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MR. JUSTICE CARDOZO

LEARNED HAND

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MR. JUSTICE CARDOZO

THE antinomy at the basis of a judge's work has been so often discussed that I can justify no more than a bare restatement of it. His authority and his immunity depend upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it — if it is to stand against the passionate resentments arising out of the interests he must frustrate. He must pose as a kind of oracle, voicing the dictates of a vague divinity — a communion which reaches far beyond the memory of any now living, and has gathered up a prestige beyond that of any single man. Yet the customary law of English-speaking peoples stands, a structure indubitably made by the hands of generations of judges, each professing to be a pupil, yet each in fact a builder who has contributed his few bricks and his little mortar, often indeed under the illusion that he has added nothing. A judge must manage to escape both horns of this dilemma: he must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time — at all hazards he must maintain that tolerable continuity without which society dissolves, and men must begin again the weary path up from savagery.

This was the problem that fascinated Cardozo throughout his life; about it he wrote with much beauty, insight and feeling. His solution of the contradiction was his great contribution to his time. Do not understand me to suppose that there is a solution in the sense that one finds an answer to a problem in algebra or geometry. There is no such solution; there seldom is to any of the real problems of life. But there are ways of going about a solution, and to find the right way constantly teased him. A judge must think of himself as an artist, he said, who, although he must know the handbooks, should never trust to them for his guidance; in the end he

must rely upon his almost instinctive sense of where the line lay between the word and the purpose which lay behind it; he must somehow manage to be true to both. There were indeed times when I dared to question the paths by which he reached his goal, but it seems to me that almost never did I venture to say that he came out at the wrong place. His results had an unerring accuracy, which, in my case at any rate, usually left me altogether reconciled, and which curiously contrasted with his tentative, at times almost apologetic, approaches to them. He never disguised the difficulties, as lazy judges do who win the game by sweeping all the chessmen off the table: like John Stuart Mill, he would often begin by stating the other side better than its advocate had stated it himself. At times to those of us who knew him, the anguish which had preceded decision was apparent, for again and again, like Jacob, he had to wrestle with the angel all through the night; and he wrote his opinion with his very blood. But when once his mind came to rest, he was as inflexible as he had been uncertain before. No man ever gave more copiously of himself to all aspects of his problem, but he knew that it was a judge's duty to decide, not to debate, and the loser who asked him to reopen a decision once made found a cold welcome.

In all this I have not told you what qualities made it possible for him to find just that compromise between the letter and the spirit that so constantly guided him to safety. I have not told you, because I do not know. It was wisdom: and like most wisdom, his ran beyond the reasons which he gave for it. And what is wisdom — that gift of God which the great prophets of his race exalted? I do not know; like you, I know it when I see it, but I cannot tell of what it is composed. One ingredient I think I do know: the wise man is the detached man. By that I mean more than detached from his grosser interests — his advancement and his gain. Many of us can be that — I dare to believe that most judges can be, and are. I am thinking of something far more subtly interfused. Our convictions, our outlook, the whole make-up of our thinking, which we cannot help bringing to the decision of every question, is the creature of our past; and into our past have been woven all sorts of frustrated ambitions with their envies, and of hopes of prefer-

ment with their corruptions, which, long since forgotten, still determine our conclusions. A wise man is one exempt from the handicap of such a past; he is a runner stripped for the race; he can weigh the conflicting factors of his problem without always finding himself in one scale or the other. Cardozo was such a man; his gentle nature had in it no acquisitiveness; he did not use himself as a measure of value; the secret of his humor — a precious gift that he did not wear upon his sleeve — lay in his ability to get outside of himself, and look back. Yet from this self-effacement came a power greater than the power of him who ruleth a city. He was wise because his spirit was uncontaminated, because he knew no violence, or hatred, or envy, or jealousy, or ill-will. I believe that it was this purity that chiefly made him the judge we so much revere; more than his learning, his acuteness, and his fabulous industry. In this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire, it was a rare good fortune that brought to such eminence a man so reserved, so unassuming, so retiring, so gracious to high and low, and so serene. He is gone, and while the west is still lighted with his radiance, it is well for us to pause and take count of our own coarser selves. He has a lesson to teach us if we care to stop and learn; a lesson quite at variance with most that we practice, and much that we profess.

Learned Hand.

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