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Aspects of Deconstruction: Thought Control in Xanadu

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Aspects of Deconstruction: Thought Control in Xanadu,
84 Northwestern University Law Review (1990) 1086-1091, by Anthony D'Amato*

Abstract: Nearly every case in nearly every legal system is a case where the factfinder—that is, the judge or jury—must decide what was going on in the minds of the litigants. For example, every criminal case turns on *mens rea*—a guess that the defendant harbored thoughts amounting to criminal intent. Tort cases involve the intention of the defendant, or at least his reckless indifference to risk. Estate cases require the probate court to assess the intent of the testator. Antitrust cases involve the question whether there was an intent to form a combination in restraint of trade. I can't think of a single case where the mental processes of one or both of the litigating parties—whatever the jury says those processes are—doesn't play a critical role in the outcome.

Tags: *mens rea*, thought-control by statute, hunches in judicial decisions

[pg1086] Xanadu has enacted a thought-control statute. In its entirety it reads as follows:

Section 22. It is a felony to think bad thoughts about the Dictator of Xanadu.

The following conversation is to be found on the master tape in the basement of the Ice Palace.[FN1]

CLIENT: I'd like to ask you about Section 22.

LAWYER: Whatever your question, there is only one reply. It is one of our wisest and most imaginative statutes.

CLIENT: Is it really a felony to think bad thoughts about our Dictator?

LAWYER: Yes. Clearly.

CLIENT: Why would our Dictator *want* such a statute?

LAWYER: Many reasons have been advanced in the literature, but I think the most persuasive reason is that our Dictator doesn't want anyone thinking bad thoughts about her.

CLIENT: But how can the statute possibly accomplish her aim?

LAWYER: Well, think of it like a religious decree. The Ninth and Tenth Commandments, for example. They make it a sin to covet your neighbor's wife or your neighbor's goods. You automatically commit a sin every time you start the mental process of coveting. As a result, the Ninth and Tenth Commandments are rather effective, I suppose, in cutting down on the societal incidence of coveting.

CLIENT: But there's no penalty for these violations.

LAWYER: You don't regard *eternal damnation* as a penalty?

CLIENT: Well, even so, I can covet all I want and I'm in trouble only if I choose to regard it as a sin—which I don't.

LAWYER: I can't see how that makes a difference.

[pg1087] CLIENT: Look. Suppose, right here in Xanadu, I think bad thoughts about the Dictator—

LAWYER: Don't! Don't even hypothesize about thinking bad thoughts about the Dictator! It's clearly illegal to do so.

CLIENT: All right, suppose some criminal were to think bad thoughts about the Dictator. How would the state ever find out?

LAWYER: You admit that what the criminal did was against the law?

CLIENT: Yes.

LAWYER: And you admit that if the state did “find out,” in your terms, the criminal would be sent to prison?

CLIENT: Yes.

LAWYER: Then it's not any different from the Ninth Commandment. One violates the Dictator's law, the other violates God's law.

CLIENT: But the state can never know whether a person has thought bad thoughts about the Dictator.

LAWYER: But now you're shifting the grounds of discourse. You're going into facts; I've been speaking so far only of deductive truths.

CLIENT: Aren't facts the most important thing?

LAWYER: Let's suppose they are. Surely you admit that whether the state knows anyone has thought bad thoughts about our Dictator is a matter of evidence and proof, and not a question about the content of the law?

CLIENT: I admit that. But isn't it impossible to know what another person is thinking?

LAWYER: Under present technology, I suppose it is.

CLIENT: Then if someone is thinking bad thoughts about our Dictator, how will the state know about it?

LAWYER: The police simply arrest you on *suspicion* that you have thought bad thoughts. The grand jury then indicts you on the ground that they think you did have such bad thoughts. If the jury believes you had bad thoughts, you will be convicted.

CLIENT: But if I didn't have any bad thoughts about our Dictator, how can the jury say that I did?

LAWYER: The same way the jury says anything in any case about anybody on any subject whatsoever. They make it up.

CLIENT: And if they're not right—

LAWYER: But they can't *not* be right! It's a question of fact. The jury finds what the facts are. And those facts, as far as the law is concerned, are the only facts.

CLIENT: You mean that if the jury says I—that is, a criminal—had bad thoughts about our Dictator, but in fact the person had nothing but good thoughts about her, the jury is right and the person is wrong?

LAWYER: No, I didn't say that. We're talking about two different things. The jury is right that the person thought bad thoughts in violation [pg1088] of the law. And you might be technically right that the person in fact did not have those bad thoughts.

CLIENT: So this is an instance where I can be found guilty even if I did not commit the crime?

LAWYER: Of course. It often happens. As you said, the jury has no idea what thoughts you actually had. If Xanadu had the technology you asked about, then you would be better off; you would go free because there would be no evidence of brain waves of the sort that signify the thinking of bad thoughts about the dictator. No ... I take that back. In your case, the jury just might *misinterpret* the brain-wave patterns.

CLIENT: Let's leave out the brain-wave patterns. What about right here and now?

LAWYER: Right here and now, if you were to tell the jury that you had nothing but good thoughts about our Dictator, and the jury for some reason disbelieved you, then under the law you had bad thoughts about the dictator. If the jury finds that you had bad thoughts—even if you didn't have them—then you violated Section 22.

CLIENT: How do you get that result out of the statute?

LAWYER: It might help you to think of Section 22 as if it said, "A person who a jury decides has thought bad thoughts about the Dictator of Xanadu has violated the law."

CLIENT: But I tell the truth and I'm a believable person. The jury isn't going to think I'm lying.

LAWYER: I wouldn't be so sure that people have the ability to tell when someone is lying. Most people think they have this ability. But let me read to you what an experienced judge in the United States had to say on this subject: “[A]t the end of eleven years upon the Bench I am more convinced than ever that the shrewdest, smartest liars often make the most plausible and satisfactory witnesses, while the humblest and most honest fellows often, upon the witness stand, acquit themselves most badly.”[FN2]

CLIENT: I find this a bit frightening.

LAWYER: You should be frightened; it is a very sound emotion to have. Many people who have been arrested for violating Section 22 were not scared because they knew in their own minds that they did not think bad thoughts about our Dictator. But nearly all of those people were convicted! They may have known their own minds, but they didn't know the law!

CLIENT: Or their lawyers didn't.

LAWYER: Right! Let's say you're charged with violating Section 22 and you're in front of a jury. If you're frightened and hire a good lawyer, you will have taken the best step you possibly could have taken under the [pg1089] circumstances. The biggest mistake you could make is to think that the jury will acquit you. Your case will not be affected in the slightest by what you *actually thought* about the Dictator.

CLIENT: I always knew we lived in an intolerable system.

LAWYER: Like all the other systems.

CLIENT: What do you mean?

LAWYER: Nearly every case in nearly every legal system is a case where the factfinder— that is, the judge or jury—must decide what was going on in the minds of the litigants. For example, every criminal case turns on *mens rea*—a guess that the defendant harbored thoughts amounting to criminal intent. Tort cases involve the intention of the defendant, or at least his reckless indifference to risk. Estate cases require the probate court to assess the intent of the testator. Antitrust cases involve the question whether there was an intent to form a combination in restraint of trade. Of course, there do seem to be some cases where intent is not important— for example, a contracts case where everything is spelled out in a written instrument. But even in that case a party can argue that the other party did not act in good faith—and faith, you know, is a deep mental secret. Actually, when I said “nearly every case” I was being too conservative. As a matter of fact, I can't think of a single case where the mental processes of one or both of the litigating parties—whatever the jury says those processes are—doesn't play a critical role in the outcome.

CLIENT: The difference here in Xanadu is that the jury seems to be able to convict anyone even if that person hasn't done anything.

LAWYER: You're not denying the *reality* of thoughts, are you? You're not saying that a person does *nothing* when he actively thinks bad thoughts of the Dictator?

CLIENT: No. But I'm saying that there has to be some tangible evidence.

LAWYER: And indeed there always is. A facial expression; a glance; an admission; body language. All these things have to be interpreted—by the jury. There is always evidence.

CLIENT: Suppose there is none of those things.

LAWYER: How would you plead?

CLIENT: Not guilty.

LAWYER: Aha! You've said two words. The jury might believe you were lying when you said them. Think of the witch trials in the seventeenth century. People said, "We know she's a witch because she *denies* it! She's being clever, just like a witch!"

CLIENT: I'll have my lawyer plead me not guilty, so I won't have to say anything myself.

LAWYER: But if you are tried, you obviously were first arrested. I've known some jurors to explain afterward that they voted to convict the defendant because he was arrested—the police don't arrest innocent persons.[pg1090] There was one juror who improved on this reasoning. She said, "I voted to convict the defendant because I figured that the state would not have spent all this money on the trial if he was innocent."

CLIENT: I can add one to your list. A jury votes guilty because the defendant refused to take the stand, and they held that against him.

LAWYER: Or you could take the stand and say too much. Are you familiar with *People v. Coleridge*?

CLIENT: No.

LAWYER: Coleridge took the stand and his lawyer asked him to repeat his thought processes exactly as they went through his mind. The defendant said he was happy to do so inasmuch as he remembered exactly what he had thought. He said:

What went through my mind was a series of questions and answers as follows. Is it true that our Dictator is mean and malevolent? Absolutely not. Does our Dictator condone torture? She does not. Is it true that our Dictator has imprisoned innocent people? No, it is absolutely false. Is our Dictator mean and rotten? Clearly not; any suggestion to the contrary is a lie and a calumny. Is our Dictator evil? No, our Dictator embodies absolute goodness and purity of spirit.

Of course, on the basis of this evidence, the jury returned a verdict of guilty. Wouldn't you?

CLIENT: And you say that law is an exact science?

LAWYER: Of course it is. Who can say the contrary? I mean, all those defendants I've been talking about *could* have been guilty—science can't say they weren't. Since science doesn't know, the law steps in. The law knows. It is infallible.

CLIENT: What can I do to protect myself against getting arrested for violating Section 22?

LAWYER: Ah, but now I have to start the meter running. Up to this point I have enjoyed discussing philosophy with you. But if you want legal advice, you must understand that I have spent three years in law school where the tuition was very high. I studied long hours when others were out playing, in order to become wise in the law. The only way I can recoup my costs is to retail my acquired wisdom to customers like you.

CLIENT: I am willing to pay your usual fee.

LAWYER: Then here is my advice. First, never ever tell anyone that you thought a bad thought about our Dictator. Not even if you had only good thoughts but want to make a joke. Second, if the general subject ever comes up in any conversation—even between you and your lover in the privacy of your bed—go out of your way to say that you only think good thoughts about our Dictator. Third, watch your facial expressions and body language. You must make sure that your facial expressions do not signify approval if others in your presence disclose that they have thought bad thoughts about the Dictator. If someone says that—and that someone, you understand, might be an undercover police agent—indicate your disapproval by facial expression, body language, and by [pg1091] strenuous verbal objection. Fourth, do not discuss Section 22 with anyone after you leave this office, because if you ever even discuss Section 22 there is a chance that someone might claim that you're discussing it because you have a guilty conscience—that you have had bad thoughts about our Dictator. And fifth, if you get arrested anyway, remember my phone number.

CLIENT: These are valuable words of advice. May I ask, counselor, whether you take all this advice yourself?

LAWYER: What's the first thing I said to you when we started this conversation?

Footnotes

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[FN1] The Ice Palace—unbeknownst to the citizens—routinely records every conversation in Xanadu. While these tapes contain vast amounts of incriminating evidence, the totality of recordings is so great that there is insufficient time or personnel to review the tapes—offering at least a measure of privacy to the citizens, as a practical matter. The dialogue that follows in the text, for instance, has not yet been discovered by Xanaduvian officials.

[FN2] Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 282 (1929). Judge Joseph C. Hutcheson, Jr., was United States District judge

for the Southern District of Texas, and a leading American Realist scholar.