Address by Chief Judge Frank M. Coffin of the
U. S. Court of Appeals for the First Circuit,
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Judges and Jurisprudents

Being somewhat under the spell of the televised series of Shakespeare plays, I shall begin with a Prologue:

Here is a matter of nomenclature
Having to do with judicial nature.

There are several words in a hierarchy
Which roughly describe our squirearchy.

We begin with the bottom, down where the sludge is,
For that's where you'll find all of us judges.

As learning in law becomes purer and purest,
We rightfully call the possessor a jurist.

But only the most esoteric student
Deserves the title of jurisprudent.

If ever together should come this trio,
We'd see judicial performance con brio.

The public's perception of the judiciary is at best spotty and robe deep. Close observers, scholars, litigants, jurors, witnesses, and lawyers do, of course, have opportunity to see how judges act, hear what they say, read what they write. Studies of increasing refinement deal with the various techniques, customs, and procedures which characterize the operations of courts. But knowledge about the thoughtways of judges, as distinguished from their workways, folk ways, and life style, is not only scant but bizarre, originating in myth and perpetuated by convention.

The result is not only an inability on the part of the public, including the press, to know what to look for in judges, to judge them with penetrating insight, but, for our own part, as we reflect upon how we are viewed by the wider world, something of an identity crisis. On the infrequent occasions when we receive any public comment, reaction or response to our efforts, we learn to our surprise and perhaps discomfiture that we are:

-- for "law and order" or "soft on criminals"
-- for strict construction or loose construction
-- apostles of judicial restraint or activism
-- conservatives or liberals.

The fact that these four categories exhaust the philosophic vocabulary of editorial writers, political interest groups, and ordinary citizens is proof of the low state of the art of judge watching. If these familiar labels ever added up to etching a consistent profile, that day is past. Alabama's famed activist judge of Wyatt v. Stickney, United States District Judge Frank

Johnson, is also sufficiently "law and order" to have been offered the directorship of the F.B.I. Mr. Justice Black gave amplitude to the due process and equal protection clauses, i.e., was "loose" as to them. Indeed, it was he who insisted that the entire Bill of Rights was binding on the states by reason of its "incorporation" into the Fourteenth Amendment. But he was literal as could be, i.e., was "strict", whenever the First Amendment came into play. And, if the Nixon appointees to the Supreme Court were supposed to be exemplars of strict construction, judicial restraint, or conservatism, what do we make of Roe v. Wade, as original, dramatic and value laden a piece of constitutional extrapolation as has ever issued from the Court in recent years.

Not only do the common labels serve mainly to confuse those who would appraise us and even ourselves, if we really took our labels seriously, but they have two other failings: they exaggerate the opportunities we have to give effect to any philosophy we might have and they ignore the different roles of different courts, with corresponding differences in the opportunities for and challenges to philosophy. In short, they overlook two other kinds of thoughtways, probably more important for most of the people most of the time than any set of ideas adding up to a philosophy.

The first of these intellectual systems is a framework of precepts and a way of using them that we all share in common. One of the things about our profession that makes it tolerable without sacrifice of sanity is the extent to which our work lies in the application of the discipline of our craft to the job at hand. We are, as Holmes said, jobbists. Not completely, but to a very large extent. If our work be viewed as a pie, the area of restraint within which we labor would cover most of the plate; the area of freedom would be a small, though significant, sliver.

As I once described it:

> "While cases during trial and even during appellate argument may be hotly contested and may seem to weigh evenly in the balance, the processes of hearing argument, studying the briefs and record, researching the law, and consulting with colleagues in chambers will lead a court in the large majority of cases to a consensus on the outcome, whatever may be the background, experience, or philosophical bent of the individual judges. Decision-influencing factors, such as a case on point or clearly analogous, an analysis of the evidence or a ruling by the trial court, a procedural or jurisdictional requirement, a compelling policy, legislative history and considerations of institutional appropriateness will in the end decide most causes. Only when these restraints are absent can it be said that there is room for a judge's moral or philosophical perceptions to play a major part in the decision."[*]

A second, large and vital part of the thought processes of a judge is that which he shares with other judges of the same type and level of court. With regard to a judge of the first level of court most accessible to people, a municipal or district court, for those appearing before him or her, and for those evaluating that judge, far more important than the values symbolized by the common labels we have discussed are such things as the judge's attitudes toward speeders, first offenders, drug cases, white collar crime, probation, bail, alternative service, continuances, domestic relations cases. These and those most basic ingredients: compassion, knowledge of human nature, and an uncommon share of common sense. At the risk of oversimplifying, I would

[*] Coffin, Book Review, The Morality of Consent, 56 B.U. L. Rev. 1029, 1035 (1976).

say that the special kind of thoughtway unique to what I call "the people's court" of first resort has to do with making and effectively communicating and using judgments about people, on a one-to-one basis.

As for a justice of a court of general trial jurisdiction, a superior court, in the eyes of all whose fate is to be settled in that court, the thoughtways that count most of the time are the judge's attitude toward pretrial discovery, pretrial conferences, stimulating settlements, letting in or keeping out evidence, his role -- passive or active -- during the trial, his attitudes at sentencing toward the defendant, the crime, and the goals of sentencing, and his approaches to devising appropriate remedies, sometimes novel and far ranging. Strangely, the trial judge, though often straitjacketed by the law, has more freedom in all these areas than supposedly higher courts. The trial judge in a court of general jurisdiction must administer a complicated institution, deal with all kinds of court personnel, jurors, witnesses, litigants, lawyers, press and public, and somehow manage to keep moving a steadily increasing stream of cases. The special thoughtways of such a judge, largely unshared by judges on higher or lower courts, draw upon the prudential lore and mutually supporting aptitudes of the administrator, manager, diplomat, psychiatrist, and public relations expert. Finally, the trial judge must have the courage and resourcefulness to make difficult decisions, alone, and under heavy pressures of time and public emotion.

Finally, the appellate courts -- the top courts of a state or federal circuit -- have their own vineyard of special concerns: maintaining fidelity to their own precedents or, conversely, deciding whether, when, and how to modify or overrule them; keeping watch over and seeking to improve the appellate process; exercising oversight and supervisory power over the entire court family, from judges to prosecutors, jurors, and the bar; and developing folkways, thought patterns, subtle signals, and modulated responses that make up their own brand of collegiality.

A large part of our "thinking day", as we have just seen, is spent both in, as we used to hear in law school, "thinking like a lawyer" -- pondering about statutes and case precedents, applying them logically to the facts, with a weather eye out for relevant history and policy considerations -- and in thinking about the particular problems posed in running our various courts. None of these thoughtways come close to qualifying us as jurisprudents. These are the tools of our craft as jobbists. But there is another domain in our mind filled with ways of thinking quite independent of legal analysis. These thoughtways are philosophic, in the sense that they reflect certain deeply held values about societal life. But they are far from a systematic jurisprudence of internal consistency, in which certain preferred principles are ideally resorted to for the ranking of rights, duties, powers and privileges.

These philosophic fragments or miniphilosophies range from the reprehensible and unhelpful, such as prejudices and biases, to the respectable and even inevitable, such as policy preferences or basic values. They are the precursors of jurisprudence much as the Titans were the precursors of the gods of Olympus. I have a hard time conceptualizing them under a single generic label; if I could, I would be well on my way to a system of jurisprudence. For lack of anything better, I call them X factors. Or perhaps, since I can discern three types, X, Y, and Z factors.

The first group, which we shall call X factors, consist of ad hominem biases or the kind of value judgments shared by the least thoughtful man-in-the-street. This baggage contains such things as repugnance to or liking for a party -- a homosexual, a social revolutionary, a respected community leader; familiarity with the reputation, good or bad, of counsel -- an X factor which may be useful to the extent it generates alertness and does not sway judgments; intense aversion to the events giving rise to the litigation such as the murder of a police officer or the vending of

alleged pornography; a preexisting view of the strengths and frailties of an official or agency whose acts are at issue, including, for appellate judges, such a view of the trial judge. Such factors are almost the antithesis of philosophies, although they are value judgments; they should be identified and ruthlessly excised as far as humanly possible before decisions are made.

A second set of values, Y factors, often derive from the social, economic, and political background of the judge, often including significantly the kind of law practice the judge engaged in. In negligence and products liability cases, for example, thinking like the old plaintiff's or defense lawyer is a hard habit to kick. So is one's former role as a prosecutor or defense lawyer. And there is nothing like a very close, hard fought labor-management case to test a panel's ability to rise above its prejudices. The same can be said about the vast range of cases pitting a government regulatory agency against a company, from occupational safety and consumer legislation to antitrust suits.

Still relatively new on the scene are the social reform-oriented class action suits against government institutions and private employers which thrust students and teachers against school boards and universities, tenants against housing authorities, welfare recipients against state departments, prisoners against wardens, women, blacks, the elderly, and even homosexuals against their allegedly discriminating employers, abortion-seeking women against restrictive laws, environmentalists against dams and nuclear power plants. Judges may vary widely in their predispositions, being pro-establishment in some categories, or being pro-plaintiff if there has been a history of incompetence or repression. To the extent that a judge is free to, even compelled to make law to resolve a given lawsuit, application of a principle emerging from some jurisprudential thinking may well play a valuable role. But such thinking is the very opposite of pushing a button reading "pro-prisoner" or "pro-warden", or "pro-environment" or "pro-nuke".

Our final group, the Z factors, is the most useful. It consists of values and more or less fixed attitudes toward the decision making process and the officials and institutions involved with judicial proceedings. A judge may venerate process or may tend to subordinate process where raw injustice would result. Similar dilemmas arise when judges attempt to weigh the deference to which the trial judge is entitled, the principle of finality, the extent to which the adversary process should be relied upon. Appellate judges may feel that trial judges and prosecutors should be held to the punctilio of fairness; or they may feel that they are already overburdened with a confusing cargo of boilerplate cautions from on high. Similarly, some may feel no compunctions about lifting the level of due process afforded by public agencies and institutions; others may be more concerned with the workability factor, the capacity of institutions to absorb such responsibilities. Finally, there will be judges deeply concerned over denying access to the courts by over-technical rulings; others will see a great danger in the litigation explosion and tend to enshrine what Bickel called "the passive virtues" guarding the courthouse door.

All of these are the stuff of philosophy, for they represent legitimate but conflicting values. They are eminently respectable considerations. But the factors themselves are not philosophies. They may be splinters, implying that somewhere there is a larger plank. They lack any guide or key enabling the judge to arrive at a neutral principled resolution of the clash of two factors. Nevertheless, as all of us know, we make do, we somehow argue, compromise, and arrive at a decision -- usually without the benefit of jurisprudence.

So we are, most of us, judges and not jurisprudents. We have, most of us, most of the time gotten along without trying to tap the wellspring of jurisprudential philosophy. This is odd, that those temporarily in charge of the justice systems should have nothing to do with the

insights and discourse of the deepest thinkers about the so called science of the law. Isn't it about time that we had a look at jurisprudence to see what, if anything, it offers us?

This "look" is no easy or quick matter. If done seriously, it means devoting a very considerable portion of our few hours of leisure to reading works written in a language calculated to be mystifying. All we can do tonight is to point to a rough road map, showing where jurisprudence has come from, where it is today, where it may be trending, and why it may be relevant and helpful to our work.

In the past hundred years American jurisprudence has gone through several stages which can be viewed from different perspectives. From one vantage point one can see the early emphasis on the question, what is law? Here the Classical school, under Langdell, ambitiously endeavored to identify in a scientific way a fundamental structure of enduring legal principles, discernible by an architectonic intelligence sensitive to such structure, from which all lesser legal rules could be derived, and the "true rule" always found, if one was rigorous enough in his analysis. While this school, abetted by the founding of the American Law Institute, held sway from the 1870's through the 1930's, dissent began to gather before the turn of the century.

The intellectual fount of dissent, again concerned with the question, what is law", was the jurisprudence of positivism as proclaimed by John Austin. This theory, simply put, is that law is no more than rules established by political superiors to govern political inferiors, a law arising out of a difference in position, hence, to use the word in a way we seldom do today, "positive". Its latter day expositor is H. L. A. Hart. Its opposite is natural law, as embodied in the theory of the social contract, its major expounders being Locke, Rousseau, and Kant. Also striking at Classical theory were Holmes and Thayer who claimed that legal doctrine did not flow logically from a basic structure, but was rather the product of social conflict and political compromise.

The focus then began to shift from "what is the law?" to "how do or should courts decide?" Brandeis, Frankfurter, and Pound, in their separate ways felt that non-legal facts should play a larger part in the decision process. Their teachings came to be classified as the sociological school of jurisprudence. Then came the feisty Legal Realists, led by Jerome Frank, coming full circle from the Classical school, and exposing the latter's rules and principles as mere myths in the decision-making process. Nothing positive was ventured, the assumption being that once the myths were exposed, judges would have no trouble in promulgating decisions which would shape a just society. This excessive reliance on psychological maturity led to harder analysis and the Legal Process School, which found guidance for decision in consideration of the relative competence of institutions and the need for the judiciary to stick to its last decision and defer to legislatures, agencies, other judicial systems, and private parties. The alumni of this school include such contemporary scholars as Wechsler, Bickel, Henry Hart and Sacks.

Here then is the reigning school of contemporary American jurisprudence. The conceptual source is the legal positivism of Austin, with the sophisticated amendments of H. L. A. Hart. Its ethical wellspring is Bentham's utilitarianism, the greatest good for the greatest number. And the key to accomplishing this goal lies in the precepts of the Legal Process School about institutional competence.

The chief teachings of the reigning school are fidelity to process and neutral principles, humility as to the power of the judiciary, restraint, deference to other branches of government, sovereignties, and court systems. All of this points to a condition of equilibrium in jurisprudence. But I wonder if we should stop inquiry at this point. Thomas Kuhn has written a well known, seminal tract entitled "The Structure of Scientific Revolutions". In it he traces the complete upheavals in the thought wrought by Galileo, Darwin, and others. He defines scientific

revolutions as "non-cumulative developmental episodes in which an older paradigm is replaced in whole or in part by an incompatible new one." A conventional thesis meets, with increasing frequency, anomalies, resistances, inconsistencies. Pressure builds up. Then, perhaps quite adventitiously, a new theory is proposed which is quickly seen to resolve the problems dammed up during the regime of the old. And presto! a new era is begun.

I see three forces in motion which suggest a new and fruitful relation between the judiciary and jurisprudence. The first is the emergence and fecundity of scholars outside of the reigning school of utilitarian-positivists. I speak mainly of John Rawls and his "Theory of Justice" and Ronald Dworkin and his "Taking Rights Seriously". These men do not write in a best seller style. They are hard to read. And they obviously are not writing for judges. But they challenge most rigorously a total reliance on the tenets of utilitarian-positivism and painstakingly make the case for recognizing as a priority or preferred principle an equal right in the individual to basic liberties, or a primal respect for the individual, stemming from what rational people would have been likely to agree upon had they articulated the bases of their living together in society, a respect finding expression in the principle of equality.

Here then is a sophisticated resurgence of contractarian ideas, although a far cry from Locke and Rousseau. Some, discerning that in the new jurisprudence principles available for decision of hard cases preexist, are part of the law and only await the thoughtful judge, liken this to the classical view of Langdell, and, before him, Chief Justice Marshall and Montesquieu, that there are no gaps in the legal order. In any event, the works of Rawls and Dworkin are major and fresh contributions to thinking about law. They have attracted other scholars as have Hart and other positivists.

I sense also a movement in the focus of the debate. In the last century the issue was generally framed in terms of defining the nature of law. In the first half of this century, with the sociological school, the Legal Realists, and the Legal Process school, the emphasis has been on the extent to which judges should be free to decide, or should be subject to self imposed restraint. Now, it seems to me, the ferment surrounding the questioning of positivism and the efforts of thinkers like Rawls and Dworkin focuses on the nature, source, and status of certain individual rights vis-a-vis those of society. In short, jurisprudence over the past century has moved from what law is, to how judges should decide, to the values which should inform judicial decision.

I view this resurgence of vitality in jurisprudence as fortunate. Whether fortuitous or not, it directs us to the issues likely to be front and center stage for the foreseeable future. The Augustinian Age of plenty, privacy, autonomy, and wide options seems to be over. In this springtime of fear of inflation, energy shortage, unemployment, diminution of power abroad, and budgetary restraints, all of us sense a time, a long time, perhaps an enduring condition of scarcity of energy, of material resources, of space and of privacy with correspondingly increasing regulation of the individual. In such a shrinking world, the issues of fairness of conduct of government and other institutions, access to the courts, autonomy, and, principally, the equality of treatment accorded to citizens will be more important than ever. For, whether it is a mark of strength or weakness, we are increasingly, as deTocqueville early observed, a justice-oriented society. In short, the conditions of societal life promise to be such as to elevate in new kinds of ways -- and to greater intensity and higher degrees of refinement -- the age old issue of the proper balance between the rights of the individual and of the state.

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even room for the states to go beyond where the federal courts had led. But in the past decade, with the Burger Court pausing and even retreating a bit here and there, state courts have not felt

compelled to define individual rights solely in federal terms. Their constitutional texts, histories, and traditions have created a different framework and recent constitutional revision and amendments have given more precise, recent, and authentic sanction for closer judicial oversight in economic matters, in criminal cases, in protecting the environment, and in insuring educational equality. Notable examples of this newly discovered "inverse federalism" are the decisions in Massachusetts to base abolition of the death penalty on that Commonwealth's constitution and in Maine, in State v. Sklar, 317 A.2d 160 (1974), to draw from our state's history, constitutional text and debates the conclusion that a jury is required for the trial of all criminal offenses. See generally Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 873 (1976).

Oliver Wendell Holmes once wrote: "Whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, . . . what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. . . . When there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice." Collected Legal Papers (New York: Harcourt, Brace, 1920), p. 239.

What Holmes never accomplished or even really tried to accomplish was to reveal a principled approach to how to choose. In the decades ahead I see courts increasingly facing refined choices between the power of the state and the rights of individuals. For our society to endure with stability and individuals to thrive in freedom, we shall need all the enlightenment we can get. And perhaps some of that enlightenment can come from thinking deeply and systematically about values and choice, in short, from mining the ore of jurisprudence.