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THE RHYTHMS OF HOPE AND DISAPPOINTMENT IN THE LANGUAGE OF JUDGING

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I want to talk today about a certain aspect or dimension of the language of judging. From one point of view the quality I mean can be seen as a kind of idealism inherent in legal language; from another, as a kind of fundamental hypocrisy; from still another, as a simultaneously tragic and comic element in legal life.

I.

Let me begin with a recent experience of my own, which I think will not be entirely unfamiliar to everybody in this room.

A couple of weeks ago, when the term began, I once more started off teaching a course to new law students—Introduction to Constitutional Law—and found myself having a very familiar set of feelings. For every time I start a course I find myself full of intense and unreasoning hope. I am determined that I will be the best law teacher in the world; I believe that these students will be the best law students in the world; and I want this to be the best law class in the world, wonderful for us all. Yet, every time, there is built into the experience of a course a kind of minor heartbreak, certain to occur; for in the event I prove much less than perfect—missing chances to make points, confusing issues, not hearing questions, failing to understand what is before me, and so on—and the students do too, missing easy points, not paying attention, coming in late, not understanding what anyone should understand, and so forth. At the end comes the depressing experience of the exam, and its grading, when I find myself forced to see the reality of my own work and theirs in a new way.

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From the perspective of my own religious tradition, you could say that we collectively act out the truth that we live after the Fall. Later on, my feelings change, and I come to think of the course with a sense of real though limited accomplishment; as valuable, though far from ideal. Once more I arrive at the confidence that this is worth doing after all.

Then, after a short break, I find myself starting off on a course again, full of the same hopes that are certain to be disappointed, as though I am some kind of a fool who can't learn from experience. Yet—and this is my main point—I think I am right to do this, that these unreasonable hopes are part of the essential gift that a teacher makes to his or her students, just as the hopes on the other side are a part of the essential gift of the students to the teacher and to each other. Without the desire—and this requires a hope—to make the class wonderful, it would be much worse than it is. There thus is built into teaching a constant rhythmic shift between hope and disappointment, confidence and despair, concluding in temporary moments of more or less stable acceptance. This is part of the stuff of the teaching life, and in my view a good part.

But this is true not only of teaching: perhaps, indeed, this rhythm is present in every act of language, for there is a sense in which every statement or question is an act of hope, never to be perfectly realized: the hope that at last you will say the truth, or be understood, or receive a perfectly intelligible response. Perhaps every sentence promises in its structure an order, an intelligibility, that the world cannot keep, and expresses a hope, of being fully comprehensible and fully comprehended, that will never be met. For every attempt to communicate is across differences that can never be perfectly bridged. Think how much of a good marriage, after thirty years, remains a conversation, one aim of which is to bring the two languages, and the two people, still closer together. But they never become one.

II.

I think, then, that all acts of language have something of the same rhythm as a class, moving from hope to disappointment to a kind of acceptance of limit, followed by the same sequence again: hope, disappointment, and acceptance. Legal language seems to have this quality in sharpened and clarified form; and

perhaps it is one of its great virtues that it does so. That is: as the utterance of a sentence holds out a possibility towards which we orient ourselves—of intelligibility, of community, of truth—the law's task is to do exactly that on a larger scale: to set forth ideal possibilities towards which we can strive, without which our energies would have no direction.

Let me give you an example. We began our course this fall by reading the Constitution, which of course begins with the phrase: "We the People of the United States." But in what sense was it in fact "the People" who spoke there? Of course the document was ratified in each of the states, at conventions assembled for that purpose; in this sense, it was indeed the act of the People. But who was permitted to vote for representatives at those conventions? Certainly not slaves; in most states certainly not African Americans and Indians; certainly not women; in most states nobody who failed to meet certain property qualifications.

Does this mean that the statement "We the People" is false and hypocritical? In one sense the answer is yes. But would it really have been better if the Constitution said, "We, the voting population of propertied white males, do hereby ordain and establish this Constitution of the United States?" I think your reaction indicates that you know the answer to that question.

But exactly why is that so? What is the difference between the two formulations I have given you? The more "realistic" formulation would have been more nearly true to certain political facts; but much less true to others, to the hopes and aspirations that animated the founding of this country. The phrase, "We the People," thus becomes a promise, or a pledge, against which actions of the government and its agents can be tested, defining a goal to drive us on; and—here is the crucial point—it does this by virtue of its very unreality. It is the function of the Constitution, that is, not merely to reflect social or political reality as it exists but to create a reality of another kind, in this case by holding out a hope, an ideal, that in some sense can never be perfectly realized—and certainly is not yet realized today.

The same thing could be said, perhaps even more strongly, about the famous phrase in the Declaration of Independence, "All men are created equal." The English opponents of our independence, Samuel Johnson in particular, made enormous fun of this language, issuing as it did from the mouths of slaveholders. It was ridiculed as obviously and overtly hypocritical.

But is that fair? As a statement of aspiration, it is a kind of commitment that asks the future, and the present, to test the government and our polity against that standard. Its force derives from the very fact that it does not reflect the reality of the moment, but a hope. In the event, this language became the ground of a constitutional revolution, for in it Abraham Lincoln saw the fundamental premise of the Union, which became explicit in the great Civil War amendments.

Now compare what a judge does in writing an opinion: she describes the case before her as though her statement of the facts were full and complete; she sets forth an array of authoritative legal texts bearing upon the case in a way that assumes the completeness or adequacy of her account; she then identifies the tensions presented by the facts and the legal texts before her and resolves them as well as she can, at the end saying in effect that justice has been done. As for the future, she says that the world can confidently take this opinion as a charter for a certain side of life. She speaks as one whose only concern is justice, whose only methods are reason and compassion, as one to whom this case is of crucial importance. But none of these things is entirely true.

Measured against the ideal, then, the judicial opinion can always be seen as defective, for the judge, like the legislature and the Constitution itself, creates a claim of meaning that cannot be true and cannot work in the perfect way that it seems to promise. There is always more to be said against what we say; our claim to have explained our real reasons is always defective, for even we ourselves do not fully know them; no one will read the opinion as we wish, for no one reads anything entirely as we wish. The opinion in the end will become one of a thousand cases, floating like last year's playbills in the winds of time. But I think that much of the work of the opinion lies in the very unreality of the hope that the judge brings to and expresses in her work; though certain to be disappointed, it is essential to the intellectual and ethical life of the law. Without it, we would have nothing; with it, we have the law. It is an essential part of her gift to the world.

III.

Perhaps we all have an impulse to seize upon the gap be-

tween what we think of as "reality" and the verbal act, and to say that this gap shows that the text is bunk, or hypocritical, or something even less polite. In doing so, we are responding to one part of the multiple rhythm I earlier described, the stage of disappointment, and letting it overwhelm us. Yet the facts of the rhythm I describe, including the element of hope, cannot be wholly evaded, including in our very efforts to do so. For when asked to go on in the vein I am describing we are likely to say that what is "really" happening is that the Court is acting out of class interest, or gender bias, or racial animosity, or psychological need, or political desire. That is all it is "really" doing, we say: "the judges do what they want."

Yet even such a statement as this is not in a pure sense real or true; it too expresses a hope that is certain to be disappointed: for in it the speaker asks you to imagine the world in a certain way, and in a way that it cannot fully bear. Judges don't just "want" particular results, for example: they are people, with minds trained and affected by experience, including sometimes by argument with each other or what the lawyers say. And it cannot be a ground of criticism that there is a gap between the promise and the reality, for that is true in all human thought and utterance.

I think, then, that it is best to imagine this dimension of life not in terms of alternatives such as truth versus fiction, real versus ideal, or anything like that, but to see it as having an essential rhythm, through which human beings go, all the time, from hope to disappointment to acceptance. To be caught permanently in either of the first two stages—perpetual and unchecked optimism, or perpetual and unchecked pessimism—is so inhuman as to become a kind of insanity; it is exactly that kind of reduction of the self to a single repeated form that Dante so chillingly represents, again and again, in his *Inferno*.

The hope to which I refer should not be confounded with optimism, which is the sunny expectation that somehow everything will work out all right. It is rather the spring of life that enables us to keep on when we know perfectly well that things will not work out all right; it is a way of responding to a world that is full of incitements to despair. It is ultimately I think a hope for meaning in experience.

IV.

Like other forms of language, law has the rhythmic characteristics that I describe. It consists in part of the articulation of ideals, impossible statements of hope, that work as promises to which we can hold each other, hostages to the future. The judge pretends that he is wise and good, and this means that he can be taxed, and by his own standards, when he is not; how much better is this than if he pretended simply to be the representative of a class or ideology or psychological impulse, which would, despite its claims, be no more "real," but simply articulate a different idealized state. It would be equally a pretense, but not one to build one's life upon.

It is one of law's essential functions to make these rhythms salient and public. This suggests that in evaluating a piece of judicial writing we should not complain that it stimulates hopes of a kind that lead inevitably to disappointment; rather, we should ask what kinds of hopes and disappointments it occasions, whether they are good ones or bad ones; and whether the speaker recognizes both elements of the rhythm in which he or she is necessarily engaged. We too should learn to accept both stages of the rhythm, which is in its way an acceptance of an element of tragic loss, with comic overtones, built into every human hope or effort, into virtually every sentence we utter.

One final word: To return at the end to the feelings with which I begin a class, I find in myself not only the hope I speak of but also, as all teachers must, a kind of love as well, both for my students as individuals and as a class: a concern and attachment and sympathy; a willingness to give; and a sense of joy at our meeting. This is made possible by the hope that lies behind it; and its meaning and value are not undone by the disappointment that is certain to follow.