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BEING RIGHT / AVOIR RAISON

Last summer, I read in the New York Times an article entitled “Reasons Seen More as Weapon Than Path to Truth”.¹ The article referred to recent American researches suggesting that reasoning is a social phenomenon, that reasoning only helps up to convince others or to be careful when others try to convince us. In other words, reasoning

¹ Patricia Cohen, “Reason Seen More as Weapon Than Path to Truth” *The New York Times* (June 14, 2011), online: The New York Times < <http://www.nytimes.com/2011/06/15/arts/people-argue-just-to-win-scholars-assert.html?pagewanted=all>>.

had nothing to do with the search for truth. The only purpose of reasoning was to win over an opposing group.

This was good food for thought. It brought me to think more about the concept of “being in right”. And today I’d like to share with you my thoughts on the subject.

The expression “being right” is quite an arbitrary and relative concept, which has little relation to reality. When I say: “I am right”, it is because I am convinced that my perception of reality is the right one. When I say: “you are right”, I am simply saying that you are thinking exactly the way I think. We would never tell someone whose ideas are opposed to ours that they are right. Therefore, being right is simply a concept that echoes our own thoughts.

As for the concept of being wrong, it is probably quite foreign to the people listening to this speech. Being wrong is a distinctive concept in that it is rarely, if ever, used in the first person. As for being right, the opposite nearly always applies: most of the time it is used in the first person.

The concept of “being right” can be an extremely frustrating one. Take the example of four people who have different opinions on the subject under discussion. Each person obviously thinks that he or she is right. This immediately creates enormous frustration. What to do?

Since Adam and Eve, the means used to overcome this enormous challenge has been persuasion. I must try to convince the others to think like me, that is, to change their

minds, to get them to come around to my point of view, i.e. the “right” one. You will rarely hear someone say: “Listen, I do not agree with him, but he is right.”

Therefore, the real challenge is to convince the others. Essentially, the challenge in terms of communication is to make friends, because most people do not like controversy and prefer to agree with you rather than disagree. If they disagree with you this will severely limit their topics of discussion, while if they share your opinion, you can speak *ad nauseam*, and at great length, explore your subject, nod your head approvingly, wink knowingly; simply being in agreement with someone can lead to a great friendship or even a romantic relationship.

We must conclude that “being right”—especially being right more often than not, implies having to make friends.

If you are the only one who feels a certain way about something, you will feel quite alone, but if others share your point of view you will feel much happier and more confident.

Now that we have addressed the question of “being right” in general terms, let us apply it to the legal world. I took it upon myself to examine how this could be applied, in a very practical way, to day-to-day (in fact, my own day-to-day) life, since, having worked as a lawyer for over thirty years and being currently a judge, I can safely say that I have more than a passing familiarity with the concept of “being right.”

That being said, I am familiar with another area where I have had to examine the concept of “being right”: politics. I don’t need to tell you that it is difficult to “be right” in politics. But right now I will limit my remarks to the field of law.

The concept of being right is quite widespread in legal circles. If there is anyone in this room—and I’m not encouraging anyone to come up and make a fool of themselves in front of everybody—but if there is anyone in the room who does not think they are right, I would like them to come and tell me, although I recommend they do it in private. I may be able to provide you with a few addresses to seek help. At any rate, I don’t want to turn this into a competition, but I am sure that everyone here this morning will agree with me that obviously lawyers are

right. They are right because they regularly make claims. Can you imagine a lawyer who would submit something about which they are not convinced to be right.

That being said, consider Lord Wilfrid Greene's tactic of persuasion. Before he became himself a Law Lord, Wilfrid Green was one of the most famous advocate of England. In one appeal before Lord Dunedin, Greene took advantage of the Law Lord's high self-esteem. In the course of his opening speech he made his argument weaker than it needed be : 'I don't know how I'm going to win this case,' he said to the Lord, 'for the point against me is very strong.' At which Lord Dunedin, in order to show himself cleverer than Greene, said, 'But surely Mr Greene, the answer to the point against you is so and so...' At this Greene sat down quickly. His opponent got up and said, 'I

think your Lordship has forgotten case X.’ ‘I forgot nothing of the sort,’ answered Lord Dunedin. It is reported that Greene won his case.

Courts are not the only means to determine who is wrong. Conciliation, negotiation, mediation, the *bon mot*, case management are all means that ultimately lead people to be less right. Mediation is an interesting mechanism that sometimes brings people of varying opinions together, where everyone ends up being right.

However, sometimes parties may become more antagonized than before mediation. Counsels emerge without a settlement but with the conviction that they are right. So they bring the case to court. This is where it gets interesting. If you imagine that the concept of “being right”

is quite prevalent among counsel, I can assure you that it can also be found within the community of judges. Perhaps some of you here will say that I am wrong, this is possible. But if you discuss this with judges in a serious and sober manner, they will, after a certain amount of reflection, probably agree with me, as will most people. They will say I am right. This is always nice to hear.

So, after mediation fails, the parties go to trial. Counsel will appear before the trial judge and try – by means of witnesses, submissions, facts, objects, physical representations – to explain to the judge that they are right. Obviously, the judge will pay attention to the testimony and the submissions and will finally come up with his own opinion. In this recipe for “being right”, facts are essential ingredients. As Benjamin N. Cardozo once wrote: “Let the

facts be known as they are, and the law will sprout from the seed and turn its branches toward the light.”²

Could we even envisage for one minute a judge who, when delivering his decision, is not firmly convinced of being right? It is very clear that when the judge delivers his judgment, he is convinced that he is right: having been appointed to the bench, he no doubt feels that the people who appointed him were right to do so. Even though he has yet to express an opinion on the matter before him, since he is generally right, the judge feels that when he arrives at a finding, he cannot even fathom the possibility of not being right. He would not deliberately say “Bah, I think B is right, but I am going to say that A is right.” That would

² Benjamin Nathan Cardozo, *Law and literature and other essays and addresses* (New York: Harcourt, 1931) at 74.

make no sense whatsoever, but that could also happen and there is a treatment for that as well.

Surprisingly, when the judge delivers his judgment, obviously the winning party, very happy and convinced that they were right, is still convinced that it was obvious that they were right all along. There may be a brief spell, which may last a few seconds or a few minutes, when the losing party may have a moment of doubt; the kind of doubt where you might ask yourself “Might I have been wrong?” because counsel, when faced with a negative judgment, and I refer here to counsel, not to the party, may ask himself “Could it be possible that I was wrong?”. This too is a doubt for which, incidentally, treatment can be sought, but such doubt does not last long and if it happens to you, don’t worry—it too shall pass. In general, you will

get over it pretty quickly, and there is always the client who, immediately after the proceedings, will help you regain your senses and, in fact, you will realize that you were right, you have been right all along and that perhaps you should lodge an appeal. So, in the end, when everyone leaves, they are still right.

Sometimes counsel will say “I was right, the judge is an imbecile, he didn’t understand, he didn’t understand my arguments;” OK, so maybe he won’t say that the judge is an imbecile but will simply say “the judge didn’t understand, he did not follow exactly what happened, he did not understand the scope of my arguments”.

All right, let's move on to the interesting part of my subject, namely, "being right" before a court of appeal. You will understand that I left this small pleasure for the end because the subtleties in my outlining the way this theory applies to a court of appeal are quite entertaining and are probably more likely to capture your interest.

Let us assume that a lone judge hearing a case is right. But let us take a situation such as one we would find at the Court of Appeal. There are different appeal courts. There are some with three, five or even nine members, such as the Supreme Court, so obviously there are certain nuances, but let us examine the kind of appeal court with which I am familiar, i.e. one with three sitting judges. We can assume that the three judges, when undertaking an analysis of a case before them, will be armed with the same basic

general principle that guided them throughout their careers, from student to counsel to trial judge (if they have had the opportunity to serve as a trial judge), that they are generally right. This is not a fault, it's a concept. I stated that it is a concept, so we should not judge falsely, it is a sign of self-confidence. We like being right, we do not like being wrong. Let us assume that these judges, all three being of sound mind, are working as they normally would. So the three judges are hearing the same case. Obviously, without revealing too many intimate secrets, the three judges will have received documents beforehand, will have read the documents and reflected on them; they will have had discussions with the law student or clerk who collected the documents in order to clarify certain points. They will also have shared some preliminary impressions with the other two judges to gain a better understanding of the case, but

obviously without expressing any final or determinative opinion on the matter. So then the judges will sit down, listen to the parties, a bit like the trial judge, and will reflect, raise their eyebrows, exchange furtive glances, smile briefly and listen carefully to the parties' submissions.

After hearing the parties' submissions, the judges will retire and will either eventually return to deliver their judgment from the bench or deliver it later in writing. We can quickly examine what happens when the judgment is delivered orally: the judges retire, deliberate and discuss, obviously still convinced that each of them is right, because if the trial judge is right, the judges of the Court of Appeal are right too. But the three of them have the same case before them. So, obviously, if the three judges more or less agree on the

final judgment, they will grant that Mr. or Ms. A is right and Mr. B is wrong; they will quickly come to a consensus and write it down. Sometimes one of the three will write it or all three will write it. Finally, after awhile they will return to see the parties and deliver their judgment orally. So obviously the three judges will be right and obviously, as I explained just now, for counsel, the result is about the same.

Let us now examine the rather more complicated situation where there is no agreement among the three judges. Actually, that is probably the wrong expression to use; let us say that the three judges, all of whom are right, arrived at markedly different findings with regard to the judgment to be delivered. So, obviously discussions will continue that day to see if we can at least cobble together a majority,

because in the end, with three people and two parties before the Court, it would appear to be an easy task: all you need is for two people to be on one side and, whether the third judge is opposed or agrees in part is of minor importance because at least we would be sure to move in one direction.

Ah! If only it were that simple.

In fact, the process for arriving at a *modus vivendi* has been the same for ages. Three people, all of whom are convinced they are right, will take steps that should, without too much damage, lead to a decision. This decision will be either unanimous; or a majority with one dissenting opinion, or a majority with one concurring opinion and one dissenting opinion, or a majority with two concurring opinions, or a majority with opinions dissenting in part. Don't think that I'm exaggerating here!

Keep in mind that each of those three judges are convinced they are right and that no matter what happens, no matter how intense the debate is or how much blood is spilled, in the end it is likely if not absolutely certain, that the three judges will have convinced themselves that they are still right.

In the aftermath of the process whereby the three judges realize they do not have a final, definitive opinion, the three judges will agree to assign one of them the task of writing a draft judgment which the other two will read and, after reflection, decide whether to approve or distance themselves from it.

The submission of the draft judgment to the other parties is a crucial moment which can unfold quickly and cheerfully without incident or it can become extremely difficult and lead to a whole series of pitfalls and challenges to be overcome by the three judges involved. Let us examine each of the possibilities in turn.

The first (and easiest) occurs when the draft is submitted to the other two and is accepted without any corrections being made, other than the odd comma or apostrophe being added here and there, and perhaps a note of thanks. Obviously, the judgment is then quickly and cheerfully signed, in a spirit of exuberance and with the satisfaction of a job well done.

The second possibility follows an exchange of correspondence, memos and e-mails in which the parties

correct each other by means of letters or virtually, resulting in an agreement between two or three parties. This example also ends in joy and always with the satisfaction of a job well done.

A third (and more difficult) option, would be when the one (or more) of the parties is unsatisfied with the draft and decides to write a concurring or dissenting opinion. Finally, the parties, not the parties, but rather the three judges, still convinced that each of them is completely right, will sign a two or three-part judgment expressing a nuanced opinion but which will nonetheless be a majority decision and in the end, once again, the three judges and two parties will remain convinced that each of them was right.

CONCLUSION

You will have noticed that my theory about the concept of being right is rather optimistic. Assuming that everyone generally believes they are right, it was not too difficult for me; knowing that one is right, one does not need to go through the perilous exercise of being convinced by anyone else.

You will also notice that when you are among friends, close acquaintances or family, you are generally more likely to be right, because, being with your friends and relatives, it is even more likely that you will share the same opinions with them.

However, this does not mean that when you are alone, even in a group of 100 people, that you are not right. Take

comfort in what I said at the beginning: that the concept of being right is a general concept which is shared by all. Even if you are the only person in a group who holds a particular opinion, you can always console yourself by telling yourself that you are right and everyone else is wrong. If you look around you, you will often realize that many people are quite comfortable in that situation and, unlike many other people, have a feeling of being even more right when they are the only ones to hold a particular opinion.

Remember, even when you say “I was wrong!”, you are right.

Thank you for your kind attention.