Philosophy, Cybernetics, and the X Factor

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Mr. President. I have been impressed. Not only have I bundled into an obsolete tuxedo in midafternoon, 100 miles to the north, and withstood the bemused stares of the takers of tolls, to arrive at this rendezvous, but all the rest of you -- from the shores of Lake Champlain, the suburbs of New York, the outermost reaches of Cape Cod, the depths of the Berkshires, and the Ultima Thule of Coos & Aroostook Counties -- have done likewise. In the depth of winter, too.

A year ago an old friend invited me to address the New York State Bar. While I managed to resist his blandishments, I confess that I have never seen a better justification of such events as these. My friend wrote:

> "We have had some awful prominent speakers in my years of attendance as a carefree celebrant (ambassadors, Cabinet members, recognized Legal Giants) who have stunk out the place and sedated the defenseless spouses with ponderosity. By happy contrast, we have had a couple of judges ... who captivated lawyer and spouse alike with the light, deft strokes about anything or nothing, leaving all of us with the idea that the practice of law or judgery, as represented by lawyers like those listening and judges like the one talking to them, is a pretty good way of occupying one's time between youth and senility."

Then my friend laid down what he called a controlling principle as adumbrated by Circuit Judge Mulligan: "The greatest danger to our society is not from abroad, nor is it even crime in our streets. The real menace is the after-dinner speaker with a message."

Well, my friend is a New York lawyer. It is not surprising that postprandials in Manhattan tend to the frothy, frivolous, and insubstantial. But we are near, if not in, Boston tonight. Were we to miss a chance to improve ourselves, we would have sullied the conscience of New England. Encouraged by your president, I sought for a subject worthy of your mettle.

I am afraid I found one. Recently I have felt that it wasn't quite enough for me to decide a case and write an opinion, marshalling the law and facts in a way that I could arrive at a fair result without doing great violence to established law. This is really pretty pedestrian work. Holmes called it jobbism. What really lifts a judicial opinion out of the run-of-the-mill is panache. Where, after all, would Holmes be today if he hadn't said such things as "The law is a seamless web", or "The Constitution has not reenacted Mr. Herbert Spencer's Social Statics", or "The life of the law is not logic but experience".

But the obvious epigrams have all been made. So I've been turning to jurisprudence. My first venture was John Rawls, "The Theory of Justice". His underlying concept, the basis for his system, was that the valid principles of justice were those that free and rational persons, bent on furthering their own interests, would accept in an original position of equality and ignorance as defining the fundamental terms of their association. Judgments made in this hypothetical bargaining situation would be fair. Well, I tried Rawls in a prisoner transfer case, deciding it according to what rational persons in the original position would think was fair. When our decision was subsequently vacated by the Supreme Court, I began to suspect that the Justices had absolutely no idea of what the original position was. And it's just too big a job for me to try to

educate them.

So then I turned to another renowned scholar, Ronald Dworkin. In a celebrated essay called "Hard Cases", Dworkin, to illustrate how a philosophical judge might go about deciding the constitutionality of a statute, invents Hercules, a judge of "superhuman skill, learning, patience and acumen". Before Hercules can decide the case, says Dworkin, he "must develop a theory of the constitution, in the shape of a complex set of principles and policies that justify the scheme of government ... by referring alternately to political philosophy and institutional detail. He must . . . test [possible theories justifying different aspects of the scheme] against the broader institution." Well, this seemed a bit much. It would take me at least a day to develop a comprehensive theory and set of principles justifying our scheme of government. And if I did that well, I'd stop judging and write a book about it.

Up to this point nothing the philosophers have said threatens to change the course of judging, principally because the judges aren't philosophers. But there is something else afoot that bids fair to revolutionize both judging and the practice of law. We are on the verge of, if we have not entered, what has been variously called the Post-Industrial Society, the Information Age, the Service Economy. Cybernetics is the religion and the computer is the high priest. Lawyers already rely on computers to do their accounting, to speed their research, to provide litigation support in organizing for retrieval thousands or hundreds of thousands of documents. Courts have used computers to administer court calendars and select juries.

But now, having served its apprenticeship, the computer is tired of being a para-legal. It is ready for bigger things. It is ready for us. In a recent symposium on jurisprudence -- certainly a respectable subject, and in a respectable legal publication -- the Georgia Law Review, I found an article ominously entitled, "Can/Should Computers Replace Judges?" by a Northwestern University Law Professor, Anthony D'Amato. Here I met the future -- a future which may well hold little room for the likes of me or the likes of you.

The author sets as his task to find out how the computer may be so programmed as to replace the judicial function. He would let the camel's nose into the tent by letting the computer resolve all issues short of the merits -- procedure, jurisdiction, venue, choice of law. Our author observes that these issues account for a huge expenditure of time and money by the parties, their attorneys, and the courts. He ventures his opinion that this is so because there is always one side which feels it has a poorer case on the merits and thus chooses to hack away at procedural issues to make for an easier settlement. And of course the other side must answer back.

So, to take a choice of law question, all the relevant facts in all the choice of law cases in a jurisdiction would be fed to the computer -- the place of injury, place of the conduct causing the injury, domicile and residence of the parties, the place where the parties' relationship is centered, etc. A lawyer would simply type in the facts he hopes to prove. The computer would then perform a complex multivariate analysis, regressing the facts to fit the clusters of facts previously programmed, the clusters being loosely associated with the dependent variables, i.e., "use the foreign law" or "use the law of the forum state". The computer will express the measure of the fit in terms of "least square" distance or "regression" with a number like 0.476 or -0.77. A positive number means law of the foreign state; a negative number means law of the forum. A score close to 1.0 means law almost entirely in favor of foreign law; if it is close to 0, the issue is evenly balanced.

At this point the implications seem pretty clear. Most cases will never get out of the office. You will chat with your client, take a few notes, swivel around to your console, type in the relevant facts, and, in a few moments, say either "You haven't got a prayer" or "You've got a

gilt-edged case". In either case you phone the other party's lawyer, who will get pretty much the same feed-back from his machine. There is no bluffing and little bargaining. Of course if the facts are disputed, this will occasion a trial. In such a case the plaintiff will know he must prove 35 facts and disprove 15 others. All the jury need do is render its special verdict. And in the few areas where there is little precedent, there may be room for a judicial decision. Perhaps there would be enough of these to justify a Supreme Court.

Professor D'Amato in evaluating this brave new world acknowledges that precedents would be frozen, vast areas of the law would be rendered uninteresting, practice will be dehumanized, the quality of decision may suffer. But, on the benefit side he points to the saving in time and money, the clear preference at least in procedural matters for a cheap and prompt decision as against a "right" decision, the perceived increase in impartiality. D'Amato closes his essay, saying: "There may be fewer judges, fewer courts, fewer attorneys. Fewer cases mean less societal friction. A diminution in the trappings of law may signify greater equality before the law and greater delivery of the equal protection of the law to poor people."

The logic is inescapable. The majesty of the law increaseth as such trappings as judges and lawyers are stripped away. It seems to me that our only hope is what I used to see only as a dark cloud. Now I begin to see the scintillating sliver of a silver lining -- the energy shortage. With any luck we shall be so pressed to conserve on energy that we shall be asked to sacrifice our aspirations, and to go slow on converting to computer technology. That is, unless some misguided genius hitches up a computer to a windmill.

Leaving the Elysian fields of philosophy and the Himalayan heights of cybernetics, as substitutes for or guides to judging, let me stroll in much humbler terrain. As you may have guessed, my view of judges in the main is that very few, if any, can lay claim to being sophisticated systematic jurisprudential philosophers. Given the current state of the art, this is probably a good thing. This, however, is not the conventional wisdom, which does not hesitate to pigeonhole a judge as an activist or restraintist, a liberal or conservative, a loose or strict constructionist, even though at times its neat dichotomies are left quavering when a Harry Blackmun can write a Roe v. Wade opinion. No, conventional wisdom would have it that judges by definition are philosophers.

I see no particular utility in prolonging this illusion of philosophic competence. Rather, there is merit in seeing more clearly what moves judges and in saying so. I know that in speaking to trial lawyers, I am speaking to judge watchers par excellence. I may add nothing to your perceptions, but there is no harm in trying.

My thesis is that judges, like most people, are philosophers by fragments. That is, while they may not have thought out a systematic framework with internal consistency in which rights and obligations, powers and privileges are ranked and interrelated on the basis of certain principles, they have -- to use a descending intellectual scale -- mini-philosophies or policy judgments or values or biases or prejudices. Since our judges are not Dworkin's superhuman Hercules, these are not internally consistent vectors or forces. Therefore, I have a hard time in devising a generic label. So I simply call them X factors. Some of them seem good, some bad, some impotent, some quite powerful. I find it hard to generalize about them. The only thing I can say with conviction is that the more I think about these X factors, the more important it seems to me to find out more about them.

I recently conducted an experiment on myself. Much as a doctor might take his own blood count, I reviewed the briefs in some 36 cases at a time before our court had arrived at any decision. I jotted down the legal issue and then asked myself if there were some factor other than

the evidence, statutes, precedents, logic, or policy which might play a part in decision. I also asked myself how probable was it that these factors would influence decision. I found myself jotting down notes in the following categories: the personality or character of a party -- e.g., a social revolutionary, a rapist, a business of notorious reputation; the personality of counsel -- e.g., one who radiates the aura of loser, or, conversely, of winner, one known for his acts of delay, or one dreaded for verbal overkill; the peculiar traits or biases of the trial judge -- e.g., his tendency to shoot from the hip, his result orientation in certain kinds of cases, or his painstaking deliberateness; the inherent pull of inertia -- i.e., a reluctance to reverse, which increases with the length and complexity of the proceedings below.

All of these, except the last, inertia, have no proper place in the decision process. The natural reluctance to reverse is really not an X factor, it is reflected in the legal presumptions of regularity, the considerable threshold prerequisites for reversal -- "clearly erroneous", "manifest injustice", prejudice and the like. In my calculus I was able, I think, honestly, to say that while a judge may be sensible of these X factors as he begins consideration of an appeal, they shrink and retreat as research and deliberation take place and in most cases, I suspect, have no influence on the decision.

Other X factors are not ad hominen but relate to judgments or attitudes with a larger intellectual component. They may be harder to dislodge. One such class is a preference, stemming either from a judge's earlier practice or his background, in certain kinds of cases for the values normally associated with a plaintiff or defendant. Very close personal injury cases are an example; thinking like the old plaintiff's lawyer or defense lawyer is a difficult habit to kick. The same may be true in close labor-management relations cases. And in cases arising out of the enforcement of new statutes such as occupational safety and consumer protection, there is some initial polarization between a generalized feeling that government is meddling too much or that industry is getting away with too much.

Then there is a still more articulate kind of value judgment phrased in terms of process or institutions. A judge may feel that trial judges and prosecutors should be held to the punctilio of fairness; or he may feel that they are already overburdened with a useless cargo of boilerplate cautions from the appellate court. A judge may have a high respect for agency processes and be reluctant to intrude or cut them short; or he may have a cynical suspicion that an agency is hopelessly bureaucratic and insensitive to individual interests. His feelings may vary with the institution; he may be initially biased for the university and against the teacher; against the prison and for the prisoner; for the tax system and against the taxpayer; or against the insurance company and for the policyholder.

Finally, there are preferences for or against broad policies or values -- the disclosure of information, the range and strength of a privacy interest, the goodness or vice of governmental regulation, the reach of the commerce clause, the priority accorded to environmental protection, the public funding of legal services, and so on. These, of course, are X factors only to the extent that they reflect less or greater enthusiasm than the policy stated in legislation.

In my informal rating of 36 cases, I found only five cases where I could identify no X factor worthy of the name. In eleven cases, while I could discern an X factor, I could confidently predict that legal and factual issues would clearly control decision. In another ten cases I predicted that legal factors would probably control decision. In six cases I felt, at least well before the time of decision, that it was a toss-up between legal and X factors. These were very close cases. Then there was one case, in a field where law was sparse, where I thought the X factor would probably control, and three cases -- where the legal choice was wide open -- where

I felt the X factor would clearly predominate.

What are judges and lawyers to do about such things as X factors? Condemn them? Ignore them? Certainly we prefer to live under the rule of law, not of the X factor. There is no justification for their having any weight compared with the facts and the law. But if the case is terribly close, if legal guideposts are few or nonexistent, are they necessarily bad? I am not sure that they are. What I am sure of, however, is that they constitute a hazard if they are allowed to remain unacknowledged and unexamined, I see a critical dimension of the advocate's job in identifying, flushing out, and portraying either the relevance and strength or irrelevance and weakness of the discernible X factors in a case. This is partly good strategy -- to bring the unarticulated premise out of the closet. But it is also a service to the court in promoting a greater self consciousness and capacity for self questioning on the part of the judges. Until an approved and tested all-purpose jurisprudence is mandated for all judges, it is likely that they will carry around their miscellaneous baggage of X factors. Since these can not be pretested for quality, there is every reason to expose them to the sunshine of adversarial comment.

As we enter the waning years of this century, we may well be on the brink of major changes of lawyering and judgery. I suppose, when all is said and done, that we shall have to do what lawyers and judges have done for the past seven or eight hundred years -- wait and see what happens, then hustle to jump aboard what looks worth jumping aboard. It can't be more traumatic than no-fault. In the meantime neither philosophy nor cybernetics is likely to enter the, day-to-day work of either the trial lawyer or the judge. And at least for yet awhile these two branches of our profession share a splendid twilight where the final duty is non-delegable; where the core of the task can be done only by one mind and one voice; where specialization, automation, or mechanization has not yet found its way; where the ingredients of success and greatness defy formula; and where, therefore, the work at its best remains incalculable fun.