Chapter 3

JUDGING

We here offer you a highly unsystematic — if you like, arbitrary — selection of statements about what judges do, or ought to do. You have so far read only a handful of cases and you may feel ill equipped to answer the questions we raise. But we do not expect you to "answer" them; they are not in any event "answerable." We only expect that you give them serious thought. We have a fairly modest aim: to introduce you to some of the questions asked and some of the observations made, to acquaint you with the issues that face a judge and surround the judicial process, and perhaps to stimulate a desire for more concentrated study at a later time.

We also wish to inspire you to empathy with the task of judging. Too often, students impatiently dismiss judges' efforts because they do not "like" the opinions — sometimes out of disappointed idealism, sometimes out of a "gut reaction," a direct pipeline from stomach to mouth bypassing both the heart (which has its reasons, after all) and the head, and sometimes out of the opposite, a purely intellectual conviction that may indicate narrow-mindedness more than learning.

Several of the quotations that follow appear in Cardozo's *The Nature of the Judicial Process*,[1] a set of lectures setting out his philosophy of adjudication. They were, in other words, of concern to Cardozo. Try to think of why that was so.

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[1] Benjamin N. Cardozo, The Nature of the Judicial Process (Yale University Press 1921) [hereafter cited as *NJP*]. Benjamin N. Cardozo (1870-1938) was and is one of the most revered American jurists. The literature on Cardozo is extensive. The definitive biography is Andrew L. Kaufman, Cardozo (1998). You might enjoy an essay including personal reminiscences of the Justice by Milton Handler & Michael Ruby, *Justice Cardozo, One-Ninth of the Supreme Court*, 10 Cardozo L. Rev. 235 (1988). Richard Posner, Cardozo: A Study in Reputation (1990) is just what its subtitle says it is; Posner offers many cites to the literature, including some to the inevitable "debunkers." Cardozo had his greatest impact as Chief Judge of the New York Court of Appeals (the state's highest court), which, under his leadership, became the preeminent common law court in the country. His tenure on the United States Supreme Court was too brief for him to leave as large a mark there, although no less an authority than Justice Frankfurter wrote: "What is unparalleled in the history of the Supreme Court, is the impress he made on his judicial brethren during the less than six full terms that he served on the Court and the influence that he has left behind him." Felix Frankfurter, *Benjamin Nathan Cardozo*, *in* Felix Frankfurter, Of Life and Law and Other Things that Matter 185, 187 (Philip P. Kurland, ed., 1965). Even allowing for the exaggeration that attends assessments of Cardozo, *see* Posner, *supra*, it might fairly be said that Cardozo's Supreme Court stint was unusually significant given its brevity. For such an argument, *see* Richard D. Friedman, *On Cardozo and Reputation: Legendary Judge, Underrated Justice?*, 12 Cardozo L. Rev. 1923 (1991).

Cardozo was "the first modern judge to tell us how he decided cases, how he made law, and, by implication, how others should do so." Kaufman, *supra*, at 199. Many students who, at our urging, read *The Nature of the Judicial Process* (it is a slim volume) have told us how helpful they found it and how much it illuminated their law school experience in all their courses but especially in the first year.

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A. THE BASES OF JUDICIAL DECISIONS

Holmes[2]

> The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.[3]

Gray[4]

> We all agree * * * that many cases should be decided by the courts on notions of right and wrong, and, of course, everyone will agree that a judge is likely to share the notions of right and wrong prevalent in the community in which he lives; but suppose in a case where there is nothing to guide him but notions of right and wrong, that his notions of right and wrong differ from those of the community — which ought he to follow — his own notions, or the notions of the community? * * * I believe that he should follow his own notions.[5]

Are Holmes and Gray saying the same thing? If not, how do they differ?

What was the basis of the court's decision in *Kelly v. Gwinnell*? The "feelings and demands of the community" or the Justices' "notions of right and wrong"? Could it be both? Is there a problem when the two conflict?

Suppose that your community is empathetic and deeply compassionate toward people dying of AIDS. A landlord has evicted such a person. The law is "open" as to whether he may or may not do so. You are the judge. Will you follow *your* notions, *your community's* notions, or those of the *larger community* in which, let us stipulate, it is universally felt that the landlord should have the right to do what he did. What should you do if that were also "the law"?

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[2] Justice Oliver Wendell Holmes, Jr. (1841-1935) is an American legal figure of mythic but controversial proportions. Holmes was a thrice-wounded Civil War veteran, and his experiences in the war were to color his view of the world ever after. (When asked, years later, for the facts of his life he is said to have commented: "Since 1865 there hasn't been any biographical detail.") Holmes was a Judge on the Supreme Judicial Court of Massachusetts prior to his appointment to the U.S. Supreme Court, on which he sat from 1902-1932. The best-known American jurist of his day, if not in the nation's history, he has been both deified and reviled. The fluctuations in Holmes's reputation are described in G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. Chi. L. Rev. 51 (1971). For an interesting discussion and rich cites to the literature, *see* G. Edward White, *Holmes' "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. Rev. 1409 (1990). The many biographies of Holmes (not to mention a movie and a Broadway play) include Sheldon M. Novick, Honorable Justice (1989), and Liva Baker, The Justice from Beacon Hill (1991). A useful collection of Holmes's writings is The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr. (Richard Posner ed. 1997).

[3] Oliver Wendell Holmes, Jr., The Common Law 41 (1881).

[4] John Chipman Gray (1839-1915) served with Holmes in the Union Army and they were fellow students at Harvard Law School. After practicing in Boston, Gray became a law professor at Harvard, where he was a leading advocate of the "case method." He wrote two treatises in the field of property law, *Restraints on Alienation* (1883) and *The Rule Against Perpetuities* (1886), but is today best remembered for his jurisprudential work, *The Nature and Sources of the Law*.

[5] John Chipman Gray, The Nature and Sources of the Law § 610 (1909), *quoted in* NJP at 107–108.

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Is Holmes saying that the law should simply adopt and legitimize majoritarian prejudices, however unreasoned or immoral? Does this sentence "reduce[] all of jurisprudence to a single, frightening statement" that legitimizes any and all persecution of minorities?[6] Does congruence between the law and "the actual feelings and demands of the community" frighten you? Writing in 1945, one observer suggested: "If totalitarianism comes to America it will not come with saluting, 'heiling,' marching uniformed men * * * [but] through dominance in the judiciary of men who have accepted a philosophy of law that has its roots in Hobbes[7] and its fruition in implications from the philosophy of Holmes."[8]

If the linkage of Hitler and Holmes (or for that matter Hitler and Hobbes) shocks you (it does us) what follows sheds some light. In her biography of Holmes, Liva Baker writes:

> His patrician genealogy, his influence on American legal thought and jurisprudence, his sharply worded opinions read from the United States Supreme Court bench, particularly the dissents, even his more or less regular trips to a Washington burlesque house, had acquired a larger-than-life quality. It was said at the time that if you asked your neighbor to name the justices of the Supreme Court, he might name the chief justice, he might think of Louis Brandeis, but surely he would name Oliver Wendell Holmes. Holmes's birthdays were celebrated on the front pages of the *New York Times*. There was an Oliver Wendell Holmes Parent-Teacher Association in Cleveland, Ohio. And in 1946, Emmet Lavery wrote the popular Broadway play *The Magnificent Yankee*; Holmes was the first Supreme Court justice to be so portrayed.
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> It is unusual for a judge to capture the imagination and affection of the American people, to translate into a genuine folk hero. * * *
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> Then in the 1940s, as Hitler's hordes threatened to destroy what men who had been constructing it for at least five thousand years called civilization, a cult of detractors, led by a group of Jesuit professors scandalized by Holmes's lack of religious faith, formed to demythologize him. When they were through, his democratic sensitivities, his scholarship, and his standards were all found wanting, his work the mechanistic mischief of a materialist. In their zeal to create a modern Antichrist, these critics, like Holmes's admirers, also had distorted the picture.

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[6] Grant Gilmore, The Ages of American Law 49 (1977).

[7] [Ed. Fn.] Thomas Hobbes (1588-1679). Hobbes's best-known work, *Leviathan*, is an effort to articulate and justify a vision of strong sovereignty. Hobbes begins with two premises: (1) the state of nature, in which life was "solitary, poor, nasty, brutish, and short" (I *Leviathan* ch. 13), was intolerably anarchic, and (2) motivated by appetite and self-interest, mankind has as its primary goal self-preservation and the avoidance of violent death. To obtain peace and order, people give up certain natural rights, make a social contract, and create a sovereign. Readers of Hobbes vary in their assessment of just how all-powerful his sovereign is; detractors view Hobbes's vision as absolutist and totalitarian, supporters stress that Hobbes believed that the sovereign was limited by its own self-interest and deemed resistance permissible if the subject's life were in danger (for then the sovereign would not be performing the function for which it existed). [Ed. Fn.].

[8] Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 A.B.A. J. 569, 573 (1945).

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> In an easy effort of transference, Holmes's capacity for deferring to legislative enactment as an expression of majority will became an expression of authoritarianism, might makes right. Supported by an occasional secular scholar, this group created out of Holmes's writings a judicial monster whose jurisprudence came closer to the philosophy of the German dictator than to that of America's Founding Fathers.[9]

Consider the following story, told by Judge Learned Hand, for half a century a federal district and court of appeals judge and sometimes referred to as the single individual most nominated for the Supreme Court by others than the President of the United States:

> I remember once I was with [Justice Holmes]: it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupe. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: "Come here. Come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."[10]

Does this anecdote confirm or refute the picture of Holmes, totalitarian? In its light, could the quote from Montesquieu immediately following be just as readily attributed to Holmes? The quote from Blackstone?

Montesquieu

> In certain cases the law, which is both clairvoyant and blind, may be too harsh. But the judges of the nation * * * are only the mouths that pronounce the words of the law; inanimate beings who can moderate neither its force nor its rigor.[11]

Blackstone[12]

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[9] Baker, *supra* note 2, at 8, 10. For a more recent treatment that shares some of the doubts about Holmes voiced by his 1940s detractors, *see* Albert Alschuler, Law Without Values: The Life, Work, and Legacy of Justice Holmes (2000) (a portrait stressing Holmes's tendencies toward social Darwinism, eugenics, and the belief that might makes right).

[10] Learned Hand, The Spirit of Liberty 306–307 (Irving Dilliard ed., 3d ed. 1960). This story has been told, and modified, by many people for many purposes. For an overview and analysis of the different versions, *see* Michael Herz, *Do Justice! Variations on a Thrice-Told Tale*, 82 Virginia L. Rev. 11 (1996).

[11] Charles de Secondat de Montesquieu, De L'Esprit des Lois, bk. 11, ch. 6 (1748) (translated from the French), *quoted in part in* NJP at 169.

[12] You will come across Sir William Blackstone (1723-1780), an English lawyer, professor, and judge, with surprising frequency.

> Blackstone's *Commentaries on the Laws of England* (1765-1769) is the most important legal treatise ever written in the English language. It was the dominant lawbook in England and America in the century after its publication and played a unique role in the development of the fledgling American legal system. The book went through eight editions during Blackstone's lifetime; innumerable editions, revisions, abridgments, and translations appeared thereafter. Astonishingly, it can still be read with pleasure in the late twentieth century.

Stanley N. Katz, *Introduction* to 1 William Blackstone, Commentaries on the Laws of England at iii (1979).

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> [A] very natural, and very material, question arises: how are these customs or maxims [that form the common law] to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. * * * [J]udicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. * * * [I]t is not in the breast of any subsequent judge to alter or vary from [these prior decisions], according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.[13]

Were the majority of the judges on the New Jersey Supreme Court "only the mouths" that pronounced "the words of the law" in *Kelly v. Gwinnell*? If so, where did that law come from? Is there preexisting law, perhaps a just, "natural" law separate from, and external to, the law of the State of New Jersey and its judges? How would we go about discovering such a body of law?

Suppose there is an eternal body of law; must such a body necessarily contain a specific *rule* for the *Kelly* case — a rule, for example, which says: Where a social host provides liquor directly to a guest and continues to do so beyond the point at which the host knows the guest is drunk and does this knowing that the guest will shortly thereafter be operating a motor vehicle, the trial court should not grant summary judgment for defendant-host in a suit by a third party who suffered serious personal injuries as a consequence of the guest's drunken driving?

If that seems asking a bit much, then how about a background *principle* or *standard* — for instance, society has an interest in deterring behavior that is of little social utility but that endangers life and limb of innocent third parties? Or, principles of justice and fairness require that innocent third parties be compensated for injuries they sustain at the hands of actors whose behavior is of little social utility?

Perhaps some external and eternal body of law does contain such standards or principles. But stated at this level of generality, how do they help us to decide the case of Marie Kelly v. Mr. and Mrs. Joseph Zak?

And what explains the inability of dissenters to discover these rules (if they exist) or principles, and their insistence on disagreeing even when these rules and principles are pointed out?

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[13] 1 William Blackstone, Commentaries on the Laws of England *69–*70.

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A Detour into Rules and Standards

We suggest above that "rules" are something different from "standards" and "principles," from which it would follow that one cannot use these terms interchangeably. However, courts sometimes do so — see the first case in the Chapter 4 case sequence, *Barrett v. Southern Pacific Co.*, and especially Question (2) following the case.[14] It seems appropriate to try and get it straight now. The following may be helpful:[15]

> *I. Definitions.* — Here is the rules and standards debate in a nutshell. Law translates background social policies or political principles such as truth, fairness, efficiency, autonomy, and democracy into a grid of legal directives that decisionmakers in turn apply to particular cases and facts. In a non-legal society, one might apply these background policies or principles directly to a fact situation. But, in a society with laws, using the intermediary of legal directives is thought to make decisionmakers' lives easier, improve the quality of their decisions, or constrain their naked exercises of choice.
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> These mediating legal directives take different forms that vary in the relative discretion they afford the decisionmaker. These forms can be classified as either "rules" or "standards" to signify where they fall on the continuum of discretion. Rules, once formulated, afford decisionmakers less discretion than do standards. Although the terms "rules" and "standards" are not everyone's favorites,[16] I hope we can stipulate to their definition as follows:
>
> *(a) Rules.* — A legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule captures the background principle or policy in a form that from then on operates independently. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.
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> *(b) Standards.* — A legal directive is "standard" — like when it tends to collapse decisionmaking back into the direct application of the background

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[14] *Infra* page _____.

[15] Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–59 (1992). Professor Sullivan is a distinguished constitutional law scholar and appellate litigator and the former dean of the Stanford Law School.

[16] First, the ambiguity of the terms breeds confusion. Some people call both rules and standards "principles"; some (notably Ronald Dworkin) call rules "rules" and standards "principles"; some (again, notably Dworkin) use the term "standard" as a broad genus subsuming the species of rules, standards, principles, and policies; and some use rules and standards as synonyms rather than antonyms.

Second, the rule/standard distinction deceptively appears to be a dichotomy. In fact, there is only a continuum of greater or lesser "ruleness."

> principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule — the more facts one may take into account, the more likely that some of them will be different the next time.

Let us give you an easy example: the point of imposing a speed limit presumably is to make highway travel safer and to reduce accidents and their attendant social costs. The usual way of trying to achieve these social ends is to fix on a number, let's say 65 miles per hour, and to post signs along the route to which that number applies. If you get caught traveling faster than 65 miles per hour, you will get a ticket. The law enforcement officers may have some enforcement discretion in deciding whether to ticket you or not. But there is no judgment call, no discretion, involved in determining whether you broke the law: you either observed the numerical speed limit or you didn't.

Let us look again at how Dean Sullivan describes a rule-like legal directive, of which this is a classic example: "it binds a decisionmaker [here the police officers] to respond in a determinate way to the presence of delimited triggering facts" — you went 70 mph, you get a ticket. "Rules aim to confine the decisionmaker to facts" — did you or did you not travel 70 mph? "A rule captures the background principle or policy . . ." — we (i.e., the legislature in this instance) believe that a speed limit of 65 mph strikes the appropriate balance of safety and convenience. "A rule necessarily . . . produces errors of over- or under-inclusiveness." Suppose you are in the middle of Montana on an empty stretch of a well-maintained Interstate; there isn't another car around as far as the eye can see; you are driving a late model Lincoln Town car; you have been a professional chauffeur for 20 years and you have never even gotten a parking ticket; it is a clear, dry, crisp day, early in the morning and you are traveling west. Under these circumstances the rule (65 mph) is surely overinclusive; that is, it prohibits conduct that should be permitted in light of "the background principle or policy" in that our societal goal would not be endangered by letting you drive 70 mph or maybe even 75 (80? 100? 120?)

Suppose instead you are in New Jersey on a crowded two-lane highway, none too well maintained; you are driving a 1987 Rattletrap; you just got your first driver's license; it is evening and it is raining heavily. Under these circumstances the rule is surely underinclusive, permitting conduct that should be prohibited, because our societal goal is endangered by your driving more than 40 mph (35? 30?).

If all rules share the characteristics of producing "errors of over- or under-inclusiveness," and if we know that and yet still choose a rule as our "mediating legal directive," then it must be because we want to "afford decisionmakers less discretion"; because we want to "constrain their naked exercises of choice."

Suppose we post a sign saying not "Speed Limit 65 MPH," but this:

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"Reasonable and prudent" is a standard, not a rule. It is a legal directive that "collapse[s] decisionmaking back into the direct application of the background principle or policy" — that is, we want people to drive safely and prudently because we want to prevent accidents (within limits) but instead of translating that policy into a number, we state it directly.[17]

Assume now that the police stop you. They say you were speeding. You, of course, protest that you were driving in a "reasonable and prudent" manner. You point to the condition of the road, the time of day, the weather, the condition of your car, your prior driving record, and other traffic. All of these factors are presumably relevant and have a bearing on whether you drove reasonably and prudently.

"Standards allow the decisionmaker [here in the first instance the Highway Patrol and eventually, if you contest your ticket, perhaps the Montana Supreme Court] to take into account all relevant factors or the totality of the circumstances," to quote Dean Sullivan again. We now also decrease "errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules." But do we want to do that? Granting such discretion has costs. Our answer might well depend on the context, and on our feelings about the particular decisionmaker. Note that this particular level of discretion is that given to juries in civil cases.

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[17] In 1995, Montana adopted precisely this approach, becoming the first and only state to eliminate a numerical speed limit. In Montana v. Stanko, 974 P.2d 1132, 55 Mont. St. Rep. 1302 (1998), the Supreme Court of Montana held the speed law to be unconstitutionally vague under the Montana constitution; the Montana legislature then re-established numerical speed limits. *See* Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U.L. Rev. 155 (1999). Montana and its highway culture made it repeatedly into *The New York Times* and, under the title *Postcard from Montana*, into the June 7, 1999 issue of *The New Yorker*.

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Note one other consequence of using a standard rather than a rule: "the more facts one may take into account, the more likely that some of them will be different the next time" and the consequence of *that* is that "the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule." To put it differently: cases that are decided on the basis of standards yield less precedential value than cases decided by the application of rules.

Let us return to our main subject.

Saleilles

> One wills at the beginning the result; one finds the principle afterwards; such is the genesis of all juridical construction. Once accepted, the construction presents itself, doubtless, in the ensemble of legal doctrine, under the opposite aspect. The factors are inverted. The principle appears as an initial cause, from which one has drawn the result which is found deduced from it.[18]

Was the result in *Kelly* deduced from principle or did the majority "will at the beginning the result"?

Is not Saleilles' account a perversion of the very ideal of judging, a corruption? How would you defend such a process? Do you believe many judges go about their task in precisely the manner described by Saleilles? Consider:

> Any lawyer or judge who is honest with himself knows that he often intuits a conclusion and then goes to work to see if legal reasoning supports it. But the original intuition arises out of long familiarity with the structure and processes of law. A judge will have such intuitions in cases where he has not the remotest personal preference about the outcome. A process like that must occur in all intellectual disciplines. But the honest practitioner, including the lawyer or the judge, also changes his mind when the materials with which he works press him away from his first tentative conclusion. I have had, as many other judges have, the experience of reaching one result after reading the briefs and reversing my position at oral argument, or of voting one way at the judges' conference after argument and then changing my mind in the process of reading, discussion, and writing. I have had the even less pleasurable experience of publishing my opinion and then concluding I was wrong upon reading the petition for rehearing and having to change the result of the case. Many judges can testify to similar experiences. If that is true, and it is, then it is not true that all judges choose their results and reason backward.
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> But it is true for some judges.[19]

And, Judge Bork charges, *that* view of the judicial process is "profoundly cynical."[20] Do you agree?

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[18] Raymond Saleilles, De la Personnalité Juridique 45–46 (1922) (translated from the French), *quoted in* NJP at 170.

[19] Robert M. Bork, The Tempting of America: The Political Seduction of the Law 71 (1990).

[20] *Id.*

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Hutcheson[21]

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.

* * * [B]ut 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." * * *

I knew, of course, that some judges did follow "hunches" – "guesses" I indignantly called them. I knew my Rabelais,[22] 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 logomachy; second, aleatory, of and by the dice; 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. * * *

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 precept, safely and firmly, bridges for the judicial mind to pass the abysses between that past and the new future. * * *

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

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[21] Joseph C. Hutcheson (1879-1973) was Mayor of Houston when, in 1918, he was appointed to the United States District Court for the Southern District of Texas. He was elevated to the U.S. Court of Appeals for the Fifth Circuit in 1930. He was Chief Judge from 1948 until 1959, when he took senior status.

[22] [Ed. Fn.] Rabelais was probably the most famous French writer of his generation (around 1494-1553) and the creator of a number of fantastic fictional characters — in addition to Judge Bridlegoose — such as Gargantua and Pantaguel.

> "having well and exactly seen, surveyed, 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."
>
> Thereafter I proceeded "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 offhand 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." * * *
>
> 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.[23]

Was the result in *Kelly* arrived at by cogitation; by dice; by hunch? Why should it matter that you understand how the decision was arrived at so long as you know the result?

Judge Bridlegoose has two sets of dice — "large, great dice, fair and goodly ones" and "little small" ones. The large he uses for matters "plain, clear and liquid," the "little small dice" when "there are many bags on the one side and on the other," or, in Judge Hutcheson's words, "when the case is difficult or involved, and turns upon a hairsbreadth of law or of fact." As for Judge Hutcheson, instead of using dice, large or little, he decides the one case "more or less offhand and by rule of thumb," and the other by imagination, brooding, hunch — "that intuitive flash of understanding."

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[23] Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L.Q. 274, 275–279 (1928) (emphasis added).

There are, apparently, "easy cases" and "hard cases."

Suppose a plaintiff brings suit for injury to a fetus in a jurisdiction in which case law has held in the past that unborn children are not persons and have, therefore, no cause of action. Is this an easy case or a hard case? How would we know this? Who would decide it?[24]

Are the abortion cases "easy" or "hard?" The surrogate mother cases? The "right to die" cases?

Do we mean by "hard" that the case falls into lacunae in the legal system? If so, then must we draw on extra-legal sources, e.g., our system of ethics, morals, ideology, what have you? (Or, of course, toss dice — but that, too, reflects a value system, does it not?)

Why should judicial behavior differ, as Judge Hutcheson tells us it does, depending on whether the case is easy or hard, assuming "we" can decide the threshold question?

Was *Kelly* an "easy" or a "hard" case? If you have difficulty deciding whether it was one or the other — does the difficulty lie with you or with the task of sorting cases into "easy" and "hard" ones?

Is reliance on intuition, on that "flash of understanding," as Hutcheson calls it, merely avoidance (out of arrogance, laziness, concern for convenience, or possibly wisdom) of the task of finding not the "rule" governing the case, since there does not seem to be one, but the "principle" or "standard"?

What did the *Kelly* court mean by the following: "This Court *senses* that there may be a substantial change in social attitudes and customs concerning drinking, whether at home or in taverns. We *believe* that this change may be taking place right now in New Jersey and perhaps elsewhere."[25]

If Hutcheson is correct and the law is not deductive, does that leave any basis for decision other than the hunch? Consider what is perhaps Justice Holmes's most famous nonjudicial statement:

> The life of the law has not been logic: it has been experience.[26]

Could Holmes mean that logic has *no* place in the law? As a lawyer, wouldn't you hope that logical argument might carry some weight?

Holmes's writings were in large measure a reaction to a view of the law we have already considered: that of Dean Langdell, in which law is self-contained and governed by strictly logical considerations. You will recall Langdell's conception of law as a science. On this account, the judge's task is to reason from prior decisions, the dominant mode of legal reasoning being the syllogism. Holmes insisted that judicial decisionmaking was not so rarified or abstract; he saw the common law as

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[24] The example is taken from Richard Taylor, *Law and Morality*, 43 N.Y.U. L. Rev. 611, 624–625 (1968), and is discussed in Anthony D'Amato, *The Limits of Legal Realism*, 87 Yale L.J. 468, 478–491 (1978).

[25] *See supra* page _____ (emphases added).

[26] Holmes, *supra* note 3, at 1.

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the pursuit (sometimes unconscious) of sound public policy.

Holmes develops his theme elsewhere in *The Common Law*:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed. * * *
>
> [There exists a] paradox of form and substance in the development of law. In form its growth is logical. The official theory is that each new decision follows syllogistically from existing precedents. But just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view.
>
> On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.[27]

If Holmes is correct, why do we have judges making law? In trying to "legislate" effectively, they are surely handicapped by inadequate training, resources, expertise, and opportunities. Moreover, doesn't Holmes's view fly in the face of basic democratic principles, under which the electorate controls policymakers?

Re-examine *Kelly* (both the majority and the dissent) in light of Holmes and in light of our questions. What would you now add to your thoughts about the case?

Cardozo

We shall next listen at some length to Cardozo. First of all, we should treasure all judges' explications of what they do; they are, after all, the ones doing it! More often, academics are the ones who debate what judges do and should do. But more importantly, Cardozo, in the words of Justice Brennan, "was able, in a slim volume of near lyric prose [*The Nature of the Judicial Process*] to alter the course of American legal thought":

> [T]o an extent almost unimaginable today, the legal and popular culture of Cardozo's day denied the relevance of the human dimension of the judicial process. * * * [T]he judge was thought to be no more than a legal

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[27] Holmes, *supra* note 3, at 1, 35–36.

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pharmacist, dispensing the correct rule prescribed for the legal problem presented. It was supposed that judges decided cases in mechanical, "scientific" fashion. * * *

Into this formalistic conception of law Cardozo breathed the wisdom of human experience.[28]

Here then is Cardozo:

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. * * * "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." * * * "When the conclusion is there," says William James, "we have already forgotten most of the steps preceding its attainment."[29]

One of the most fundamental social interests is that law shall be uniform and impartial. * * * Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.[30]

If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. * * * Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him

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[28] William J. Brennan, Jr., *Reason, Passion and "The Progress of Law"*, 10 Cardozo L. Rev. 3, 4 (1988). Professor Gilmore put the point this way: "Cardozo's hesitant confession that judges were, on rare occasions, more than simple automata, that they made law instead of merely declaring it, was widely regarded as a legal version of hardcore pornography." Gilmore, *supra* note 6, at 77.

[29] Benjamin N. Cardozo, The Paradoxes of Legal Science 59–61 (1928).

[30] Benjamin N. Cardozo, The Nature of the Judicial Process 112–113 (Yale University Press 1921). This and later excerpts reprinted with permission.

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upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art. * * * None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom.[31]

Or, as Holmes said:

[J]udges do and must legislate, but they can do so only interstitially; they are confined from Molar to molecular motions. * * * The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.[32]

We return to Cardozo:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. * * * As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation.[33]

Again, compare Holmes:

The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty is generally an illusion, and repose not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.[34]

Adrift on the trackless ocean the judge may be, but, wrote Cardozo,

[h]e is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness.[35]

Perhaps not usual for the time and place, Cardozo spoke of the unconscious:

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or

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[31] NJP at 113–115.

[32] Southern Pac. Co. v. Jensen, 244 U.S. 205, 221–222 (1917) (Holmes, J., dissenting).

[33] NJP at 166.

[34] Oliver Wendell Holmes, Jr., *The Path of the Law*, *in* Collected Legal Papers 167, 177 (1920).

[35] NJP at 141.

> judge. * * * There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not run aside in their course and pass the judges by.[36]

Cardozo speaks of the need for candor in contemplating the judicial role. What role should candor play in the writing of opinions? Is it good or bad to erect a rationalizing screen, to quote Judge Hutcheson, between "the decree" and the "logomachy, the effusion * * * by which that decree is explained or excused"?

To put the question more sharply:

> If the [Legal] Realists were right, if the legal rules applicable to most cases are indeed indeterminate, and such decisions therefore almost always the result of factors other than the mere application of doctrinal categories, then aren't judges lying when they seek to present their decisions as the determinate result of the application of preexisting rules?[37]
>
> * * * [W]hat are judges doing when they write about law in their opinions? They are not describing the state of the law, nor are they describing their own internal thought processes. Rather, they are making arguments * * * [to the judges of the appellate court] to persuade them that the * * * decision should be affirmed [and to t]he lawyers, litigants and public at large * * * to *explain* and *justify* the judge's decision.
>
> * * * [T]he whole question of "truth" and "belief" in connection with legal argument is rather complex and vexing. When I think about myself as a lawyer making arguments to a court, I find that I can easily make statements like "The law requires a judgment in favor of my client" or "The precedent on which my opponent relies is clearly distinguishable from the case at bar." In short, I find myself phrasing my arguments in the same language of determinacy and clear meaning that seems so problematic when expressed in judicial opinions.
>
> Do I believe it? Do I really believe that the law requires a judgment in favor of my client? Well, yes, but not in quite the same way I believe that

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[36] NJP at 167–168.

[37] [Ed. Fn.] "Legal realism" was a large and complicated "school" of jurisprudential thought which had its heyday in the 1930s. Rejecting the view of legal reasoning as purely deductive, the legal realists "denied that the actions of legal decisionmakers were the determinate results of applying general legal rules. * * * [They] asserted that in virtually every case the legal decisionmaker * * * was free to decide the case in directly contradictory ways * * * and then find adequate grounds for justifying either result." Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 236 (1990). *See also* Charles M. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 CARDOZO L. REV. 917 (1985).

> the train will arrive at 3:30. I believe that I have made a good argument, that a ruling for my client would be sensible and just and supportable on the basis of prior precedent, but I am perfectly aware that nothing actually *requires* the judge to rule my way, that other arguments have been made by my opponent, and that it is possible that the judge will rule against my client.
>
> Then why do I speak in the language of requirement, compulsion and determinacy? In part, because those are simply the conventions of my language game. No one expects me to say, indeed they would be somewhat surprised if I said, "Truthfully, the precedents could support a ruling either way in this case, but I believe it would be desirable and appropriate to rule for my client." The judge knows very well that when I say the law "requires" or "compels" a given result, I am not denying that she has a choice in the matter. The judge, and everyone else in the process, knows that those words are part of the conventions of making a forceful argument. This in turn makes it impossible for me to express my argument in more ordinary language, closer to my actual belief, that a ruling for my client would be "desirable" or "appropriate," because the conventions of legal argument make those terms seem exceedingly weak. * * *
>
> It is possible to view judicial language as expressing something quite different from the reasons which floated to the top of the judge's mind as she rendered her decision. Rather, the conventions of legal argument may well lead judges to express their decisions in terms of determinate results of legal rules, although the participants in the process understand these statements as explanations and justifications of the judge's choice in ruling for one side or the other, not as a description of the way in which the judge discovered the "right answer" to the legal problem presented by the case before her.[38]

Cardozo spoke of the "grandeur of the conception" that lifts judges into "the realm of pure reason" but dismissed it as unattainable, accepting the presence of the "human" as inevitable. In our own time, Justice William Brennan, invoking Cardozo, has called for the judge to combine passion and reason not because doing so is unavoidable, but rather because "this interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality."[39] By the beginning of this century, he writes, the greatest threat to judicial legitimacy

> lay in the legal community's failure to recognize the important role that qualities other than reason must play in the judicial process. In ignoring these qualities, the judiciary had deprived itself of the nourishment essential to a healthy and vital rationality. I shall refer to these qualities

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[38] Charles M. Yablon, *Are Judges Liars? A Wittgensteinian Critique of* Law's Empire, 3 CAN. J. JUR. 123, 124–125, 135–138 (1990).

[39] Brennan, *supra* note 28, at 3. For a glowing tribute to Justice Brennan, *see* Frank I. Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296 (1980). For a typical less sanguine view of "activist" judges as undermining self-government, *see* LOUIS LUSKY, OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA (1993).

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> under the rubric of "passion," a word I choose because it is general and conveys much of what seems at first blush to be the very enemy of reason. By "passion" I mean the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason. Two hundred years ago, these responses would have been called the responses of the heart rather than the head. Indeed, to individuals such as Thomas Jefferson, the faculty of reason was suited to address only questions of fact or science, while questions of moral judgment were best resolved by a special moral sense, different from reason, and often referred to as the "heart." In his well-known *Dialogue Between My Head & My Heart*, Jefferson stated that "[m]orals were too essential to the happiness of man to be risked on the incertain combinations of the head. [Nature] laid their foundation therefore in sentiment, not in science."
>
> An appreciation for the dialogue between head and heart is precisely what was missing from the formalist conception of judging. Indeed, Cardozo's own appreciation for it was slow in developing. In *The Nature of the Judicial Process* he appeared to accept with resignation the inevitability of such a dialogue, and did not value or encourage it. He adhered to pure reason as the goal toward which judges, flawed humans though they were, should continue to aspire. Some years later, however, he would come to champion the role of intuition. "The law has its piercing intuitions," he wrote, "its tense, apocalyptic moments." "Imagination, whether you call it scientific or artistic, is for [both law and science] the faculty that creates." The well-springs of imagination, of course, lie less in logic than in the realm of human experience — the realm in which law ultimately operates and has meaning. Sensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is therefore not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared.[40]

Passion, however, is not to be confused with "impassioned judgment." Brennan continues:

> It is of course one thing for a judge to recognize the value that awareness of passion may bring to reason, and quite another to give way altogether to impassioned judgment. Cardozo, as usual, said it best:
>
> > [The judge] is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.
>
> It is often the highest calling of a judge to resist the tug of such sentiments. There is no better example than the criminal law, where the awareness of the brutality of the underlying crime often threatens to overwhelm the mind and discretion of even the most seasoned judge. Yet the judge's job is not to yield to the visceral temptation to help prosecute the criminal, but

[40] Brennan, *supra* note 28, at 9–10.

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> to preserve the values and guarantees of our system of criminal justice, whatever the implications in an individual case. Indeed, the judge who is aware of the inevitable interaction of reason and passion, and who is accustomed to conscious deliberation and evaluation of the two, is the judge least likely in such situations to sacrifice principle to spasmodic sentiment.[41]

Holmes, Cardozo, and Brennan each reject the view that the judge's task is purely logical or syllogistic. How do their views of the inadequacies of reason differ? How do their prescriptions of what judges ought to bring to their task besides pure reason differ?

B. EMPATHY, PASSION, REASON: TWO EXAMPLES

Here are two Cardozo opinions through which to digest and evaluate the foregoing.

HYNES v. NEW YORK CENTRAL RAILROAD
231 N.Y. 229, 131 N.E. 898 (1921)

On July 8, 1916, Harvey Hynes, a lad of sixteen, swam with two companions from the Manhattan to the Bronx side of the Harlem River, or United States Ship Canal, a navigable stream. Along the Bronx side of the river was the right of way of the defendant, the New York Central Railroad, which operated its trains at that point by high tension wires, strung on poles and crossarms. Projecting from the defendant's bulkhead above the waters of the river was a plank or springboard, from which boys of the neighborhood used to dive. One end of the board had been placed under a rock on the defendant's land, and nails had been driven at its point of contact with the bulkhead. Measured from this point of contact the length behind was 5 feet; the length in front 11. The bulkhead itself was about 3½ feet back of the pier line as located by the government. From this it follows that for 7½ feet the springboard was beyond the line of the defendant's property and above the public waterway. Its height measured from the stream was 3 feet at the bulkhead, and 5 feet at its outermost extremity. For more than five years swimmers had used it as a diving board without protest or obstruction.

On this day Hynes and his companions climbed on top of the bulkhead intending to leap into the water. One of them made the plunge in safety. Hynes followed to the front of the springboard, and stood poised for his dive. At that moment a crossarm with electric wires fell from the defendant's pole. The wires struck the diver, flung him from the shattered board, and plunged him to his death below. His mother, suing as administratrix, brings this action for her damages. Thus far the courts have held that Hynes at the end of the springboard above the public waters was a trespasser on the defendant's land. They have thought it immaterial that the board itself was a trespass, an encroachment on the public ways. They have

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[41] *Id.* at 11–12. If questions of reason and passion and their relationship to judging and judges interest you, you may want to peruse other contributions to Symposium, *Reason, Passion, and Justice Brennan*, 10 Cardozo L. Rev. 1 (1988).

thought it of no significance that Hynes would have met the same fate if he had been below the board and not above it. The board, they have said, was annexed to the defendant's bulkhead. By force of such annexation, it was to be reckoned as a fixture, and thus constructively, if not actually, an extension of the land. The defendant was under a duty to use reasonable care that bathers swimming or standing in the water should not be electrocuted by wires falling from its right of way. But to bathers diving from the springboard, there was no duty, we are told, unless the injury was the product of mere willfulness or wantonness — no duty of active vigilance to safeguard the impending structure. Without wrong to them, cross-arms might be left to rot; wires highly charged with electricity might sweep them from their stand and bury them in the subjacent waters. In climbing on the board, they became trespassers and outlaws. The conclusion is defended with much subtlety of reasoning, with much insistence upon its inevitableness as a merely logical deduction. A majority of the court are unable to accept it as the conclusion of the law. * * *

Rights and duties in systems of living law are not built upon such quicksands.

Bathers in the Harlem River on the day of this disaster were in the enjoyment of a public highway, entitled to reasonable protection against destruction by the defendant's wires. They did not cease to be bathers entitled to the same protection while they were diving from encroaching objects or engaging in the sports that are common among swimmers. Such acts were not equivalent to an abandonment of the highway, a departure from its proper uses, a withdrawal from the waters, and an entry upon land. A plane of private right had been interposed between the river and the air, but public ownership was unchanged in the space below it and above. The defendant does not deny that it would have owed a duty to this boy if he had been leaning against the springboard with his feet upon the ground. He is said to have forfeited protection as he put his feet upon the plank. Presumably the same result would follow if the plank had been a few inches above the surface of the water instead of a few feet. Duties are thus supposed to arise and to be extinguished in alternate zones or strata. * * *

The truth is that every act of Hynes from his first plunge into the river until the moment of his death was in the enjoyment of the public waters, and under cover of the protection which his presence in those waters gave him. The use of the springboard was not an abandonment of his rights as bather. It was a mere by-play, an incident, subordinate and ancillary to the execution of his primary purpose, the enjoyment of the highway. * * * We think there was no moment when he was beyond the pale of the defendant's duty — the duty of care and vigilance in the storage of destructive forces.

This case is a striking instance of the dangers of "a jurisprudence of conceptions" (Pound, Mechanical Jurisprudence, 8 Columbia Law Review, 605, 608, 610), the extension of a maxim or a definition with relentless disregard of consequences to "a dryly logical extreme." The approximate and relative become the definite and absolute. * * * In one sense, and that a highly technical and artificial one, the diver at the end of the springboard is an intruder on the adjoining lands. In another sense, and one that realists will accept more readily, he is still on public waters in the exercise of public rights. The law must say whether it will

subject him to the rule of the one field or of the other, of this sphere or of that. We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of the defendant's immunity and exemption, and place him in the field of liability and duty.

PALSGRAF v. LONG ISLAND RAILROAD

248 N.Y. 339 (1928)

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. * * * The plaintiff as she stood upon the platform of the station might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity * * *.

A different conclusion will involve us, and swiftly too, in a maze of contradictions. A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste? If not, is the result to be any different, so far as the distant passenger is concerned, when the guard stumbles over a valise which a truckman or a porter has left upon the walk? The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. * * * [T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the

one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before provision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must show is "a wrong" to herself, *i.e.*, a violation of her own right, and not merely a wrong to someone else, nor conduct "wrongful" because unsocial, but not "a wrong" to anyone. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and, therefore, of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. * * * This does not mean, of course, that one who launches a destructive force is always relieved of liability if the force, though known to be destructive, pursues an unexpected path. * * * Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

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1. *(Com)passionate judging*. What are we to make of these two contrasting opinions, so different at least in tone, and perhaps in substance? *Hynes* is often seen as a case of (com)passionate judging; *Palsgraf* as a case of dispassionate distancing. It has been described as an example of "the judge cleaning and polishing principles with his back turned to the parties."[42] The comment was intended as a criticism, but is this not precisely what we want judges to do? To decide, *impartially*, on the basis of general principles, regardless of the wealth, race, or identity of the parties. Why, after all, does Justitia wear a blindfold?

For that matter, make an argument that if *Hynes* is a passionate case, so too is *Palsgraf*.

2. *Is judicial passion dangerous*? Justice Brennan seems to propose that passion is an essential ingredient of justice. But might not passion produce *in* justice? We have all seen people act unreasonably (unjustly?) when overwhelmed by passion.

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[42] Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1350 (1988).

Would legitimizing judicial passion give a valid passport to judicial tyranny?

Consider the response to Justice Brennan by Judge Richard Cudahy of the U.S. Court of Appeals for the Seventh Circuit:

> During the last fifty or so years, the growing acceptance of passion or intuition in the law seems generally to have favored "liberal" outcomes and been approved by liberal theoreticians. I do not think there are any iron laws of history, however, that dictate the immutability of these relations. * * *
>
> My own instincts tell me, nonetheless, that in the long run the judges who invoke a measure of intuition and passion are somehow more likely to benefit the powerless than the powerful. This may be Justice Brennan's underlying hunch although he does not articulate it. And perhaps this is merely an illustration of flawed induction from my own life experiences. But I expect there will always be groups too small, diffuse, or reviled to obtain redress for their real grievances through majoritarian processes. These groups will continue to prefer judges whose logic is informed by their sensitivity to the plight of the dispossessed and underrepresented, as opposed to judges who confine themselves to passive roles guided by principles thought to be congenial to the status quo. This is all speculation, of course; nevertheless, it is a surmise deserving of consideration. * * *
>
> In summary, I find myself in general agreement with Justice Brennan's thesis. I must note in candor, however, that the passions and intuitions that he perceives as legitimate and constructive are those that correspond to his own point of view. A passion for capital punishment is not something that he would easily see as legitimate or constructive within the reason-passion paradigm.[43]

Reviewing Ingo Müller's *Hitler's Justice, The Courts of the Third Reich*,[44] Professor Berghahn writes:

> On Dec. 22, 1943, the executioner at the county prison of Wolfenbüttel, some 50 miles east of Hanover in Germany, had to work particularly hard. As the prison chaplain recorded in his death register, the guillotine fell in swift succession that evening at 6:35, 6:38, 6:40, 6:42 and 6:44.
>
> Unlike the thousands of other men, women and children who also died on that day in all parts of Nazi-occupied Europe in the concentration camps, as hostages or as innocent bystanders in military operations, the victims at Wolfenbüttel had been sentenced to death by ordinary courts — courts that had never ceased to operate throughout the Nazi period. These courts were manned by judges who had gone through the traditional law schools, often with excellent examination results, and who, according to conservative estimates, handed down 40,000 to 50,000 death sentences in the 12 years of Hitler's rule of terror. Around 80 percent of these sentences were carried

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[43] Richard D. Cudahy, *Justice Brennan: The Heart Has Its Reasons*, 10 CARDOZO L. REV. 93, 102–103 (1988).

[44] (Deborah Lucan Schneider trans. 1991).

> out, often within hours of the verdict being rendered. University-trained lawyers also imposed over 12,000 death sentences as members of military courts-martial, of which a mere 10 percent were ultimately commuted. If one adds also the reprisal executions of so-called "Night and Fog" prisoners, mainly in occupied Western Europe, and the sentences of special courts set up in Nazi-occupied Eastern territories, at least 80,000 people can be assumed to have died at the hands of Hitler's hanging judges.[45]

How many of these death sentences were handed out by judges full of passion for the Neue Reich?[46] If you do not consider this a fair comment, why not? "The best lack all conviction, while the worst/Are full of passionate intensity."[47]

If you are, by now, thoroughly disquieted, perhaps there is some comfort at least in this:

> The ultimate check, however, upon the passions, intuitions and emotions of one judge is the same faculties of another judge. That is why there is appellate review. It also explains why those reviewing courts always contain more than one member.[48]

Then again, if passions can "sweep" whole countries, why can they not sweep whole courts, or at least five lonely figures?

3. *Empathy.* If "passion" is not unproblematic, will "empathy" serve us better?

Barack Obama, both as Senator and as President, has stressed the importance of empathy in judging. Explaining his vote against the confirmation of John Roberts as Chief Justice of the United States, he stated:

> The problem I face * * * is that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, * * * what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.
>
> In those 5 percent of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision. In those * * * difficult cases, the critical ingredient is supplied by what is in the judge's

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[45] Berghahn, *The Judges Made Good Nazis*, N.Y. Times Book Rev., Apr. 28, 1991, at 3.

[46] Regarding law and legal rhetoric in Vichy France see *Avoiding Central Realities: Narrative Terror and the Failure of French Culture Under the Occupation* and *Legal Rhetoric Under Stress: The Example of Vichy*, both in Richard Weisberg, Poethics and Other Strategies of Law and Literature (1992). *See generally* Richard H. Weisberg, Vichy law and the Holocaust in France (1996).

[47] William Butler Yeats, *The Second Coming*, lines 7–8 (1920).

[48] Cudahy, *supra* note 43, at 103–104.

heart.[49]

As a candidate, he returned to this theme: "[W]e need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."[50] And when Justice Souter announced his resignation, giving President Obama his first Supreme Court vacancy, the President said this with regard to what sort of person he would nominate:

> I will seek somebody with a sharp and independent mind and a record of excellence and integrity. I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a case book. It is also about how our laws affect the daily realities of people's lives — whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation.
>
> I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at just decisions and outcomes.[51]

The President's emphasis on empathy provoked a powerful reaction, pro and con, in the media, the public, and the Senate. The negative reaction was strong enough that during the Sotomayor confirmation process the White House came to avoid the word "empathy" as too charged and politically problematic.[52] The nominee herself did not use it a single time during her testimony and expressly disavowed the President's account of what a judge is supposed to do.

Why the flight from empathy? The anti-empathy flank derided it as a code-word for activism, bias, feelings, emotions, and favoritism — in short, decisionmaking based on grounds other than law. Consider this summary of the standard account of the disconnect between empathy and even-handed judging.

> The Rule of Law is the reification of rules governing rights and duties to which we pay homage: thus, this is a "government of laws, not men";[53] the Rule of Law transcends humans and is superior to them. The virtue of the Rule of Law is that it is ostensibly "neutral" and prevents abuse of persons. The neutrality and generality of the Rule of Law seek to serve the goals of protecting individuals from arbitrary treatment and of respecting people as autonomous and equal. As such it is not in direct opposition to empathy. Yet

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[49] 151 Cong. Rec. S10,366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama).

[50] *See* Edward Whelan, *Obama's Constitution: The Rhetoric and the Realit* y, Wkly. Standard, Mar. 17, 2008, at 12.

[51] The President's Remarks on Justice Souter, available at http://www.whitehouse.gov/blog/09/05/01/The-Presidents-Remarks-on-Justice-Souter/.

[52] *See* Sheryl Gay Stolberg, *Say It With Feeling? Not This Time Around*, N.Y. Times, May 29, 2009, at A15 ("Empathy was all the rage in Washington only a few weeks ago, . . . [b]ut now that conservatives have cast empathy as an epithet when it comes to the judiciary . . . Mr. Obama seems to have dropped it from his confirmation lexicon.").

[53] [Ed. Fn.] This much invoked aspiration originated in the Massachusetts Constitution of 1780, in a provision guaranteeing the separation of governmental powers.

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> to the extent the concern is with perpetuating the Rule of Law for its own sake, the importance of empathic understanding can disappear.
>
> Essential to legality is the premise that fidelity to the law is necessary for predictability and control over outcomes and for social ordering. The Rule of Law provides us with an anchor, a grounding, that otherwise would not exist in modern postindustrial society; it keeps chaos and anarchy away from our door. Rules — whether explicit or open-textured — provide the illusion, if not the reality, of certainty; that certainty is reason enough to obey or acquiesce to the Rule of Law without question. For this reason the narrative of the suffering caused by the law to the Other can be ignored or suppressed.[54]

Is *Hynes* a case of "empathic understanding"? If so, is it (therefore) a case cut loose from the anchorage of the rule of law? Is it, not to put too fine a point on matters, essentially a lawless, albeit just decision? But is to speak of "lawless but just" decisions not an oxymoron?[55] It seems to come more naturally to speak of "lawful but unjust" decisions. Why?

How do the answers you just gave apply to *Palsgraf*? Where does *Kelly* fit in?

4. *Empathy and Impartiality*. In part, the 2009 empathy debate turned on a disagreement over whether empathy is a neutral characteristic, a turn of mind, or whether it is simply a substantive preference for particular individuals or groups. One empathy skeptic wrote:

> President Obama says he wants judges who have the "empathy to understand what it's like to be poor, or African American, or gay, or disabled, or old." But if judges who feel empathy for these groups can legitimately base decisions on it, the same goes for the considerably larger number of jurists who most easily empathize with what it's like to be rich, or white, or straight, or able-bodied. If we weaken the norm of judicial impartiality in favor of greater emphasis on empathy, minorities and the poor are unlikely to benefit.[56]

Do you agree? If not, how would you respond?

Which way does empathy cut in a case about affirmative action? When a judge must decide whether to suppress illegally seized evidence in a murder trial?

"Empathy" can be variously defined.

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[54] Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1587–1588 (1987).

[55] Before you say yes too quickly, think of that great icon of American (and world) popular culture: the gun that brings justice to the lawless town. Think of the American Western! *See generally* André Bazin, *The Western, or the American Film* par excellence, in II WHAT IS CINEMA? (1971).

[56] Ilya Somin, *How empathy can distort judges' thinking and lead to bad decisions*, L.A. Times (on-line edition), May 28, 2009, at http://www.latimes.com/news/opinion/opinionla/la-oew-chemerinsky-somin28-2009may28,0,4921073.story. Professor Somin was writing as part of a "Point/Counterpoint" exchange with Dean Erwin Chemerinsky; the whole exchange is worth reading. For an endorsement of empathic judging written against the background of the Sotomayor hearings, *see* Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133.

> While the word ["empathy"] often appears to be used interchangeably with "love," "altruism," and "sympathy," it actually encompasses specific psychological phenomena. Although the literature of empathy manifests disagreement about what is or is not "empathy," rather than projection, sympathy, or what have you, there are three basic phenomena captured by the word: (1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion). The first two forms are ways of knowing, the third form a catalyst for action.[57]

Which, if any, of these three phenomena (none of which equates to bias, sympathy, or preference) are relevant to deciding cases? Note the stress on understanding both "affectively" *and* "cognitively." (Is this the difference between passion and empathy?)

Lawsuits by definition involve two sides. Can a judge be empathetic toward both? If empathy is a thumb on the scale, a preference for one set of interests over another, the answer is no. But if empathy is "a way of knowing," a more complete understanding of the relevant, and competing, interests, the answer might be yes.

5. "*Real people.*" It is sometimes said, almost always as a compliment, of a particular judge that he or she does not lose sight of "the people behind the cases," or of how the court's decisions "will affect real people." Consider the following information about the real person behind *Palsgraf.* Does it change your view of the decision? If so, should Cardozo have included some or all of it in the opinion?

> "Mrs. Palsgraf" bore the Christian name of Helen. She was forty-three and the mother of three children, of whom the younger two, then fifteen and twelve, were with her at the time of the accident. She was married, but neither side judged it desirable to ask who her husband was or where he was. It may be inferred that they had separated. She testified that she paid the rent, that she had always worked, and that she was "all alone."
>
> At the time of the accident Helen Palsgraf lived in a basement flat at 238 Irving Avenue in Ridgewood [Brooklyn], performing janitorial work in the apartment building, for which she was allowed ten dollars a month on her rent. She did day work outside the apartment, earning two dollars a day or about eight dollars a week. She spoke English intelligibly but not with complete grammatical correctness.
>
> The day of the accident was a hot Sunday in August. She was taking Elizabeth and Lilian to the beach. It was ten o'clock. She carried a valise. She bought their tickets and walked onto the station platform, which was crowded. Lilian went for the Sunday paper. As a train started to pull out, there was the noise of an explosion. Then, "Flying glass — a ball of fire came, and we were choked in smoke, and I says 'Elizabeth turn your back,' and with that the scale blew and hit me on the side." * * *

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[57] Henderson, *supra* note 54, at 1579.

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> In 1924 the Long Island's total assets were valued at $114 million of which $98 million was the valuation set on track and equipment. Net income from railroad operations was just over $4 million, reflecting a return just over the 4 percent that was usual for railroads of the period to show. Over 60 percent of the operating income was from passenger traffic. The parent Pennsylvania [Railroad] had a net income of $48 million and assets of $1.7 billion, of which almost one half billion represented capital stock and surplus.[58]

Does *Palsgraf* reflect an appropriate, indeed necessary, judicial detachment? After all, aren't such factors as the relative wealth of the parties legally irrelevant? Or, given the above, might one conclude that Cardozo was not merely not empathetic toward Mrs. Palsgraf, but that the decision *does* reflect "passion" as well as reason, though passion directed *against* the plaintiff? Alternatively, perhaps Cardozo was entirely empathetic, but his empathy was for the Long Island Railroad and its employees.

In *Hynes*, Cardozo says that Harvey Hynes was in "the enjoyment of the public waters," painting a nearly bucolic picture of a boy swimming in the river. In *Palsgraf*, he does not mention that Helen Palsgraf and her children were on their way to the beach on a hot August day. The fact that it was hot is

> a detail of consummate irrelevance in terms of any legal principles but suggestive of the circumstances in which urban users of public transportation need to travel, a reminder of the innocence of Helen Palsgraf's seaside excursion. How such a fact should affect the outcome is nondemonstrable, yet it will play a part in the process by which judgment is reached.[59]

Should Cardozo have mentioned the August heat? If you were Palsgraf's attorney, would you have, even though it is legally irrelevant? Perhaps the ability to identify such factors distinguishes effective litigators from ineffective ones even more than skill at "legal reasoning" (which might, after all, lead an advocate to ignore such factors as the temperature). Does this mean that the most effective advocate is the one with the least sophisticated legal understanding? Or does it overstate the importance of such factors "in the process by which judgment is reached"?

Consider one last aspect of *Palsgraf*:

> Severe impartiality led in *Palsgraf* to the aspect of the decision which seemed least humane: the imposition by Cardozo of "costs in all courts" upon Helen Palsgraf. Under the New York rules of practice, [awards of court] costs [which does *not* include attorney's fees,] were, in general, discretionary with the court. An old rule, laid down in 1828, was that when the question was "a doubtful one and fairly raised, no costs will be allowed." In practice, the Court of Appeals tended to award costs mechanically to the party successful on the appeal. Costs here amounted to $142.45 in the trial

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[58] John T. Noonan, Jr., Persons and Masks of the Law 126–128 (1976).

[59] *Id.* at 141–142.

> court and $100.28 in the appellate division. When the bill of the Court of Appeals was added, it is probable that costs in all courts amounted to $350, not quite a year's income for Helen Palsgraf. She had had a case which a majority of the judges who heard it [counting those on the lower courts] thought to constitute a cause of action. By a margin of one, her case had been pronounced unreasonable. . . . The effect of the judgment was to leave the plaintiff, four years after her case had begun, the debtor of her doctor, who was still unpaid; her lawyer, who must have advanced her the trial court fees at least; and her adversary, who was now owed reimbursement for expenditures in the courts on appeal. Under the New York statute the Long Island could make execution of the judgment by seizing her personalty. Only a judge who did not see who was before him could have decreed such a result.[60]

6. *Judging.* Finally: if *you* were a judge, how would you go about judging and, particularly, how would you go about judging when the case before you is not "controlled" by a prior, "precedential," case or statute? Do you know your predilections and prejudices, your "complex of instincts," your "subconscious loyalties" to the groups "in which the accident of birth or education or occupation or fellowship" have placed you? Do you know your passions? Do you trust your *reason*? (What do you mean by reason?) Do you trust your *intuition*? (What do you mean by intuition?) Do you simply rely on your *judgment*? (What do you mean by judgment?[61])

Is the injunction, "Judge, Know Thyself" sufficient?

Can you ask only "What should *I* do in this case? What do *I* think is 'best' in this case?" If you answer yes, are you then not assuming a legislative mantle? And if so, then we can no longer evaluate your decision in terms of its correctness or incorrectness vis-à-vis any preexisting "law" but only in terms of its foolishness or wisdom — is that not so?

Or should you ask, "What can and should I, *a judge*, do in this case?" If you deem that the correct question, are you then not asserting that there is always "something else" for which a judge can reach to help her decide the case? That is, that "there is some aspect of judicial decisionmaking which renders it *qualitatively* different from legislative decisions,"[62] even in a case of "first impression," that is, a case not controlled by precedent. Ought you, in other words, seek to experience "the legal rule structure * * * simultaneously as an 'internal' source of obligation and an 'external' institutional constraint"?[63] And if so, then we could evaluate your decision not only as "wise or foolish, but in terms of some notion of 'correctness' or

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[60] *Id.* at 144.

[61] Judge Posner calls "good judgment" a "cousin of intuition and another major factor in judicial decisions" where legal materials leave significant judicial discretion. He describes it as "an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense." RICHARD A. POSNER, HOW JUDGES THINK 117 (2008.

[62] *See generally* Charles M. Yablon, *Judicial Process As an Empirical Study: A Comment on Justice Brennan's Essay*, 10 CARDOZO L. REV. 149, 56 (1988) (emphasis added).

[63] *Id.*

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'appropriateness' within the prevailing rule system"[64] — is that not so?

C. A FINAL NOTE

"On July 8, 1916, *Harvey Hines*, a *lad* of sixteen, swam with two companions"; they "intend[ed] *to leap* into the water"; the wires "*flung him* from the *shattered* board, and *plunged* him to his death below."

You knew by the time you reached "plunged" that Harvey Hines would win, right? Probably you guessed it at "lad."

In contrast: "Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach."

Things do not look as promising for "plaintiff," do they?

Is this a difference of form (or style) or one of substance? Cardozo himself doubted the distinction: "The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance."[65]

Assignment 1

Identify the "strength that is born of form" in *Hynes* and contrast it with the "feebleness that is born of the lack of form" in *Palsgraf*.

Assignment 2

Take an imaginative leap: you are no longer a first-semester law student. You have just become an appellate judge. You look for guidance, for a model, to help you be the kind of judge you feel you want to be and should be.

Reread the excerpts in Section A. Identify those that most nearly embody *your* ideal of what a great judge should be like and that you therefore want to take as a lodestar.[66] Explain your choice. Do the same with those excerpts that you consider at the farthest remove from your vision of the great judge you would like to be. Explain your choice.

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[64] *Id.*

[65] Benjamin N. Cardozo, Law and Literature 6 (1931).

[66] A lodestar is a star that leads or guides, especially the North Star.