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Judgment Intuitive The Function of the Hunch in Judicial Decision

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THE JUDGMENT INTUITIVE: THE FUNCTION OF THE "HUNCH"[1] IN JUDICIAL DECISION

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Many years ago, at the conclusion of a particularly difficult case both in point of law and of fact, tried to a court without a jury, the judge, a man of great learning and ability, announced from the Bench that since the narrow and prejudiced modern view of the obligations of a judge in the decision of causes prevented his resort to the judgment aleatory by the use of his "little, small dice" he would take the case under advisement, and, brooding over it, wait for his hunch.

To me, a young, indeed a very young lawyer, picked, while yet the dew was on me and I had just begun to sprout, from the classic gardens of a University, where I had been trained to regard the law as a system of rules and precedents, of categories and concepts, and the judge had been spoken of as an administrator, austere, remote, "his intellect a cold logic engine," who, in that rarified atmosphere in which he lived coldly and logically determined the relation of the facts of a particular case to some of these established precedents, it appeared that the judge was making a jest, and a very poor one, at that.

I had been trained to expect inexactitude from juries, but from the judge quite the reverse. I exalted in the law its tendency to formulize. I had a slot machine mind. I searched out categories and concepts and, having found them, worshiped them.

I paid homage to the law's supposed logical rigidity and exactitude. A logomachist, I believed in and practiced logomancy. I felt a sense of real pain when some legal concept in which I had put my faith as permanent, constructive and all-embracing opened like a broken net, allowing my fish to fall back into the legal sea. Paraphrasing Huxley, I believed that the great tragedy of the law was the slaying of a beautiful concept by an ugly fact. Always I looked for perfect formulas, fact proof, concepts so general, so flexible, that in their terms the jural relations of mankind could be stated, and I rejected most vigorously the suggestion that there was, or should be, anything fortuitous or by chance in the law. Like Jurgen I had been to the Master Philologist and with words he had conquered me.

I had studied the law in fragments and segments, in sections and compartments, and in my mind each compartment was nicely and logically arranged so that every case presented to me only the

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[1]"A strong, intuitive impression that something is about to happen." WEBSTER, INTERNATIONAL DICTIONARY.

problem of arranging and re-arranging its facts until I could slip it into the compartment to which it belonged. The relation of landlord and tenant, of principal and agent, of bailor and bailee, of master and servant, these and a hundred others controlled my thinking and directed its processes.

Perceiving the law as a thing fullgrown, I believed that all of its processes were embraced in established categories, and I rejected most vigorously the suggestion that it still had life and growth, and if anyone had suggested that the judge had a right to feel, or hunch out a new category into which to place relations under his investigation, I should have repudiated the suggestion as unscientific and unsound, while as to the judge who dared to do it, I should have cried "Away with him! Away with him!"

I was too much influenced by the codifiers, by John Austin and Bentham, and by their passion for exactitude. I knew that in times past the law had grown through judicial action; that rights and processes had been invented by the judges, and that under their creative hand new remedies and new rights had flowered.

I knew that judges "are the depositories of the laws like the oracles, who must decide in all cases of doubt and are bound by an oath to decide according to the law of the land,"[2] but I believed that creation and evolution were at an end, that in modern law only deduction had place, and that the judges must decide "through being long personally accustomed to and acquainted with the judicial decisions of their predecessors."[3]

I recognized, of course, that in the preparation of the facts of a case there was room for intuition, for feeling; that there was a sixth sense which must be employed in searching out the evidence for clues, in order to assemble facts and more facts, but all of this before the evidence was in. I regarded the solution of the problem when the evidence was all in as a matter for determination by the judge by pure reason and reflection, and while I knew that juries might and did arrive at their verdicts by feeling, I repudiated as impossible the idea that good judges did the same.

I knew, of course, that some judges did follow "hunches,"—"guesses" I indignantly called them. I knew my Rabelais, and had laughed over without catching the true philosophy of old Judge Bridlegoose's trial, and roughly, in my youthful, scornful way, I recognized four kinds of judgments; first the cogitative, of and by reflection and logomancy; second, aleatory, of and by the dice;

[2] 1 BL. COMM. 169. [3] *Ibid.*

third, intuitive, of and by feeling or "hunching;" and fourth, asinine, of and by an ass; and in that same youthful, scornful way I regarded the last three as only variants of each other, the results of processes all alien to good judges.

As I grew older, however, and knew and understood better the judge to whom I have in this opening referred; as I associated more with real lawyers, whose intuitive faculties were developed and made acute by the use of a trained and cultivated imagination; as I read more after and came more under the spell of those great lawyers and judges whose thesis is that "modification is the life of the law,"[4] I came to see that "as long as the matter to be considered is debated in artificial terms, there is danger of being led by a technical definition to apply a certain name and then to deduce consequences which have no relation to the grounds on which the name was applied;"[5] that "the process of inclusion and exclusion so often applied in developing a rule, cannot end with its first enunciation. The rule announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen."[6]

I came to see that "every opinion tends to become a law."[7] That "regulations, the wisdom, necessity and validity of which as applied to, existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, would probably have been rejected as arbitrary and oppressive, . . . and that in a changing world it is impossible that it should be otherwise."[8]

I came to see that "resort to first principles is, in the last analysis, the only safe way to a solution of litigated matters."[9]

I came to see that instinct in the very nature of law itself is change, adaptation, conformity, and that the instrument for all of this change, this adaptation, this conformity, for the making and the nurturing of the law as a thing of life, is the power of the brooding mind, which in its very brooding makes, creates and changes jural relations, establishes philosophy, and drawing away from the outworn past, here a little, there a little, line upon line, precept upon

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[4]CARTER, LAW, ITS ORIGIN, GROWTH AND FUNCTION (1907). "Modification implies growth. It is the life of the law." Washington v. Dawson, 264 U. S. 219, 236, 44 Sup. Ct. 302 (1924), Brandeis, J., dissenting.

[5]Guy v. Donald, 203 U. S. 399, 406, 27 Sup. Ct. 63 (1926).

[6]Washington v. Dawson, *supra* note 4.

[7]Lochner v. New York, 198 U. S. 45, 76, 25 Sup. Ct. 539 (1905).

[8]Euclid Valley v. Ambler, 272 U. S. 365, 47 Sup. Ct. 114 (1926).

[9]Old Colony Trust Co. v. Sugarland Industries, 296 Fed. 129, 138 (S. D. Tex. 1924).

precept, safely and firmly, bridges for the judicial mind to pass the abysses between that past and the new future."[10]

So, long before I came to the Bench, and while I was still uncertain as to the function of the judge, his office seeming pale and cold to me, too much concerned with logomachy; too much ruled by logomancy, I loved jury trials, for there, without any body of precedent to guide them, any established judicial recognition of their right so to do, nay, in the face of its denial to them, I could see those twelve men bringing equity, "the correction of that wherein by reason of its universality the law is deficient," into the law.

There they would sit, and hearing sometimes the "still, sad music of humanity," sometimes "catching sight through the darkness of the fateful threads of woven fire which connect error with its retribution," wrestling in civil cases with that legal Robot, "the reasonably prudent man," in criminal cases with that legal paradox, "beyond a reasonable doubt," would hunch out just verdict after verdict by the use of that sixth sense, that feeling, which flooding the mind with light, gives the intuitional flash necessary for the just decision.

Later, when I became more familiar with the practices in admiralty and in equity, more especially when, a judge in such cases, I felt the restless, eager ranging of the mind to overcome the confusion and the perplexities of the evidence, or of constricting and outworn concepts, and so to find the hidden truth, I knew that not only was it the practice of good judges to "feel" their way to a decision of a close and difficult case, but that in such cases any other practice was unsound. "For it is no paradox to say that in our most theoretical moods we may be nearest to our most practical applications."

I knew that "general propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."[11]

And so, after eleven years on the Bench following eighteen at the Bar, I, being well advised by observation and experience of what I am about to set down, have thought it both wise and decorous to now boldly affirm that "having well and exactly seen, surveyed,

[10]"Judges do and must legislate, but they can do so only interstitially. They are confined from Molar to molecular motions. A common law judge could not say, I think the doctrine of consideration a bit of historical nonsense, and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common law rules of master and servant, and propose to introduce them here *en bloc*." Southern Pacific v. Jensen, 244 U. S. 205, 221, 37 Sup. Ct. 524 (1917), Holmes, J., dissenting. [11]*Ibid.*

overlooked, reviewed, recognized, read and read over again, turned and tossed about, seriously perused and examined the preparitories, productions, evidences, proofs, allegations, depositions, cross speeches, contradictions... and other such like confects and spiceries, both at the one and the other side, as a good judge ought to do, I posit on the end of the table in my closet all the pokes and bags of the defendants—that being done I thereafter lay down upon the other end of the same table the bags and satchels of the plaintiff."[12]

Thereafter I proceed "to understand and resolve the obscurities of these various and seeming contrary passages in the law, which are laid claim to by the suitors and pleading parties," even just as Judge Bridlegoose did, with one difference only. "That when the matter is more plain, clear and liquid, that is to say, when there are fewer bags," and he would have used his "other large, great dice, fair and goodly ones," I decide the case more or less off hand and by rule of thumb. While when the case is difficult or involved, and turns upon a hairsbreadth of law or of fact, that is to say, "when there are many bags on the one side and on the other" and Judge Bridlegoose would have used his "little small dice," I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.

And more, "lest I be stoned in the street" for this admission, let me hasten to say to my brothers of the Bench and of the Bar, "my practice is therein the same with that of your other worships."[13]

For let me premise here, that in feeling or "hunching" out his decisions, the judge acts not differently from, but precisely as the lawyers do in working on their cases, with only this exception; that the lawyer, having a predetermined destination in view,—to win his law suit for his client—looks for and regards only those hunches which keep him in the path that he has chosen, while the judge, being merely on his way with a roving commission to find the just solution, will follow his hunch wherever it leads him, and when, following it, he meets the right solution face to face, he can cease his labors and blithely say to his troubled mind—"Trip no farther, pretty sweeting, journeys end in lovers meeting, as every wise man's son doth know."

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[12]RABELAIS, BOOK III, c. 39. [13]*Ibid.*

Further, at the outset, I must premise that I speak now of the judgment or decision, the solution itself, as opposed to the apologia for that decision; the decree, as opposed to the logomachy, the effusion of the judge by which that decree is explained or excused. I speak of the judgment pronounced, as opposed to the rationalization by the judge on that pronouncement.

I speak, in short, of that act of definitive sentence of which Trinquamelle and Bridlegoose discoursed.

"But when you do these fine things" quoth Trinquamelle, "how do you, my fine friend, award your decrees and pronounce judgment?" "Even as your other worships," quoth Bridlegoose, "for I give out sentence in his favor unto whom hath befallen the best chance by the dice, judiciary, tribunian, pretorial, which comes first. So doth the law command."[14]

And not only do I set down boldly that I, "even as your other worships do," invoke and employ hunches in decisions, but I do affirm, and will presently show, that it is that tiptoe faculty of the mind which can feel and follow a hunch which makes not only the best gamblers, the best detectives, the best lawyers, the best judges, the materials of whose trades are the most chancey because most human, and the results of whose activities are for the same cause the most subject to uncertainty and the best attained by approximation, but it is that same faculty which has guided and will continue to guide the great scientists of the world,[15] and even those august dealers in certitude, the mathematicians themselves, to their most difficult solutions, which have opened and will continue to open hidden doors; which have widened and will ever widen man's horizon.

"For facts are sterile until there are minds capable of choosing between them and discerning those which conceal something, and recognizing that which is concealed. Minds which under the bare fact see the soul of the fact."[16]

I shall further affirm, and I think maintain, that the judge is, in the exercise of this faculty, popularly considered to be an attribute of only the gambler and the short story detective, in the most gallant of gallant companies; a philosopher among philosophers, and I shall not fear to stand, unrebuked and unashamed before my brothers of the Bench and Bar.

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[14] *Ibid.*

[15] "The method of science indeed is the method of the Chancery Court—it involves the collection of all available evidence and the subjection of all such evidence to the most searching examination and cross examination." GREGORY, DISCOVERY, THE SPIRIT AND SERVICE OF SCIENCE 166, quoting H. E. Armstrong.

[16] *Ibid.*, at 170, quoting Henri Poincare.

I remember once, in the trial of a patent case, where it was contended with great vigor on the one side that the patent evidenced invention of the highest order, and with equal vigor on the other that the device in question was merely a mechanical advance, I announced, almost without any sense of incongruity, that I would take the case under advisement, and after "having well and exactly seen and surveyed, overlooked, reviewed, read and read over again" etc., all of the briefs, authorities and the record, would wait awhile before deciding to give my mind a chance to hunch it out, for if there was the flash of invention in the device my mind would give back an answering flash; while if there were none, my mind would, in a dully cogitative way, find only mechanical advance.

One of the lawyers, humself a "huncher," smiled and said—"Well, Your Honor, I am very grateful to you for having stated from the Bench what I have long believed, but have hesitated to avow, that next to the pure arbitrament of the dice in judicial decisions, the best chance for justice comes through the hunch." The other lawyer, with a different type of mind, only looked on as though impatient of such foolery.

But I, proceeding according to custom, got my hunch, found invention and infringement, and by the practice of logomachy so bewordled my opinion in support of my hunch that I found myself in the happy situation of having so satisfied the intuitive lawyer by the correctness of the hunch, and the logomachic lawyer by the spell of my logomancy, that both sides accepted the result and the cause was ended.

Now, what is this faculty? What are its springs, what its uses? Many men have spoken of it most beautifully. Some call it "intuition"—some; "imagination," this sensitiveness to new ideas, this power to range when the track is cold, this power to cast in ever widening circles to find a fresh scent, instead of standing baying where the track was lost.

"Imagination, that wondrous faculty, which properly controlled by experience and reflection, becomes the noblest attribute of man, the source of poetic genius, the instrument of discovery in science."[17]

"With accurate experiment and observation to work upon, imagination becomes the architect of physical theory. Newton's passage from a falling apple to a falling moon was an act of the prepared imagination without which the laws of Keppler could never have been traced to their foundations.

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[17]Address to the Royal Society of England, November 3, 1859, Sir Benjamin Brodie, quoted from FRAGMENTS OF SCIENCE, 109.

"Out of the facts of chemistry the constructive imagination of Dalton formed the atomic theory. Scientific men fight shy of the word because of its ultra-scientific connotations, but the fact is that without the exercise of this power our knowledge of nature would be a mere tabulation of co-existences and sequences."[18]

Again—"There is in the human intellect a power of expansion, I might almost call it a power of creation, which is brought into play by the simple brooding upon facts. The legend of the spirit brooding over chaos may have originated in experience of this power."[19]

It is imagination which, from assembled facts, strikes out conclusions and establishes philosophies. "Science is analytical description. Philosophy is synthetic interpretation. The philosopher is not content to describe the fact; he wishes to ascertain its relation to experience in general, and thereby to get at its meaning and its worth. He combines things in interpretative synthesis. To observe processes and to construct means is science. To criticize and coordinate ends is philosophy. For a fact is nothing except in relation to desire; it is not complete except in relation to a purpose and a whole. Science, without philosophy, facts without perspective and valuation cannot save us from havoc and despair. Science gives us knowledge, but only philosophy can give us wisdom."[20] Cardozo expresses it most beautifully.

"Repeatedly, when one is hard beset, there are principles and precedents and analogies which may be pressed into the service of justice, if one has the perceiving eye to use them. It is not unlike the divinations of the scientist. His experiments must be made significant by the flash of a luminous hypothesis. For the creative process in law, and indeed in science generally, has a kinship to the creative process in art. Imagination, whether you call it scientific or artistic, is for each the faculty that creates."

"Learning is indeed necessary, but learning is the springboard by which imagination leaps to truth. The law has its piercing intuitions, its tense, apocalyptic moments. We gather together our principles and precedents and analogies, even at times our fictions, and summon them to yield the energy that will best attain the jural end. If our wand has the divining touch, it will seldom knock in vain. So it is that the conclusion, however deliberate and labored, has often the aspect of a lucky find."

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[18]"Scientific Use of the Imagination" Address delivered before the British Association at Liverpool, Sept. 16, 1860 by Tyndall, quoted from FRAGMENTS OF SCIENCE, III.

[19]*Ibid.*, at 114. [20]DURANT, STORY OF PHILOSOPHY.

" 'When I once asked the best administrator whom I knew,' writes Mr. Wallas, 'how he formed his decisions, he laughed, and with the air of letting out for the first time a guilty secret, said: 'Oh, I always decide by feeling. So and so always decides by calculation, and that is no good.' When again I asked an American judge, who is widely admired both for his skill and for his impartiality, how he and his fellows formed their conclusions, he also laughed, and said that he would be stoned in the street if it were known that, after listening with full consciousness to all the evidence, and following as carefully as he could all the arguments, he waited until he "felt" one way or the other. He had elided the preparation and the brooding, or at least had come to think of them as processes of faint kinship with the state of mind that followed.' 'When the conclusion is there', says William James, 'we have already forgotten most of the steps preceding its attainment.' "[21]

Collision cases in admiralty furnish excellent illustrations of the difficulty of arriving at a sound fact conclusion by mere reasoning upon objective data. In these cases, as every trier knows, the adherents of the respective ships swear most lustily in true seagoing fashion for their side, and if a judge were compelled to decide the case by observing the demeanor of the witnesses alone, he would be in sad plight, for at the end of eleven years upon the Bench I am more convinced than ever that the shrewdest, smartest liars often make the most plausible and satisfactory witnesses, while the humblest and most honest fellows often, upon the witness stand, acquit themselves most badly.

Now, in such circumstances, deprived of the hunch which is the clue to judgment, "the intuition more subtle than any major premise," it would be better for the judge either to resort to the device of summoning the litigants "to personally compear before him a precise hundred years thereafter to answer to some interrogatories touching certain points which were not contained in the verbal defense"[22] or to use the "little small dice" in which Judge Bridlegoose placed so much confidence in tight cases, than to try to decide the case by rule of thumb upon the number of witnesses, or the strength of their asseverations.

Fortunately, however, in these cases the judge may, reconciling all the testimony reconcilable, and coming to the crux of the conflict, having a full and complete picture of the scene itself furnished by the actors, re-enact the drama and as the scene unfolds with the

[21]CARDOZO, PARADOXES OF LEGAL SCIENCE (1928) 59, 60.
[22]RABELAIS, BOOK III, c. 44.

actors each in the place assigned by his own testimony, play the piece out, watching for the joints in the armor of proof, the crevices in the structure of the case or its defense. If the first run fails, the piece may be played over and over until finally, when it seems perhaps impossible to work any consistent truth out of it, the hunch comes, the scenes and the players are rearranged in accordance with it, and lo, it works successfully and in order.

If in other causes this faculty of "feeling" the correct decision is important to the successful trier of facts, it is doubly so in patent cases for "it is not easy to draw the line which separates the ordinary skill of a mechanic versed in his art, from the exercise of patentable invention, and the difficulty is especially great in the mechanic arts, where the successive steps in improvements are numerous, and where the changes and modifications are introduced by practical mechanics."[23]

Mr. Roberts, in his scholarly and exhaustive treatise on *Patentability and Patent Interpretation*, has this to say of the Krementz case:

> "How the court could have arrived at the conclusion that this case furnished an instance of patentable invention is very difficult to understand in view of its attitude toward many other cases. . . . The explanation must be sought in the fact that no objective criteria has ever been recognized as decisive of the question of patentability, and that accordingly each case has had to be decided upon consideration of what the judicial mind could determine to be, on the whole, just and fair under the particular circumstances which happened to be present."[24]

Nevertheless, says Roberts, "There have frequently been unmistakable indications of perplexity on the part of the judges when endeavoring to assign reasons for their decision one way or another in cases where patentable invention was doubtful" and commenting further on the remarks of Mr. Justice Shiras in the Krementz case at page 559, parts of which are quoted herein, he concludes:—

"This was not a logical conclusion founded upon well established premises; it was only a confession of doubt, and a guess induced by special considerations which could not furnish a rule for the determination of any other question of a similar kind."[25]

To relieve this "perplexity" and to avoid these "confessions of doubt" and "guesses induced by special considerations" Mr. Roberts proposes to substitute for the subjective determination which breeds these undesirable conditions, decisions upon purely objective criteria,

[23] Krementz v. S. Cottle Co., 148 U. S. 559.

[24] ROBERTS, PATENTABILITY, AND PATENT INTERPRETATION 181.

[25] *Ibid.*, at 181.

wholly dependent upon objective evidence, and wholly free from the influence of subjective bias.

"In short," says Roberts, "it is utterly futile to attempt to settle questions of patentability by resorting to merely subjective tests. All changes effected in the industrial arts are the production of thought, but it is impossible to discover any certain gauge for their rank in the inventive scale by simply contemplating the mental processes which have accomplished their origination."[26]

Mr. Roberts' effort, while vigorous and sustained, and supported by a wealth of learning, leaves me, as to the proposition that questions of invention may in all cases be decided upon purely objective criteria, without "the intuition more subtle than any major premise," cold.

Judges who have tried many patent cases, who have heard the testimony of experts, the one affirming the matter to be merely an advance in mechanical steps, the other to be invention of the highest order; the one affirming prior use, the other denying it; the one affirming it to be the flight of genius into new fields, the other, the mere dull trudging of an artisan, know that for a just decision of such causes no objective criteria can be relied on. They well know that there must be in the trier something of the same imaginative response to an idea, something of that same flash of genius that there is in the inventor, which all great patent judges have had, that intuitive brilliance of the imagination, that luminous quality of the mind, that can give back, where there is invention, an answering flash for flash.

Time was when judges, lawyers, law writers and teachers of the law refused to recognize in the judge this right and power of intuitive decision. It is true that the trial judge was always supposed to have superior facilities for decision, but these were objectivized in formulas, such as—the trial judge has the best opportunity of observing the witnesses, their demeanor,—the trial judge can see the play and interplay of forces as they operate in the actual clash of the trial.

Under the influence of this kind of logomachy, this sticking in the "skin" of thought, the trial judge's superior opportunity was granted, but the real reason for that superior position, that the trial creates an atmosphere springing from but more than the facts themselves, in which and out of which the judge may get the feeling which takes him to the desired end, was deliberately suppressed.

Later writers, however, not only recognize but emphasize this faculty, nowhere more attractively than in Judge Cardozo's lectures

[26] *Ibid.*, at 247.

before the law schools of Yale University, in 1921[27] and Columbia University in 1927,[28] while Max Radin, in 1925, in a most sympathetic and charming way, takes the judge's works apart, and shows us how his wheels go round.[29]

He tells us, first, that the judge is a human being; that therefore he does not decide causes by the abstract application of rules of justice or of right, but having heard the cause and determined that the decision ought to go this way or that way, he then takes up his search for some category of the law into which the case will fit.

He tells us that the judge really feels or thinks that a certain result seems desirable, and he then tries to make his decision accomplish that result. "What makes certain results seem desirable to a judge?" he asks, and answers his question that that seems desirable to the judge which, according to his training, his experience, and his general point of view, strikes him as the jural consequence that ought to flow from the facts, and he advises us that what gives the judge the struggle in the case is the effort so to state the reasons for his judgment that they will pass muster.

Now what is he saying except that the judge really decides by feeling, and not by judgment; by "hunching" and not by ratiocination, and that the ratiocination appears only in the opinion?

Now what is he saying but that the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause, and that the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics?

There is nothing unreal or untrue about this picture of the judge, nor is there anything in it from which a just judge should turn away. It is true, and right that it is true, that judges really do try to select categories or concepts into which to place a particular case so as to produce what the judge regards as a righteous result, or, to avoid any confusion in the matter of morals, I will say a "proper result."

This is true. I think we should go further, and say it ought to be true. No reasoning applied to practical matters is ever really effective unless motivated by some impulse.

"Occasionally and frequently, the exercise of the judgment ought to end in absolute reservation. We are not infallible, so we ought

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[27]CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

[28]*Supra* note 21.

[29]Radin, *Theory of Judical Decision* (1925) 2 AM. B. A. J. 359.

to be cautious."[30] "Sometimes," however, "if we would guide by the light of reason, we must let our minds be bold."[31]

The purely contemplative philosopher may project himself into an abstract field of contemplation where he reasons, but practical men, and in that judges must be included, must have impulses. The lawyer has them, and because he has them his work is tremendously important. If a lawyer merely reasoned abstractly and without motive he would do the judge no good. But the driving impulse to bring about his client's success not only makes him burrow industriously for precedents, and as industriously bring them forth, but also makes him belabor and cudgel the brains of the listening judge to bring him into agreement.

It is this factor in our jurisprudence, and only this, that clients have lawyers and that lawyers are advocates, which has made and will continue to make it safe for judges not only to state, but sometimes to make the law. "A thorough advocate in a just cause,—a penetrating mathematician facing the starry heavens, alike bear the semblance of divinity."

If the judge sat upon the Bench in a purely abstract relation to the cause, his opinion in difficult cases would be worth nothing. He must have some motive to fire his brains, to "let his mind be bold."

By the nature of his occupation he cannot have advocacy for either side of the case as such, so he becomes an advocate, an earnest one, for the—in a way—abstract solution. Having become such advocate, his mind reaches and strains and feels for that result. He says with Elihu, the son of Barachel, the Buzite, of the family of Ram—"There is a spirit in man, and the breath of the Almighty giveth him understanding. It is not the great that are wise, nor the aged that understand justice.———Hearken to me; I also will show mine opinion. For I am full of matter; the spirit within me constraineth me. Behold my belly is as wine which hath no vent. Like new wineskins it is ready to burst."[32]

And having travailed and reached his judgment, he struggles to bring up and pass in review before his eager mind all of the categories and concepts which he may find useful directly or by analogy, so as to select from them that which in his opinion will support his desired result.

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[30] *Op. cit. supra* note 15, at 36, quoting Faraday.

[31] Burns v. Bryan, 264 U. S. 504, 520, 44 Sup. Ct. 412 (1923), Brandeis, J., dissenting.

[32] JOB, CHAPTER 32, verses 9, 10, 18, 19.

For while the judge may be, he cannot appear to be, arbitrary. He must at least appear reasonable, and unless he can find a category which will at least "semblably" support his view, he will feel uncomfortable.

Sometimes he must almost invent a category, but he can never do quite that thing, for as we have seen, the growth of the law is interstitial, and the new category cannot be new enough wholly to avoid contact and placement in the midst of prior related categories.

But whether or not the judge is able in his opinion to present reasons for his hunch which will pass jural muster, he does and should decide difficult and complicated cases only when he has the feeling of the decision, which accounts for the beauty and the fire of some, and the labored dullness of many dissenting opinions.

All of us have known judges who can make the soundest judgments and write the dullest opinions on them; whose decisions were hardly ever affirmed for the reasons which they gave. Their difficulty was that while they had the flash, the intuitive power of judgment, they could not show it forth. While they could by an intuitive flash leap to a conclusion, just as an inventor can leap to his invention, just as often as an inventor cannot explain the result or fully understand it, so cannot and do not they.

There is not one among us but knows that while too often cases must be decided without that "feeling" which is the triumphant precursor of the just judgment, that just as "sometimes a light surprises the Christian while he sings," so sometimes, after long travail and struggle of the mind, there does come to the dullest of us, flooding the brain with the vigorous blood of decision, the hunch that there is, or is not invention; that there is or is not, anticipation; that the plaintiff should be protected by a decree, or should be denied protection. This hunch, sweeping aside hesitancy and doubt, takes the judge vigorously on to his decision; and yet, the cause decided, the way thither, which was for the blinding moment a blazing trail, becomes wholly lost to view.

Sometimes again that same intuition or hunch, which warming his brain and lighting his feet produced the decision, abides with the decider "while working his judgment backward" as he blazes his trail "from a desirable conclusion back to one or another of a stock of logical premises."[33]

It is such judicial intuitions, and the opinions lighted and warmed by the feeling which produced them, that not only give justice in

[33] *Supra* note 29.

the cause, but like a great white way, make plain in the wilderness the way of the Lord for judicial feet to follow.

If these views are even partly sound, and if to great advocacy and great judging the imaginative, the intuitional faculty is essential, should there not be some change in the methods of the study and of the teaching of the law in our great law schools? Should there not go along with the plain and severely logical study of jural relations study and reflection upon, and an endeavor to discover and develop, those processes of the mind by which such decisions are reached, those processes and faculties which, lifting the mind above the mass of constricting matter whether of confused fact or precedent that stands in the way of just decision, enable it by a kind of apocalyptic vision to "trace the hidden equities of divine reward, and to catch sight through the darkness, of the fateful threads of woven fire which connect error with its retribution?"[34]

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[34]RUSKIN, SESAME AND LILIES.