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PLAN

William Blackstone (1723-1780)
Oliver Wendell Holmes (1841-1935)
Frederic William Maitland (1850-1906)
Benjamin N. Cardozo (1870-1938)
Karl Llewellyn (1893-1962)
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TEXTE

1 On August 3, 1925, as he did on most mornings, James Greeley McGowin rose early. McGowin owned the W. T. Smith Lumber Co. in Chapman, Alabama. He liked to visit his mills before breakfast and encourage his employees, all of whom he knew by name.

2 On that morning, a large piece of timber waste was stuck against a post in the conveyor belt assembly in Mill No. 2. Joe Webb, then 58 years old and one of McGowin's employees, was at work clearing the jam. Webb's task was to climb up onto the conveyor, dislodge the wood, and push it to the floor. Webb freed the 75-pound block and rocked it over the edge. Gravity had laid claim to the block by the time Webb saw McGowin walking on the floor below. Webb immediately understood that the block would land on McGowin and, when falling from that height, probably kill him. Webb struggled to restrain the block but lost his balance and fell with it, holding on and managing to divert its trajectory. The block missed McGowin and landed on Webb himself, breaking his right leg and arm and tearing off the heel of his right foot. Webb became disabled for life and incapable of gainful employment[1].

3 McGowin, the patriarch of one of the South's most prominent families, decided he owed a duty to Webb. It seems he made an oral promise to pay Webb an annuity for the rest of Webb's life at the rate of $15 every two weeks, beginning from the date of his injury[2]. The payments were made regularly until McGowin died on January 1, 1934, and then continued for another four weeks, at which point the executors of McGowin's estate, two of McGowin's sons, decided to stop the payments.

4 Webb and his wife Lessie were dirt poor and unable to work outside the home. When the payments stopped, Webb sued McGowin's estate to enforce the promise and recover the unpaid installments. The executor demurred on the grounds that McGowin's promise was without consideration and therefore unenforceable. Under the common law's consideration doctrine, no promise is enforceable at law unless it is part of a bargain. McGowin's promise was not part of a bargain. Rather it was a promise to reward Webb for services already rendered. The trial court sustained the demurrer to all counts and dismissed the case.

5 The appellate court reversed. Though the court cited numerous cases, nothing in the precedent compelled the result. It would have been easier, and probably more consistent with the decisions, to decide against Webb. The Alabama Supreme Court affirmed[3].

6 That holding was subsequently adopted by the Restatement drafters[4], but the case law is not uniform[5], and the majority view is apparently to the contrary.

7 This is the celebrated American contracts case of *Webb v. McGowin*, a case many American law students read in their first-year Contracts course. There is much to say about the decision, but I'd like to focus here on one question. It is perhaps best posed by listening to Judge Samford, one of the appellate judges who decided the case. He concurred specially, writing the following:

> The questions involved in this case are not free from doubt, and perhaps the strict letter of the rule, as stated by judges, though not always in accord, would bar a recovery by plaintiff, but following the principle announced by Chief Justice Marshall... where he says, "I do

> not think that law ought to be separated from justice, where it is at most doubtful," I concur in the conclusions reached by the court.

8 Judge Samford clearly found meaning in this story. He recognized that a conventional application of the consideration doctrine would have led him to decide the case the other way. He did not follow the traditional rule because something in the facts spoke to him, something he found more important than the consideration doctrine, more important than following precedent. He called that something *justice*, because that is one of the terms we use to designate meaning in the law. This raises the question of how jurists find (or create) meaning in a set of facts and how that meaning interacts with the way they tell the story. As Robert Cover wrote, "[E]very narrative is insistent in its demand for its prescriptive point, its moral"[6]. Narratives are, as he wrote, the trajectories plotted on material reality by our imaginations.

9 The goal here is to focus for a moment on the judicial imagination. I would like to observe how the narratives Cover was thinking about are created. One way to approach this task is by examining some of the celebrated texts by judges and other jurists about how cases are decided in the common law. I would like to ask how the authors of a few of these books would think about and decide *Webb*. In other words, what do their theories suggest about how these authors might have told the story of *Webb v. McGowin*?

William Blackstone (1723-1780)

10 How might Blackstone have decided the case? If enforceability accorded with the longstanding customs of the English people, Blackstone would have enforced the promise. One way to decide whether a particular result embodies custom is to ask what those who inhabit the system would expect. This question would lead Blackstone to think of the case in the following terms. Most people recognize that services must be reciprocated. When an employer grants an employee a lifelong pension for saving the employer's life, would we generally expect that the promise would be legally binding? I have some evidence about this, since I ask my Contracts students every year to read and decide this case. Over a couple of decades, the students have voted

virtually unanimously in favor of Webb. Blackstone might therefore argue that the decision accords with law.

Oliver Wendell Holmes (1841–1935)

11 According to Holmes, it is not the role of the courts to enforce moral norms. For this reason, he endorsed the consideration doctrine. Courts should only intervene in a private dispute when essential societal institutions are in need of protection. As much as possible should be left to the individuals. As a result, Holmes would begin not by asking what the parties should do but rather whether it was socially necessary for the court to intervene in the dispute.

12 In Webb's case, Holmes may well have suggested that the fulfillment of McGowin's promise should be left to the individuals involved. Once McGowin had died, the decision about whether to keep the promise devolved to the executors, two Oxford graduates who were heirs to the McGowin fortune. Holmes would have thought it more important to assure sufficient opportunity for individual decision making than it would be to enforce Webb's annuity.

Frederic William Maitland (1850–1906)

13 Maitland believed that the purpose of legal history is to ferret out the antiquated elements of the common law and thereby permit them to be replaced with more productive doctrines. Maitland would have understood the consideration doctrine as a historical remnant, the result of a characterization difficulty that arose in the context of the forms of action.

14 Webb was McGowin's employee who, by his act, rendered a service to McGowin. McGowin's promise had the effect of liquidating the value of Webb's services. There is no reason to allow the historical accident of the consideration doctrine to determine the outcome. Maitland might well have considered McGowin's promise enforceable.

Benjamin N. Cardozo (1870–1938)

15 Cardozo would have focused on the relationship between employer and employee. Both parties took that relationship seriously. McGowin interacted every morning with his employees, each of whom he could greet by name. He inspired the kind of loyalty that induced Joe Webb to save McGowin's life.

16 Once Webb suffered injury from his selfless act, the relationship required Webb to reciprocate. This obligation, though not legal, was inherent in the nature of the specific bond. McGowin's promise and his continued payment confirmed the obligation. The question for the court was whether it should exonerate McGowin's estate from obligations McGowin had recognized and fulfilled over the years. Cardozo would have respected the nuances of reciprocity and enforced the promise.

Karl Llewellyn (1893–1962)

17 Karl Llewellyn might have begun by noting that his teacher, Arthur Corbin, had pointed out long since that the judicial opinions never actually recognized a binding consideration doctrine [7]. Moreover, the decisions are not about doctrine. The essential question in a case is *never* how to apply a legal rule. The question in *Webb* was not how to structure the consideration doctrine but rather whether McGowin's executors should be required to continue making payments to Webb. To answer *this* question, Llewellyn would first have come to an appreciation of the facts and then he would have shaped the consideration doctrine to produce the proper result.

18 McGowin considered himself bound, not only by his promise, but even more by the circumstances. Nothing that occurred in the real world gave any reason for a court to proscribe further payments. If problem there was, it arose solely due to a quirk in the legal system, namely that McGowin's executor could make payment only on obligations considered to be legally binding. In this case, a strict application of the consideration doctrine would accomplish the opposite of the doctrine's presumed purpose. In the area of gratuitous promises, the consideration doctrine is often thought to pursue the goal of refusing

enforcement to unintended promises. In *Webb*, on the contrary, the consideration doctrine would prevent the performance of a promise which the promisor considered binding. Llewellyn would not have permitted the law to reach a result contrary not only to the thrust of the facts but that also contradicted the purpose of the norm itself. Llewellyn too would have enforced McGowin's promise.

Grant Gilmore (1910–1982)

19 Though both Gilmore and Corbin discussed *Webb v. McGowin* in their writings, neither attempted to explain the case, and neither mentioned how they thought it should be decided[8]. Instead, the case provides for both of them an intriguing example of how courts act in challenging circumstances. Both authors noted that other cases have gone the other way.

20 This non-prescriptive approach to legal theory was the final wisdom of legal realism. It is meaningless for theorists to tell the courts how to decide the cases. We should perhaps analogize the process to the way an artist paints a portrait – nothing is gained by trying to dictate rules. Instead, we should examine the paintings with care in order learn from them how such magic is performed.

Richard Posner (born 1939)

21 Posner often discussed the calculus by which a case like *Webb* should be resolved. If the probability that McGowin would be killed without the rescue attempt exceeded the probability of Webb's own injuries, and if McGowin's life was at least as valuable as Webb's, then, if the parties had been able to discuss the matter in advance, McGowin presumably would have hired Webb to save him. The courts therefore should enforce the promise.

Roberto Mangabeira Unger (born 1947)

22 *Webb v. McGowin* presents the type of doctrinal conflict that, for Unger, structures the private law. Enforcement of the consideration doctrine often denies respect for moral obligation. Following the

consideration doctrine favors the market. It enforces only those promises based on profit and gain, getting and spending. The judge who respects moral obligation, on the other hand, confirms that our lives consist of more than the marketplace and that the human relationships that bind us together are more powerful than the individualistic strivings that keep us apart.

23 There is no necessary result in Unger's view. Instead, he would say simply that those who favor social solidarity would enforce McGowin's promise.

The Role of the Rules

24 By focusing on these differing ways of describing the stakes of a single case, it becomes apparent that cases are not decided by applying rules to the facts. That is partially because there are no rules, at least not in the sense that we usually give to the term, namely legal norms that pre-exist and decide the cases. A rule is rather a product of a judicial narrative. Precedent is not decisive. Adjudication is a complex process that takes the rules and precedents into account along with numerous other factors that affect how the judge abstracts meaning from a situation. Each case is decided on its own facts, every case is a case of first impression.

Competing views

25 An analysis of the style of these texts yields a second consequence. There is a leisurely tone to much of this writing and only rarely a sense of urgency. Most of them take the wisdom of the common law for granted and do not seek to probe too deeply about how the decisions are made, especially, for some reason, the difficult ones.

26 A passage from Cardozo might explain their equanimity. He believed that, in some cases, the arguments are equally balanced. "In a sense," he wrote, "it is true of many of them that they might be decided either way. By that I mean that reasons plausible and fairly persuasive might be found for one conclusion as for another"[9]. Cardozo is certainly right about that. In fact, from the perspective of a practicing lawyer, it would seem that a good argument can generally be made on both sides of most cases.

27 Cardozo himself did not pursue the matter, but Llewellyn drew the inexorable conclusion. If the arguments in a case are so equally balanced that a convincing narrative can be created for either side, then it does not much matter to the law which way it is decided[10]. Of course the decision may matter deeply to the parties. But the decision does not matter *to the law*. As long as the narratives are sufficient to weave the proposed decision into the fabric of the law, either decision is acceptable. An extremely small number of decisions are essentially lawless – they cannot be justified by any plausible legal argument. This handful of decisions aside, the common law has developed a structure that may comfortably accept virtually any decision. Either decision is generally defensible, and neither would upset the framework of the common law.

28 *Webb v. McGowin* is a good example. The moral consideration question was decided one way in *Webb*, the other way in *Harrington v. Taylor*. The Restatement prefers *Webb* but does not dismiss *Harrington*[11]. The hornbooks distinguish a majority and a minority rule (*Webb* is in the minority), but also do not find it necessary or useful to resolve the dispute[12].

29 In other words, it makes no sense to search for a right answer to a legal dispute in the common law. There is rarely a right answer. There are usually only narratives with different resonances. The common law has created an amazing structure in which the very concept of a correct narrative is incoherent. There are answers that, for various reasons, we like more or less, that can be appreciated for different reasons, that can be admired for their creativity and daring, but none of them is right – and virtually none of them is wrong. They are simply the meanings that particular judges have found in particular situations at particular moments. The common law has created a system that encourages judges to take personal responsibility for finding meaning in the facts and a structure that can accommodate whatever narratives those judges imagine as they pursue that quest.

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NOTES

1 *Webb v. McGowin*, 168 So. 196, 196-197 (Ala. App. 1935). These facts are taken from the statement of facts in the appellate opinion, which in turn relied on the facts alleged in Webb's complaint, as well as from subsequent interviews about the case summarized in Danzig and Watson 149-184, and from a related blog post, lawprofessors.typepad.com/contracts-prof_blog/2009/04/more-on-webb-v. html.

2 The parties disagreed about whether the promise had been made, and, if so, by whom, and also about its content. See Danzig and Watson 166. For purposes of judgment on the pleadings, the courts accepted Webb's allegations. The amount of the promise seems to have been based on standard rates for worker's compensation. The purport of the promise may thus have been to extend worker's comp benefits, which would have ended after 300 months, to the end of Webb's life.

3 168 So. 199 (1936).

4 Restatement (Second) of Contracts § 86 illus. 7 (1981).

5 For the opposing solution, see *Harrington v. Taylor*, 36 S.E.2d 227 (N.C. 1945), discussed in Danzig and Watson 185-213. See also *Mills v. Wyman*, 20 Mass. 207 (1825).

6 Cover 5.

7 Corbin § 109 at 161.

8 See Corbin § 231 at 325 (example no. 7); Gilmore 75.

9 Cardozo 165.

10 "[I]t will not matter so much how it is done, in a baffling instance, so long as it is done at all." Llewellyn 39-40.

11 The Restatement cites *Webb* in the Reporter's Note, then adds "But cf. *Harrington v. Taylor*..." 1 Restatement (Second) of Contracts § 86 Reporter's Note to comment d at 228.

12 "In the ordinary case, however, receipt of unrequested benefits creates no legal obligation. If a subsequent promise is made to pay for these benefits, the majority of cases hold that the promise is unenforceable [citing *Harrington* and other cases]. A minority of cases, accepting the moral obligation concept, are to the contrary.... [citing *Webb* and other cases]." Perillo § 5.4 at 200.

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