

CHAPTER I
REFLECTIONS ON DECISION MAKING*
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The annual meetings of the National Academy of Arbitrators, like similar meetings of other learned and professional societies, are usually given over to discussions of general principles. Occasionally, but not often, at such meetings a session will be devoted to an analysis in depth of a single case. Even in such instances, however, interest is more apt to center upon the principles which were involved in the case than in the process by which those principles were applied and the outcome decided. Similar emphasis is perceivable, I think, in professional literature. In the processes of teaching and learning we tend to generalize. We resort to specific examples chiefly for the purpose of illustrating principles. The teaching of law by the method of case study and the teaching of medicine by the method of patient study are minor and superficial exceptions. Ultimate emphasis even by those who use "the case method" is also upon general laws and principles.

Emphasis upon general principles is useful, indeed necessary, if knowledge is to be systematized. Emphasis upon principles has less value, however, with respect to the effective application of systematized knowledge to the real problems of life. Solution of all the difficult business of living has not yet been, and probably cannot be, achieved by automation of the process of selecting and applying principles. The fact is that the more we tend

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to generalize, the less exact we become. The more general a statement of rule or law, the more difficult it becomes to apply to reality. To postulate as a principle that an employee may or should be discharged for "just cause" is less exact, and therefore less helpful in dealing with particular cases, than to state more specifically the kinds of misconduct for which an employee may and should be discharged. Industrial society, as all society, must have rules of general nature to guide the activities of its members. In the application of those rules, however, one should recognize that no two reality situations are ever exactly the same, and that as to many situations the rules cannot be applied with mathematical precision. Aristotle's concepts of identity constitute useful aids in dealing with individual problems, but they do not automatically solve them. "General propositions," said Mr. Justice Holmes, "do not decide concrete cases." And, to quote him again, "The life of the law has not been logic, it has been experience."

The business of arbitrators, like the business of judges, is to decide concrete cases. The business of companies and unions includes, among other things, the definition of general propositions. Arbitrators cannot decide concrete cases without relying in part upon principles, rules, and logic, but neither can they make decisions solely by reliance upon, or automatic application of them. To decide a concrete case, arbitrators like judges must do more than call to mind the one proper principle. They must at times make choices among conflicting principles, and at times proceed to resolution with little or no help from authoritative principles. Every decision involves the exercise of volition or initiative in order to cross the ground which lies between the outpost of general principle and the objective of concrete and specific choice.

Speaking broadly, with reference to the whole complex of problems which confront human beings, the exercise of volition which is necessary to the solution of a particular problem or "case" is frequently not a difficult task. Often it is so easy that one does it subconsciously or semiconsciously: "from force of habit," as we say. Each day we arise, dress, eat, work, entertain ourselves, and retire, pursuant to many decisions, the making of which is a matter of habit, and as to which we are barely conscious. Another group of problems are resolved by most of

us at a more conscious level, but do not demand much effort. We buy one suit or tie, rather than another. We make plans for minor business activities, social activities, and the like. Occasionally, but not too often, in this mid-ground of problem solving, we are stymied, but seldom for long.

A third group of problems places heavier, sometimes excruciating, demands upon us. Arbitrators are not the only ones so affected, to be sure. Others in all walks of life are similarly tried. But arbitrators in labor disputes, I believe, encounter more than their per capita share of such difficult problems. The reason is that they function at one significant front line of the 20th Century expansion of society, beyond the breastworks of well-defined customs and habits.

Not long after I became regularly engaged in arbitration, I began to realize that the making of decisions is not as easy as it originally appeared to be. I became curious about the nature of the decision-making process itself, over and beyond any curiosity about the rules and principles which largely affect decisions, and over and beyond the process of writing opinions. Opinion writing, we all know, is not the same thing as decision making, although the two are undoubtedly interrelated. Let me share with you some of the thinking of others about decision making, a topic that seldom is discussed.

Some years ago an issue of Fortune magazine carried an article about decision making by corporate executives. The author asked a number of such executives to describe how they went about making decisions. Some of those interviewed were unable or unwilling to articulate the subjective process, and one went so far as to assert that it was indescribable and better left unexamined for fear of harming it. That may be called a primitive point of view, but it is not unrealistic. It has the advantage of simplicity. Certainly it is remarkably outgoing and avoids the pain of introspection. Others with more fortitude have not been so timid about attempting, at least, to discern the subjective nature of the decision-making process. Among the moderns, one of the first was Judge Cardozo, who delivered four exquisite essays about decision making by judges, which were published and republished under the title, *The Nature of the Judicial Process*. In them he recognized that the processes by which judges shape their judgments were not wholly within their own aware-

ness. After discussing the impact of precedents, logic, philosophy, and other conscious forces, he said

“Deep below consciousness are other forces, the likes and 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 judge.” (Lecture IV, page 167)

and that

“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 limitation.” (ibid)

While Cardozo's essays are required reading for anyone truly interested in modern jurisprudence, they touch only lightly (as the author himself conceded, p. 167) upon the subjective aspects of the decision-making process. Judge Cardozo said by way of conclusion on our present point of interest that

“The training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions.” (ibid, p. 176)

He did not elaborate upon what he meant by “the training of the judge” or “the judicial temperament.” These are traditional conceptions, but they do not satisfy persistent present day inquiry as to the nature of the decision-making process.

About a decade after Judge Cardozo's essays were first published, Jerome Frank's book *Law and the Modern Mind* appeared. Intent upon relieving the law and judges from what he believed to be delusive misconceptions, both internal and external, as to the objectivity of legal decisions, Mr. Frank attempted to probe more deeply into the nature of the subjective process by which all men, including judges, reach decisions. He said in part

“The process of judging, so the psychologists tell us, seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion, more or less vaguely formed: a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot to his satisfaction find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the con-

clusion and seek another . . . Judicial judgments, like other judgments doubtless in most cases are worked out backwards from conclusions tentatively formed." (Chapter XII, p. 100-101)

Quoting from another, Mr. Frank asserted that

"The judge really decides by feeling and not by judgment, by hunching and not by ratiocination, such ratiocination appearing only in the opinion. The vital motivating impulse for the decision is an *intuitive sense* of what is right or wrong in the particular case: . . ." (page 104)

The notion that "intuition" or, to use a broader word, "personality" substantially affects the behavior and thinking of individuals is now widely accepted. But Mr. Frank acknowledged, and later psychiatric research bears him out, that a man's "personality" is not unaffected by his education and training. The judge's "hunch" is an educated hunch. The "gestalt," or totality of affect and response, of any man is a reflection of everything that ever happened to him, including his formal education as well as other environmental forces. The "intuitive sense" of an educated man living in the western free world is not the same as the "intuitive sense" of an aborigine. Intuitions in men are susceptible to conditioning in manner comparable to Pavlov's famous experiments with conditioned reflexes in animals.

Let me call your attention to two other writings which touch upon the process of decision making. Philosopher John Dewey wrote

"Deliberation is a dramatic rehearsal (*in imagination*) of various competing possible lines of action . . . Deliberation is an *experiment* in finding out what the various lines of possible action are really like. It is an *experiment* in making various combinations of related elements . . . to see what the resultant action *would be like* if it were entered upon. But the trial is in *imagination*, not in overt fact . . ." (*Intelligence in the Modern World*, page 755; emphasis added)

With respect to the decision or choice which closes out deliberation, Dewey said it consists of

"Simply hitting in *imagination* upon an object which furnishes an adequate stimulus to the recovery of overt action. Choice is made as soon as some . . . combination . . . finds a way fully open. Then energy is released. The mind is made up, composed, unified." (ibid p. 757; emphasis added)

The significance of *imagination* in the making of decisions was also noted by at least one author in the field of business management.

In a monograph entitled "Managerial Decision Making" (*Journal of Business of the University of Chicago*, January, 1950) Professor Robert Tannenbaum analyzed the process of decision making, particularly by business executives. He pointed out that, ideally, executives should make decisions only after they have identified and evaluated the real consequences of the various alternatives open to them. However, he conceded and emphasized that this *ideal* can never be *achieved*, because most of the important consequences of executive decisions lie in the future, and therefore can only be *imagined*. Tannenbaum concluded that decisions can never be wholly *rational*. Indeed, he went further and asserted that if all the future consequences of alternative courses of action were accurately known, there would be no need to exercise *judgment* as to choices among them. I, myself, would add: that when the future consequences of possible alternatives are *truly known*, it becomes possible to resolve problems entirely by the application of *formulas*. This is the sort of "thinking" or decision making that modern electronic computers can achieve. The better machines are capable of performance pursuant to *highly complex formulas*, but they cannot exercise what we call *judgment* because they cannot *imagine* for themselves the probable outcome of courses of action which are not mathematically ascertainable.

I have cited students of jurisprudence, philosophy, and business. I could also cite psychologists and others. All seem to agree that the subjective *process* involved in making decisions is a dynamic one, involving both *rational thought* and imaginative projection as to consequences. It includes conscious determination of values and application of logic, and subconscious or half-conscious leanings or predilections. In the course of deliberation, the mind traverses paths among known facts, tentative conclusions, and supporting principles, searching for a route and destination that will be satisfying to the personality. The satisfaction being sought is not confined to the intellect; it permeates the whole of the being. In the highly uncertain problem areas of the sort dealt with by arbitrators, this sense of satisfaction is seldom complete. Doubts are almost never completely dispelled.

We do the best we can with the information at hand, realizing that decisions are *human choices* ordained by a complexity of forces only some of which are susceptible to complete control.

The known forces are relatively more susceptible to identification and learning than the unknown. With respect to labor arbitration, they consist of such contractual provisions or other applicable principles and facts as are *clear*, and the rules of logic. The syllogism is ever present in our thought processes. These principles and forms of reasoning can be learned by traditional methods of study.

The unknown elements in decision making, those variously described as “hunches” or “intuition,” are less susceptible to identification and control. But we know more about them today than we did when Judge Cardozo wrote his essays. Beginnings, at least, have been made in the development of techniques for dealing with predilections and prepossessions. It is now possible, within limits, for men to deal consciously with erstwhile subconscious forces. We may in the future be able to bring them within better control of rationality, and thereby diminish the uncertainty which they tend to engender.

For the present, however, we can do little more than be aware of the role of personality in decision making and encourage all efforts to mold it into a constructive force.

Our forefathers asserted that government should be by law and not by men. We adhere to that general belief. But today we know that laws and principles are put into effective action only by the volition of men, and that such volition reflects a continuing dynamic interaction between rational thought and nonrational personality factors. We would be unrealistic if we were not to accept that knowledge, while at the same time we seek to control and utilize for good what was once regarded as an uncontrollable element of decision making.