CHAPTER 3

THE DECISIONAL THINKING OF JUDGES AND ARBITRATORS AS TRIERS OF FACT

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I.

It has seemed appropriate to the Academy that we mark the twentieth anniversary of the Supreme Court's *Trilogy*, establishing arbitration as a unique federal forum for labor-dispute resolution, by undertaking to examine what judges and arbitrators may have learned in their respective roles which may be of value to each other's understanding of decision-making, particularly as triers of fact in labor-dispute situations. It is important to do so because of the rapid evolution of disputes that are of overlapping and common concerns to judges and arbitrators. We hope to start a process of better understanding of collective bargaining, including grievance handling, among the judiciary, and we are confident of better educating ourselves about our common professional responsibilities as triers of fact. Judges and labor arbitrators increasingly are coming across each other's footprints in the records before them. Courts and arbitrators now hear cases in various stages procedurally and substantively in their respective forums that have arisen out of identical circumstances and which directly or indirectly involve such matters as discrimination (race, sex, ethnic, religious, etc.), the duty of fair representation by unions, and the obligations created by various statutes such as the National Labor Relations Act, Title VII of the Civil Rights Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the like, as interpreted and enforced by regulatory administrative agencies.

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Interesting questions occur about the nature and kinds of decisional thinking that go into judicial and arbitral resolutions of these disputes. Some are:

> Do some or all of these problems, professionally viewed, look different to judges than they do to arbitrators?
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> Are different thought-processes involved in their procedural or substantive resolution when judges think them through to decision than when arbitrators do?
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> Do judges and arbitrators react differently to the commonly experienced necessity of saying the "yes" or the "no" in situations in which the reconstruction of disputed events—"the facts"—cannot be done with assurance of accuracy?
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> Do they cope differently with uncertainty in the face of the necessity of decision?
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> Do the trial judges and labor arbitrators, as triers of fact, think decisionally in different ways than do appellate judges?
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> Are there functional differences among these three sets of decision-makers—trial and appellate judges and labor arbitrators—stemming from significantly different perceptions of the responsibilities involved that evoke (or should evoke) different responses to identical circumstances?
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> Do triers of fact, or judges and arbitrators, differ as decisional thinkers, some functioning intuitively, others cerebrally, in their approaches to the conduct of hearings and the resolving of the disputes submitted to them?

These questions and others like them have been explored in four study groups for the past several months, in Chicago, Los Angeles, New York, and Washington. The original design was to bring together a district judge, a circuit court of appeals judge, two arbitrators (one a lawyer by education, one not), and a union and a management representative. The usual vagaries of life somewhat upset the routine, but all four groups worked industriously and with some enjoyment. Each study group was supplied with a syllabus of fact situations prepared by four stout-hearted members of the Academy (Alleyne, Britton, Levin, and Murphy) in each of several problem areas commonly encountered by federal judges and arbitrators; broadly covered were problems of procedure, discrimination, fair representation, unfair labor practices, and safety.[1]

Kalven and Zeisel, in their study *The American Jury,* remark "what the American law has found to be an endlessly fascinating topic: the decision-making of judges."[2] But those judges who

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[1] *See* Chs. 4–7, *infra*

[2] Kalven and Zeisel, The American Jury 11 (1966).

have preoccupied legal writers and others have almost always been appellate judges. It is puzzling that this undoubted interest has not long since resulted in extensive examinations of the decisional thinking and conduct of the considerable variety of triers of fact that function in the adversary setting of our justice system. There are the federal and state trial judges who in bench trials, now more numerous than jury trials in both civil and criminal proceedings, perform their reconstructive tasks without the aid of a jury. There are other triers in various regulatory agencies, like those that administer our labor laws, the five members of the National Labor Relations Board, themselves triers of fact once-removed, and the 100 administrative law judges who are its first-resort triers of fact. And, of course, there are hundreds of labor arbitrators throughout the country deciding many thousands of disputes each year in a final and binding manner. What rich and untapped lodes these are, laden with social information about decision-making and disputes; yet they remain relatively untouched in the culture around us by the curiosity of researchers!

This afternoon and tomorrow afternoon there will be four challenging papers and panel discussions of some of the decisional problems encountered alike by courts and arbitrators relative to unfair labor practices, safety issues, discrimination, and fair representation. Throughout these two days we are hoping to open areas of interest and concern for your further reflection. That then is essentially a statement of the rationale and format of our program.

II.

My other undertaking at the threshold of our discussions of decisional thinking is to draw attention to some underlying aspects of the functioning of triers of fact.

Our inquiry commences in the constant shadow of one unyielding, always pressing reality of which each trier of fact, whether judge or arbitrator, is constantly mindful. That is *the necessity of decision.* Fortunately, it is a hurdle very often readily taken in full sprint without pause. But how triers think decisionally will not begin to be grasped unless one first comes to grips with the psychology of the undecided case. Having already defied sporadic attempts at decision—at the desk, in the bathroom, at the airport, on the airplane (before and after martinis) —this record has now attained the durable proportions of un-

pleasant omnipresence. Uneasy recognition, springing from prior experience, acknowledges its considerable promise for dislocating the stride and rhythm necessary to clear those other decisional hurdles that can be seen ahead (the hearings have already been held).

This brings us to a second reality that is also well known to experienced triers of fact as a recurrent, albeit unwanted, phenomenon. Curiously, it has remained unmentioned in the extensive literature about how judges decide cases. This is *the dilemma of irresolution.*

When these two realities in the life of the trier of fact come together, the necessity of decision in tension with the dilemma of irresolution, that conjunction presents an increasingly unpleasant situation for the trier thus beset; at the same time it is an intriguing one for those who are interested in understanding the decisional thinking of judges and arbitrators.

This is not the case, however, of the irresistible force meeting the immovable body. The irresistible force—the necessity of decision—will not be denied; the decision must and will be made short of the resignation or recusal of the trier of fact. The dilemma of irresolution is a transient condition.

But how does that change transpire? How does a trier make the difficult passage from doubt and uncertainty to conviction about what happened and the consequent decision?

It is 50 years since Judge Jerome Frank unsettled the thinking about the thinking of judges in his book, *Law and the Modern Mind.* Then in 1949 he published his *Courts on Trial.* It was Frank —attorney, law professor, federal administrator, federal court of appeals judge—more than any other of our legal writers who emphasized "the transcendent importance of the trial judge"[3] in the administration of justice as the court of first instance, the trier of fact, who establishes the history of the dispute. In our governmental system of justice, the federal and state appellate courts, intermediate and supreme courts alike, must exercise their duty of review in each case relative to a trial or hearing record made either by or under the aegis of a trier of fact. Appellate courts in civil litigation do not casually undertake to rewrite that record by reinterpreting the transcript of testimony presented before the trier of fact. Yet it does occur, and when

[3]Frank, Courts on Trial 271 (1949).

it does, the conceptual fulcrum for overturning the trier's findings is the phrase, "substantial evidence," thus: "the decision of the trial court [or the Labor Board, or the arbitrator] is not supported by substantial evidence in the record taken as a whole."[4]

Yet, to paraphrase Pilate, what is evidence? This is how Judge Frank would have answered Pilate:[5]

> "The facts as they actually happened are . . . twice refracted—first by the witnesses and second by those who must 'find' the facts. The reactions of trial judges or juries to the testimony are shot through with subjectivity. . . . [T]he facts as 'found' by a trial court are subjective.
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> "Considering how a trial court reaches its determination as to the fact, it is most misleading to talk as we lawyers do, of a trial court 'finding' the facts. The trial court's facts are not 'data', not something that is 'given'; they are not waiting somewhere ready-made, for the court to discover, to 'find'. More accurately, they are processed by the trial court—are, so to speak, 'made' by it, on the basis of its subjective reactions to the witnesses' stories. Most legal scholars fail to consider that subjectivity, because, when they think of courts, they think almost exclusively of upper courts and of their written opinions. For, in these opinions, the facts are largely 'given' to the upper courts—given to those courts by the trial courts."

Yet even so perceptive an observer of the trial courts as was Frank did not recognize the existence and profound decisional import of the dilemma of irresolution that triers of fact encounter from time to time and not infrequently in deciding whether to say the "yes" or the "no" to the claimant. That dilemma has its source in the commonplace among experienced triers of fact that persons who witness or participate in events, and then later become embroiled in a dispute of some sort about the events, must be regarded as potentially unreliable reconstructors and recounters of what has happened.

Initial perceptions, storage in memory, later recalls, resortings and re-storages in memory, and finally their ultimate recounting under stress as testimony in an adversary proceeding, comprise the successive stages of witnessing in each or all of which there may occur a loss or distortion of the capacity to testify accurately. No scientific method has yet been devised to

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[4]*See* Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above,* 22 Syracuse L. Rev. 635, 645 (1971).

[5]Frank, *supra* note 3, at 22–24.

extract coherence from the jumbled state of mind of an honest witness. Triers of fact know all of that. They well realize that they have no superhuman, radar-like scanning apparatus with which they can reconstitute the unreliable accounts of witnesses into reliable coherence; triers are locked into the same infirmities of the human situation as everyone else. They must do their work as effectively as they can within the limitations that unreliability imposes.

We may say that there are three sets of "facts" or circumstances that may be said to radiate from each litigated dispute.

The first set comprises what we may call *the honest-to-God facts.* It is what actually did happen, the circumstances out of which arose the dispute. As unsettling as its acknowledgment may be, this earlier known-but-to-God reality is frequently—many would say usually, some would say always—unreconstructible with the assurance of accuracy. It is essentially unknowable in the sense that it cannot be objectively verified. That is a basic trier truth that is central to an understanding of decisional thinking of triers of fact. It is also quite unsettling for many triers to accept as an accurate portrayal of their states of mind in frequent decisional situations; so also may it be for the disputants and their advocates. Unsettling as it may be, reality it remains.

The second set of "facts" we may call *the perceptual facts.* It is comprised of the trier's evolving and changing perceptions of the existing situation as it unfolds during and after the hearing and up to the moment of execution and submission of the decision. It includes the trier's views of the nature and quality of the activities of the respective disputants as they portray how it *was* prior to and during the dispute, and how it *is* as they conduct themselves during the hearing. This second set of "facts" also includes whatever perceptions may occur to the trier about the social significance of their activities in their communities.

The third set of "facts" we may call *the facts as found.* It is the trier's final reconstruction of what he says had happened. It may or may not conform to the first set, *the honest-to-God facts.* Neither the trier nor anyone else on this earth is ever likely to know if it does or does not. This third set of "facts" is the trier's supposition, a montage of hoped-for rationality and best guesses, a collection of likelihoods that must remain hypothetical because it will rarely be subject to verification. It is quite unlikely that this construct of the trier will later ever be confirmed or disproved by postdecision events or discoveries.

As Chief Justice Roger Traynor of California has observed with customary felicity:[6]

> "The problem is that the facts are forever gone and no scientific method of inquiry can ever be devised to produce facsimiles that bring the past back to life. The judicial process deals with probabilities, not facts, and we must therefore be on guard against making fact skepticism our main preoccupation. However skillfully, however sensitively we arrange a reproduction of the past, the arrangement is still that of the theater. . . . The most we can hope for is that witnesses will be honest and reasonably accurate in their perception and recollection. . . ."

In the third of his lectures on "The Nature of the Judicial Process," assessing the role of the judge as legislator, Chief Judge Benjamin Nathan Cardozo asserted that in "countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps."[7] That evidently continues to be a valid empirical statement of the experience of appellate judges who sit on the state and federal courts and perform the functions of our courts of last resort.[8] The law that is "so clear," however, may only be so viewed because in each of those many cases a trier of fact as the forum of first instance has already established the essential foundation on which must be built the decisional conclusions and which then also becomes the basis for assessing their validity. That foundation, of course, is assembled from the trier's findings of "fact." Far more often than not, those findings must be drawn from a welter of conflicting testimony. So it is an equally valid empirical observation that, to use Cardozo's numeric, in countless contested proceedings—arbitrations and trials—the reconstruction of events becomes so enmeshed in conflicting testimony and contention that a person who did *not* experience some measure of doubt about what the reality of it all must have been would simply not be functioning in a rational manner.

Yet no matter the extent of the difficulty in thinking about how to resolve a litigated dispute, the trier confronts the necessity to reconstruct the events from which the dispute has emerged with the predominant thought, at least initially, of "what happened?"

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[6]Traynor, *Fact Skepticism and the Judicial Process,* 106 U. of Pa. L. Rev. 635, 636 (1958).
[7]Cardozo, *The Nature of the Judicial Process.*
[8]Clark and Trubeck, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition,* 71 Yale L.J. 225, 270 (1961).

There are two aspects of "what happened," and we would expect an experienced trier to be sensitive to each. First, of course, is the obvious concern to put together as rational a reconstructive account, one that is as close to the past reality as is possible, of the conduct both of the disputants and of the other persons and institutions who have become involved in this dispute that has been brought before the trier.

The second aspect of "what happened" involves the relational and social contexts of the dispute. How may what they did be said to affect their own continuing relationship and, in turn, those around them who are affected by it? How might their conduct be evaluated? This latter line of inquiry raises the import of the near-term and the long-term political, economic, psychological, and moral factors that may appear to the trier to be implicated by the alleged conduct and by its impacts on those directly and indirectly caught up in the dispute.

While it may be helpful to separate these aspects of "what happened" for purposes of analytical identity, it is obvious that they must constantly intermingle; the perceptions of their relative significance are likely to shift about in the trier's actual thought-processes as the hearing proceeds and as the reconstruction of what happened gradually takes shape in the trier's mind. The growing sense of how the events probably occurred, of who said and did what, continuously changes the trier's assessments of the role of each involved and of the social setting in which the events occurred. Recognition of this kaleidescopic phenomenon that occurs in the linear course of a trial or a hearing is why an experienced trier is wary during a proceeding of leaping to conclusions prematurely.

It is helpful to try to identify the general decisional situations that are encountered by triers of fact. There are four, each of which will at one time or another be experienced as a hearing proceeds, and in some difficult cases a trier will run through all four of them before deciding the case.

First, there are situations in which *there is no doubt in the trier's mind either about what happened or of how the dispute should be resolved,* and this regardless of whether doubt might be experienced by anyone else.

Second, are those situations in which *the trier remains in doubt about what happened but has somehow developed a sense of assurance about how the case should be decided;* perceptions of its relational or social setting may or may not engender a sense of how the dispute might properly be resolved.

Third, are the situations in which *the trier has become convinced about what has happened, but remains in doubt of how properly to resolve the dispute.*

Fourth, are those instances in which *the trier is truly perplexed*—in doubt about what happened, unsure of how a decision one way or another would or should be affected by perceptions of the social or relational setting of the dispute.

Unfortunately, there are no empirical data available that indicate the relative incidence of each of those four situations in the experience of triers of fact; nor do we know whether they are experienced alike by labor arbitrators as by trial or appellate judges; nor how those two kinds of judges may differ one from another. Impressionistic accounts remain pretty much the basic resource for those who seek to understand the decisional thinking of triers of fact. This dearth of information provides the occasion, even the necessity, for public self-reflection by triers of fact.

My own impressions have been formed from experience as a journeyman arbitrator out on the circuit of hearings, as an active member of this Academy savoring collegial conversations with my peers about what they are thinking and doing, and from trial and appellate judges with whom I have discussed these matters.

I have catalogued those four decisional situations in a descending order of their relative occurrence. Thus the consensus I perceive is that there are more trier situations of the first sort than of each of the other three combined. That first situation is the one in which, at some point during or after the hearing, reflection has dispelled whatever doubts may have flickered back and forth in the trier's mind as his attention ranged across testimony, exhibits, and arguments about what had happened and of how the case should properly be decided.

What is most interesting, however, is that in the other three of these four situations, doubt is the uninvited and definitely unwelcome companion of judgment.

The second situation is that in which the trier remains in doubt about what happened, but nevertheless feels he can properly decide the matter. He has met but has overcome the dilemma of irresolution. Accurate reconstruction of the events—at least of those that appear material to the issue—seems unlikely, even impossible, with any assurance of achieving a reasonable facsimile of who said and did what, in what sequence, and with what significance. But there arises at some point in the

course of the trier's decisional thinking, from some source, a sense of assurance of what the proper decision should be. In whole or in part, this sense may be the conscious or unconscious product of the trier's intuition, however that mental process of the trier may have been programmed by education and experience. It may also owe its genesis, in whole or in part, to the trier's perceptions of the relational dimensions of the dispute: what will be the foreseeable effects of this or that finding of fact, or of this or that decision, on the interests and relationships of the disputants and of those others directly or indirectly caught up in their dispute?

The third situation is that in which the trier feels satisfied about what has happened, but is nonetheless irresolute about how to decide the case. This may move the trier to thinking more consciously about those judgmental elements that might be drawn from his perceptions of the relational dimensions of the dispute and perhaps from the broader social environment in which function the disputants and the others involved. Are there considerations of public policy that may move the otherwise irresolute balance of mind toward an inclination to decide in one way or the other? At the core of the trier's dilemma—and a hard and undigestible lump it is—preventing that state of irresolution from becoming chronic is the necessity for decision. How may the trier's judgment then be formed solely from a record that prompts irresolution, unless by broadening the focus of decisional thinking to include relational and, if still necessary to break the deadlock, societal factors?

And how much more is such resort necessary and foreseeable in the fourth situation which, fortunately indeed, I am led to believe is relatively rarely experienced (although I have known it)? That is the painful situation in which the trier cannot figure out what truly happened, or what to do about it. What is she to do?

We have at this point, then, identified the four general decisional situations experienced by triers of fact and have found three of them to involve the trier with the necessity to cope with problems of doubt and uncertainty, her will to decide enmeshed in the dilemma of irresolution.

This dilemma seems to plague experienced and inexperienced triers alike, even though the former may have learned to live with it (or efface it) with a countervailing measure of self-patience. Persistently prodding the irresolute trier of fact—

always, impatiently, unpleasantly—is the fretful, stubborn necessity to reach a decision within certain time constraints.

In contemplating this irresolution phenomenon, there is a certain immediate disinclination to accept irresolution as a recurrent and significant fact of a trier's life. There is, if you will, a certain amount of balking at the notion that an intelligent, experienced judge or arbitrator actually does, or even could, have recurrent encounters with irresolution. It almost seems to be viewed at first to be so counter-occupational as to call into question the very competence of such an irresolute decision-maker.

There is also a certain degree of misplaced, even ingenuous, confidence in the ancient legal idea of "burden of proof" as an instrument for overcoming decisional irresolution. If the trier is pestered by irresolution, why all he has to do is invoke the rationale of the burden of proof to avoid any further fretting over the case. Yet one should pause right there. To conclude that the burden has not been satisfied is itself a judgmental act. What finally prompts it? Just plain exasperation? Failure to work out a reconstruction with which one's conscience may live? Surely it is obvious that the legal rubric is not a mechanical formula that closes off further reflection by the trier. Once a trier has heard, observed, and read a welter of conflicting assertions about what has happened, and how it should be viewed, what are the ingredients of judgment that *now* prompt the conclusion that the burden of ultimate persuasion has not been borne, or has been borne, by the party who is required to bear it or fail? How does that judgmental act differ qualitatively from the inquiry: "Shall the answer be 'yes,' or 'no' to the claimants?" Is it not evident that whatever may be the combination of judgmental factors that may combine to prompt a trier to answer the latter question one way or the other are also implicated in resolving the burden inquiry itself?

May it be said that the durability and pervasiveness of reliance on the concept of burden of proof manifest a felt need by triers of fact in an irrational situation to achieve rationality in their decisions? The burden reasoning is a rationale, after all, and there is a certain common-sense appeal to the notion that the moving party ought to be able to make out its case or fail. Is not resort to the burden rubric, in a sense, a rebellion against the irrational incoherence of a trial or hearing? Does it not withdraw the trier from the effort to achieve justice in the circumstances?

Yet do we not also require of our triers their best efforts to reach a rational decision, in contrast to an arbitrary one based on impulse rather than reason?

Since that last assumption is obviously so, a double irony emerges. The first irony is that the invocation of the burden of proof rationale itself may mask from the trier the actual subterranean reasoning, be it "intuition" or some below-the-level-of-awareness analytical process, that prompts the trier's negative to the claimant. To that extent, the trier's reasoning is sheltered both from the corrosion of self-criticism and from reversing review. Skeptical appraisal is smothered beneath that apparent—but not real—process of rationalization. The second irony is that an impatient invocation of the "burden" rationale by a vexed trier as an escape from irresolution may actually frustrate an impending but untimely forestalled rational resolution of the dispute, despite continuing doubt about important details, by shortcircuiting it. Common experience suggests that persistence in mulling over the record, irksome though it may be while doubt remains, has often resulted in breakthroughs of insight that make possible rational dispositions of cases on their merits.

In our culture, the conscience of the trier, conditioned by centuries of community and professional expectation, demanding rationality in decision-making, is offended at the self-perception of coin-flipping sorts of guesswork or the manipulations of bias in decisional thinking and justification. Professional criticism constantly reinforces that expectation, deploring any perceived lapses from the rational processes of decisional thinking, condemning them as "unprincipled" or "irrational."

Thus is it common for courts to assess an arbitrator's award to determine if it appears "unfounded in reason"?[9] It is said to be "the duty of the courts to ascertain whether the arbitrator's award is derived in some rational way from the collective bargaining agreement."[10] An award is enforced because the arbitrator's determination "was not irrational."[11] One court would uphold an arbitrator's findings of fact if it is even "a barely colorable justification for the outcome reached."[12] Another

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[9] *Teamsters* v. *Coca-Cola Co.*, 613 F.2d 716, 718, 103 LRRM 2380 (8th Cir. 1980).
[10] *Detroit Coil* v. *Machinists*, 594 F.2d 575, 579, 100 LRRM 3128 (6th Cir. 1979).
[11] *Board of Education* v. *Hess*, 49 N.Y.2d 145, 400 N.E.2d 329, 331 (1979).
[12] *Andros Compania Maritime, S.A.* v. *Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978).

court is willing to settle for "any rational way."[13] A federal district judge, "frankly confused by the arbitrator's reasoning," vacates an arbitrator's award because it "lacked fundamental rationality."[14] Another judge, aghast, explains that "The Court does not believe that an honest intellect could reach the result" reached by this arbitrator.[15]

That ingrained sense of need to achieve rationality makes particularly uncomfortable the grip of irresolution about the details that comprise the events of the dispute. There is, I suggest, an equally ingrained response mechanism inclining irresolute but rational triers to widen the scope of decisional thinking toward what they may accept as a rational decision. That leads them, as I see it, *first,* to an assessment of the overall situation of the disputants in terms of how potential solutions that might resolve this dispute may alternatively affect them, and *second,* to an inclination to adopt that resolution among the options which seems most rational, given the continuing doubts about the prospect of accurately reconstructing the circumstances.

Before exploring that idea further, we should observe yet another irony that typically emerges at this point in discussions of the dilemma of irresolution. This reach for rationality in the process of overcoming the trier's irresolution, by conscious effort or instinctively, however it may be, is itself perceived by some to be "unprincipled," an arrogation of power to order the lives of others. That concern is surely misplaced; we are dealing with triers rationally attempting to resolve doubts about the accurate reconstruction of the events. These thought-processes come into being in the effort to find a way out of the evidentiary maze of loose ends so as to arrive at a decision that may be regardable as "rational" *first* by the trier in conscience, *second* by the trier in anticipation of the judgment of his peers, and *third* by the peers themselves. Surely that is the antithesis of arrogance.

How then may one reasonably expect a trier to cope with the dilemma of irresolution when encountered? Essentially, as I conceive it, the necessity of decision in a situation of irresolution

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[13] *Ludwig Honold Mfg. Co.* v. *Fletcher,* 405 F.2d 1123, 1128, 70 LRRM 2368 (3d Cir. 1969).

[14] *Empire Steel Castings Inc.* v. *United Steelworkers,* 455 F.Supp. 833, 836 99 LRRM 2728 (E.D.Pa. 1978).

[15] *Mistletoe Express Service* v. *Motor Expressman's Union,* 443 F.Supp. 1, 6 (W.D.Okla. 1975).

produces a mental process of what we may think of as scanning. Sometimes this scanning process occurs quite consciously, but more often, as I sense it in myself and others, it moves at the lowest level of conscious awareness or below it. Whether we see it as intuition or analysis, it is an acute mental process. Thus it is not uncommon for triers of fact to remark how they have puzzled unsuccessfully over what seemingly ought to be connectable loose strands of circumstantial evidence that are related to *something* in the record, but which nonetheless remain stubbornly resistant to being rationally tied together. This uncomfortable state of mind may persist for an extended period; one turns away to work on other matters, perhaps for a stretch of days, only to awaken some morning abruptly to realize that all of those frustratingly dangling ends somehow have become connected; the "yes" or the "no" has become obvious.

In this scanning process, as I see it, the mind works in a much more sophisticated and complex manner than computers have yet been programmed to accomplish, but in much the same manner. It calls up and sorts through and assesses all the direct and indirect utilities and disutilities that appear to be implicated by the alternative conclusions about what might have happened, and of what may be the various courses of reasoning available whereby to dispose of the dispute. As this decisional scanning process seems to be experienced, in one sequence or another, orderly or at random, perhaps variously in differing settings, the mental process inventories and evaluates the positive and negative interests at stake. That is to say, it reacts to the evident pronounced strengths or weaknesses among the following interests, ceasing the search entirely when conviction supplants doubt along that spectrum of thought. In order of priority they are, *first,* the disputants themselves; *second,* others who are, or will evidently be, affected by the dispute and by whatever may be the alternative ways by which it may be resolved; and *third,* the persons, institutions, and social processes that comprise the surrounding community—in short, the social context of the dispute.

This three-dimensional scanning process of inventorying and evaluating, I believe, tends to deflate and overcome the significance of the felt areas of doubt and indecision. This it does, as I conceive it, by filling in the gaps of irresolution with what are themselves justifiable acts of judgment that are fashioned from the perceptions of the trier of the benefits and detriments—the

utilities and disutilities—to be anticipated by the various resolutions that seem possible, given the alternative reconstructs of what happened.

Perhaps this description—some might call it a model—is more poetic than scientific (it surely is not the latter), but I believe it is realistic. Interestingly, however, there is some recent theoretical support of my inferences. In their 1979 book, *Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment,*[16] Professors Irving Janis and Leon Mann extracted from the extensive literature on effective decision-making seven major criteria which they believe can be used to determine whether decision-making procedures are of high quality. They deem it "plausible" to assume that decisions that satisfy these seven "ideal" procedural criteria will have a better chance than others of attaining the decision-maker's objectives and of being adhered to in the long run.[17] Although the authors do not focus at all on the decision-making of judges or arbitrators, it is interesting to consider the extent to which triers of fact would be apt to adhere to these seven "ideal" procedures. My own sense is that a trier of fact who does *not* encounter the dilemma of irresolution in resolving a dispute is quite unlikely to follow any of the seven procedures; yet the trier who is caught in the enervating grip of irresolution is very likely to resort in some manner, however casually or thoroughly and whether above or below the threshold of awareness, to at least six and perhaps (at the point of remedy) even to the seventh. Janis and Mann set the criteria forth as follows:[18]

> "The decision maker, to the best of his ability and within his information-processing capabilities,
> "1. thoroughly canvases a wide range of alternative courses of action;
> "2. surveys the full range of objectives to be fulfilled and the values implicated by the choice;
> "3. carefully weighs whatever he knows about the costs and risks of negative consequences, as well as the positive consequences, that could flow from such alternatives;
> "4. intensively searches for new information relevant to further evaluation of the alternatives;
> "5. correctly assimilates and takes account of any new information

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[16]Janis and Mann, Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment (1979).
[17]*Ibid.*
[18]*Id.*, at 11.

or expert judgment to which he is exposed, even when the information or judgment does not support the course of action he initially prefers;

"6. reexamines the positive and negative consequences of all known alternatives, including those originally regarded as unacceptable, before making his final choice; [and]

"7. makes detailed provisions for implementing or executing the chosen course of action, with special attention to contingency plans that might be required if various known risks were to materialize."

Of the significance of the seven criteria, the authors assert that, "Our first assumption is that failure to meet any of these seven criteria when a person is making a fundamental decision (one with major consequences for attaining or failing to attain important values) constitutes a defect in the decision-making process. The more defects, the more likely the decision maker will undergo unanticipated setbacks and experience postdecisional regret."

It seems reasonable to expect that more decisions will be reached in the process of overcoming the sense of irresolution by being responsive to the competing interests of those most directly involved in the dispute than of those less directly affected by it. (An inherent difficulty, certainly, is that those interests themselves must be identified and assessed in this same setting of inadequate information.) It would seem thus that most doubts would be resolvable—that is, final decisions realized—within the parameters of that first of the three dimensions of concern, that is, limited to the disputants themselves. Even this first dimension, however, is once removed from the confines of the precise issue that was initially submitted by the disputants for the "yes" or the "no" of final decision.

It seems reasonable to assume that most, if not all, triers of fact would readily subscribe to the proposition that they are duty-bound by statute, contract, or commission of office to restrict themselves to deciding the precise issues submitted to them by the disputants. For that matter, all would likely agree that no writ has been entrusted to them as triers of fact to move as they will through the equities of situations, dispensing "Justice" as seems most appropriate to them in the circumstances. Constraints of doctrine and precedent exist for courts; constraints of contract, custom, and expectation exist for labor arbitrators. Those constraints are expected by both groups, no less than their peers and critics, to tether their judgment closely to the case at hand and to do so rationally.

If all of this circumscription is universally accepted, as assuredly it is, how could a trier of fact be justified in broadening the focus of decision to take into view the impacts on the existing and future relationships of the immediate disputants? Or broader yet, the effects on those who may indirectly but significantly be affected by one decision or another? Or broadest of all, of how values of the surrounding communities of interests—industrial and social—are apt to be advanced or retarded by one decision or another among the various options whereby the submitted issues might be decided?

But there is a third stubborn reality in addition to the *necessity of decision* and the *dilemma of irresolution.* That is the *thrust for rationality* in deciding disputes. In our insistence on rationality, we demand that the trier *not* resort to tea leaves, coinflips, tarot cards, ouija boards, or the roll of the hot and cold dice. Where then lies the rational way for the trier out of the dilemma of irresolution? The central thesis here is a truism: the trier must, one way or another, *think* his way out of it by resorting to whatever resources may rationally be available. This is not, therefore, a trier arrogating the role of omniscient Providence. This is an indecisive but intelligent person who must in any event say the "yes" or the "no" to a claimant, a trier of fact who feels compelled to be rational in the process, one who is groping for a rationale of decision that may be acceptable as fair and reasoned alike to personal conscience, to professional peers, and, the trier hopes, to the disputants.

The more that sophistication develops in regard to the processes for finding facts in adversary proceedings—the existence and effects of conflicting and inadequate testimony and exhibits —the more should we see developing a willingness to think through the implications to the decisional thinking of triers of fact (and appellate tribunals) and to the justice systems within which they function, of the ineradicable presence of uncertainty that encumbers their efforts in many cases to reconstruct the events from which each dispute has emerged and to decide the dispute rationally.