, 683.

⁹⁹ 451 U.S. 527 (1981).

¹⁰⁰ *Id.* at 537, 543-44.

¹⁰¹ 365 U.S. 167 (1961), *overruled in part*, *Monnell v. Department of Social Servs.*, 436 U.S. 658 (1978).

cabin the constitutional remedy either by discarding the simplistic dictionary approach to "deprivation" in favor of a more refined delineation of the wrong or by further extending the catalogue of judicially implied privileges under section 1983. In the "underinclusiveness" situation the Court has already previewed its escape routes. In *Parratt* it distinguished *Monroe* on the ground that the violation there was of the fourth amendment, not the fourteenth alone, and thus did not hinge on the presence or absence of "due process." This distinction, however, is painfully artificial—not only because the fourth amendment binds the states only through the due process clause of the fourteenth—but because of its utterly irrational consequences. A police officer who beats up a citizen while searching her home (in violation of the fourth amendment) or while questioning her at the station house (in violation of her privilege against self-incrimination) or anywhere because of her race (in violation of the equal protection clause) would be liable in federal court under section 1983, whereas an officer who beats up a citizen on a street corner out of sheer dislike would not be.

A more promising basis for distinguishing *Parratt* from cases such as *Monroe* and *Johnson* is that the latter involved deprivations of liberty rather than, like *Parratt*, a deprivation of property. The liberty-property distinction makes some sense if the due process issue hinges solely on the adequacy of the state postdeprivation process as a substitute for a prior hearing that could have prevented the deprivation altogether. A damage recovery will more often more closely approach full restoration, rendering a prior hearing correspondingly less essential, in property cases than in liberty cases. Property loss, however, is not always fully repairable, nor is liberty loss always irreparable. More important, it can fairly be argued that in cases such as those we are discussing—where a predeprivation hearing is obviously unfeasible—that the proper comparison for due process purposes is between state and federal postdeprivation remedies, and that where the former is substantially as effective as the latter—and substantially as effective as possible—due process is satisfied. To be sure, the state remedy, though available and fully compensatory in theory, may not be sufficiently reliable in practice to be considered an acceptable substitute for postdeprivation scrutiny by a federal court. In holding that a citizen need not exhaust state judicial or administrative processes before bringing a federal court action under section 1983, the Supreme Court has repeatedly noted the deep distrust with which those state processes were viewed by the Congress that enacted that statute in 1871. The Congress that proposed the fourteenth amendment five years earlier undoubtedly shared that mistrust. Thus, whether the stake be liberty or property, to hold that the

existence on paper of a state tort remedy satisfies the due process requirement and insulates otherwise unconstitutional state action from scrutiny or redress by a federal court goes against the historic spirit of the amendment.

The two classes of deprivation might also be distinguished, of course, on the ground that property is a lesser interest more cheerfully exposed to the risk of state-court bias. That limitation, however, was rejected by the Supreme Court in *Lynch v. Household Finance Corp.*,¹⁰² in which Justice Stewart wrote that "the dichotomy between personal liberties and property rights is a false one,"¹⁰³ and that the federal courts have been "particularly bedeviled by 'mixed' cases in which both personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity."¹⁰⁴ Confining *Parratt* to deprivation of property cases would give rise to similar difficulties and anomalies. A citizen driver involved in a collision with a negligently driven police car would have a federal constitutional claim for personal injury but only a state law claim for her property damages. At all events, whatever the ultimate limiting principle, one can be fairly sure that cases involving physical abuse of suspects, prisoners, or other citizens will be governed in the end not by *Parratt*, but by a balancing text such as Judge Friendly's in *Johnson v. Glick*.

CONCLUSION

For twenty-five years Henry Friendly has occupied a preeminent position in American law. In nearly a thousand judicial opinions, and in other writings covering the legal landscape, he has uniquely combined the roles of judge and scholar. His opinions in the field of securities regulation—briefly and inadequately sampled above—are merely illustrative of the qualities that distinguish all his work: consummate craftsmanship; a principled common sense that pays attention to the practical consequences of decisions and to the efficient use of scarce judicial resources; avoidance of all-or-nothing approaches in favor of balancing, weighing, and the drawing of fine lines to reflect real but subtle differences; deference, where appropriate, to other decisionmakers, along with willingness, where necessary, to make hard moral choices; and obedience to higher judicial authority, without fear, from time to time, of testing its limits. In the tradition of Learned

¹⁰² 405 U.S. 538 (1972).

¹⁰³ *Id.* at 552.

¹⁰⁴ *Id.* at 551 (footnote omitted).

Hand, Judge Friendly has given absolutes no quarter. "Moderation is all."