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SOME REASONS COURTS HAVE BECOME ACTIVE PARTICIPANTS IN THE SEARCH FOR ULTIMATE MORAL AND POLITICAL TRUTH

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There are many interrelated reasons why emotionally charged basic value and policy decisions might be referred to the courts and why, as many critics believe, some judges might feel comfortable with that challenge. The most prominent reason is the belief that there is either some text or some set of universal moral principles that can guide judicial decision making when justice requires it even in the face of current social preferences or long-existing legal doctrine. There is no doubt that many legislators and substantial portions of the public share that belief.

We shall first examine why legislators might want to delegate to the judiciary the duty of incorporating extra-legal moral sources into the law, even when the goals and values involved are widely shared and not considered controversial. One obvious set of reasons arises from the fact that, even if there is a high degree of acceptance that some broadly expressed values and policies are universal goods that ought to be pursued by all human societies, there is a much lower level of universal agreement on exactly what those values and policies require to be done in practice. There is an even lower degree of universal agreement as to the comparative ranking of those values and policies when they come in conflict with each other not only as general goals which cannot always be pursued simultaneously, but also and more frequently in their attempted application in particular circumstances. From a political perspective the obvious move for a rational legislator would be to delegate the resolution of those conflicts to the courts while at the same time making use of the same broad language that has been used in declarations of universal human rights or in other articulations of broadly accepted social goals that have heretofore been largely interpreted as human aspirations rather than legally enforceable mandates. This move accomplishes two purposes. First it gives the patina of universal acceptance to values and goals that are accepted as such only in the abstract but not in detail. And second, by making these broadly worded values and goals judicially enforceable, it removes the need for individual legislators to make choices with which many of their constituents would not agree. The convergence of these two motives presents an irresistible incentive to set up a regime by which a legislator, through the use of noble language with which no one would take umbrage, is able to luxuriate in the aura of making a great step forward in the search for justice and also avoid the anticipated backlash from making concrete choices that a considerable number of people, including political rivals, would sharply criticize.

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While a rational legislator might want to support broad language that partisans on both sides of a particular issue believe supports their side and thus avoid the opprobrium that would arise from his deciding between competing basic human values in particular concrete situations, there are also other reasons which might induce a rational legislator to prefer a legal regime based on a multiplicity of basic values, particularly when some or all of those basic values are declared to be of equal worth. From a strategic perspective, he may clearly prefer one of two competing values but might nevertheless decide to delegate the choice to the courts not merely to avoid a political backlash but because he believes that the judges are likely to be of the same opinion as he is and would be more successful in garnering public support since, in advanced societies, judges are generally considered more impartial and objective than legislators. In a world in which politically charged issues are referred to courts and judicial selection is almost inevitably influenced by political considerations, assigning responsibility for choosing between competing basic values to what is believed to be a friendly court would certainly be a rational course of action for a legislator seeking public support for a policy he favors. There is also finally the very strong possibility that an individual legislator, who has rehearsed in his own mind the types of conflicts between competing basic values that are likely to arise, honestly concludes that he would not know how to resolve the conflict. He might, under these conditions, decide that the best thing to do is to refer the matter to the judiciary. He may do that not merely because he himself finds it difficult to decide what the correct resolution might be but because, having read something of the work of legal philosophers who maintain that there are (almost) always right answers to legal disputes,[1] he believes that he can confidently refer the matter to the courts because they are privy to some special way of reasoning that can produce an objectively correct solution to controversies that a layman might find impossible to resolve.

If one looks at the matter from the perspective of a judge trying to decide a case under such a broad legislative delegation of decisional authority he is likely to have a more diffident reaction. He would undoubtedly be anxious about his ability to provide a rationale that would be accepted by appellate courts and the key members of the legal profession whose approbation is also important to a judge sitting on an appellate court. This is one of many reasons why a judge would want to feel that he is applying a known existing law when he decides a difficult case. For many judges it may indeed be the most pressing reason, because one important function that law plays is that it can remove the moral responsibility for the decision from the decider to the "law." While most legal decisions do not implicate any serious moral issues, some do. It has been persuasively maintained that the "beyond a reasonable doubt" standard of proof applied in criminal cases in common-law countries was adopted to overcome the fear of jurors that they might be damned if they condemned an innocent defendant to death.[2] In establishing the beyond a reasonable doubt standard the objective was to place the moral responsibility for a verdict that led to the imposition of the death penalty on the law rather than on the juror who was only following the law. A known law performs the same function for a judge. Modern examples include the dismissal of appeals despite their evident merit if they are not filed on time and the refusal of federal courts to hear habeas corpus petitions that

[1] *See e.g.*, R. Dworkin, *Law's Empire* (1986).
[2] J. Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (2007).

involve meritorious issues that could have been but were not raised in previous state court proceedings. When no way exists for a court to avoid having to decide a controversial and difficult case, judges will often try to avoid taking moral responsibility for decisions that they regard as morally dubious by declaring that they wished they could have decided differently but, regrettably, were bound to decide as they did by "the law." More colloquially a judge might say that he was initially inclined to decide in a certain way but "the opinion just wouldn't write." Obviously the ability of the law to be viewed as removing the moral responsibility for a decision from judges will depend on the clarity of the governing law. The more open-ended the law is, the less able the "law" is to take the moral responsibility for a decision off the shoulders of judges.

It is not only legislators and judges who might wish to avoid accepting responsibility for what are difficult moral and political choices. Legislators often work with legal scholars who realize that legislators and judges are looking to scholars for support for their decisions, and yet sometimes feel uncomfortable in giving decisive answers on which legislatures and courts can rely to support their decisions, either because they feel that some types of decisions are so fact specific that only someone with a greater understanding of the underlying fact situations in each particular case would be qualified to make the necessary decision or because they do not feel able to declare what the correct legal doctrine to govern the matter should be. Where the hesitation of legal scholars is based on the factual complexity of the issues at play in some area of the law, legal scholars have often turned to the various social "sciences" that have figured prominently in discussions about social and political issues since their establishment as true academic disciplines in the latter part of the nineteenth century. Relying on these developments, legal scholars have advocated the judicial use of the findings of these social sciences in guiding judicial decision making. What scholars would thereby offer to the courts would not be concrete solutions to legal disputes but rather the identification of the various factors that courts should consider in reaching their decisions.

The assumption underlying this approach was that it would be possible for judges, who had delved into the factual circumstances of particular disputes or types of disputes and who were able to take advantage of the insights provided by the modern social sciences, to come to decisions that were not largely the result of the social preferences and biases of individual judges but were based on "social facts." In short these scholars were urging courts to resist the temptation to rely on a largely subjective decision making process and to rely instead on what were claimed to be quasi-objective methods of decision making. How helpful to courts that advice might be is another matter.[3] What is important to note is that, in offering this advice, scholars were acknowledging that there were some areas of the law in which they were unable to advise courts as to how they were to rule but were still able to fulfill their advisory function by directing judges to a supposedly fact-based objective method for deciding difficult cases. From the perspective of the scholars proffering this advice they could arguably claim that they were not doing anything much different from what they did when, after examining the corpus of the law at greater leisure and depth than was possible for judges, they expressed their opinion as to what was the law, that is to say issuing "expert" opinions on which judges could justifiably rely. Where they were unable to provide that guidance they could console

[3] *See* G. C. Christie, *The Notion of an Ideal Audience in Legal Argument*, 167-79 (2000).

themselves by claiming that they were at least giving courts expert guidance as to what neutral sources they should look to for assistance in their decision making.

But what if the difficult legal questions that academics are called upon to guide judicial decision making are not basically fact driven but involve a substantial number of contested social or moral issues? Telling judges what are the social and moral issues in play in such situations is neither terribly helpful nor is it advice that is beyond what any educated and well-rounded person endowed with common sense and sufficient practical experience might proffer. Suppose furthermore that legal scholars do indeed have ideas about what is the correct answer to the contested issues in question but for some reason are diffident about taking responsibility for suggesting a definitive answer to the matter in question? That is, they would wish to avoid some of the responsibility that accompanies any difficult concrete choice. The modern evolution of the role assumed by the restatements of the law produced by the American Law Institute has produced examples of why that course of action might be tempting.

The American Law Institute was established in 1923 "to promote the clarification and simplification of the law and its better adaptation to social needs."[4] Accordingly, the initial restatements produced by the Institute strived mainly to state what was the predominant judicial doctrine in the areas of the law covered by the restatements. Hence the use of the term "restatement" to describe the results of their efforts in each area which they had examined. That was understandable given that one of the complaints made of the legal system of the United States at the time the American Law Institute was established was the variation among the states about what was accepted as being the common law. A more important perceived problem confronting the practical operation of the American legal system at that time was the difficulty of ascertaining what actually was current legal doctrine when the American legal profession was faced with what seemed to be an exponential explosion in the number of reported decisions. This was particularly troublesome because it was recognized that, in the less urbanized areas of the country, neither the courts nor the majority of practicing lawyers had either the libraries or the time needed to grapple with that growing flood of judicial decisions. To meet these problems, the founders of the American Law Institute stressed both the "necessity for precise statement" and that "[t]he statement of principles should be much more complete than that found in European continental codes."[5] The desire of the Institute to give a concrete and unbiased description of the law in the initial restatements was reflected by the insertion of "caveats," after some of their provisions, that began with the words "[t]he Institute expresses no opinion…"[6] regarding some of the issues with which that particular provision was concerned. As its use of caveats makes clear, the American Law Institute was not initially prepared to make declarations about what the law was or should be unless it was prepared to take full responsibility for what it said.

Over time, however, the Institute recognized the need to adjust to the fact that the law was always evolving. Relying accordingly on scholarly criticism of existing law and more recent judicial decisions in some of the more rapidly changing areas of the law, the Institute began to break with its past practice and adopt positions that reflected what was thought by scholars and an increasing number of courts to be

[4] 1 A.L.I. Proc., Part I, at p.41, Part II, at p.117 (1923).
[5] *Id.*, Part I, at p.20.
[6] *See, e.g., Restatement of Torts* § 48 (1934).

what the law should be rather than what might still probably be the majority position.[7] Although not binding on American courts, many state courts did in fact expressly adopt the new positions advocated by the restatements and many of those revised sections of the restatements even came to be seen in the same light as statutes.[8] In basic subjects, like torts and contracts and other subjects largely based on common law, the restatements were often used by the so-called "national schools" as the authoritative expression of what, for instructional purposes, was the law in the United States, even though it would be rare to find a restatement provision that was actually universally adopted by all the various states.[9] While a more forward looking approach was both desirable and inevitable, such an approach carries some costs with it for the obvious reason that recommending the path future legal development should take carries with it more responsibility than reporting what exists at the present, a task in which the major responsibility is to produce an accurate report.

During a period such as the one in which we now live, in which our society and consequently many areas of the law are more visibly seen to be changing, it is understandable that the inclusion of too many caveats would diminish the attractiveness of the various restatements. To avoid that unattractive possibility, some of the more recent restatements have tried an approach that, while well-meaning, arguably undermines the original purpose of the restatements, namely giving courts and the profession something concrete on which to rely when applying the law to meet evolving social needs while continuing to encourage as high a degree of uniformity as possible among the various states. This new approach attempts to respond to the growing complexity of society by treating some sections of the new restatements not so much as statements of what the law in the United States is, or is in the process of becoming, or as declarations as to what social policies should drive that legal evolution, but rather as what amount to mere suggestions as to how the courts of the various states might go about framing their own individual law.

In § 52 of its *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, for example, the American Law Institute decided to rationalize the evolving American law governing the liability of a possessor of land to a person injured on his property owing to the negligence of the possessor or those for whose actions he was responsible. In pursuit of that goal, the *Restatement (Third)*, following the lead of a number of states, sought to impose something close to a general duty of reasonable care on the possessor of the land, regardless of whether at common law the person injured might be considered an invitee or a licensee, such as a social guest, or even a trespasser. Recognizing the increasing tendency of some courts to abolish completely the possessor's common-law immunity from liability to trespassers for injuries occasioned by the condition of his land or from the mishap of activities carried out upon his land, the *Restatement (Third)* adopted a general rule of liability to all trespassers subject to an express exception for a category characterized as "flagrant trespassers," a category that had not previously been recognized or defined by the courts.

[7] Justice Scalia, who has been reluctant to give special weight to the restatements' descriptions of current law on issues governed by federal law, has recently declared that the restatements should be given "no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar." *Kansas v. Nebraska*, 135 S.Ct. 1042, 1064 (2015).

[8] Section 402A of the *Restatement (Second) of Torts* (1965) is a classic example, but even it did not receive universal adoption. *See* D. Owens, *Product Liability Law*, 281-88 (2d ed.).

[9] *Id.* at 283, 287-88.

What is meant by the term "flagrant"? It could refer to the frequency of the trespass or the motive of the trespasser for entering the land or some combination of these and other factors. In the comments the *Restatement (Third)* stressed that the core of the notion of flagrancy was the concept of "egregious or atrocious rather than in its alternative meaning of conspicuous,"[10] a notion that, however it might be denigrated, admittedly does suggest something more objective and less value-laden than the terms "egregious" and "atrocious." The drafters prided themselves on the fact that "[t]his Section leaves to each jurisdiction employing the concept to determine the point along the spectrum of trespassory conduct at which a trespasser is a "flagrant" rather than an ordinary trespasser,"[11] even though, as we have noted, one of the original goals of the American Law Institute was to promote sufficient uniformity so that it made sense to talk about an "American common law." The drafters of the *Restatement (Third)* listed several approaches a jurisdiction might use to give content to that concept. For example it might provide "that a flagrant trespasser is one who commits a crime of a certain severity" or an approach that extends the "definition of flagrant trespasser… to one who enters the land with a malicious motive," or finally

> "a jurisdiction might adopt a general standard, for example, that a flagrant trespasser is one whose entrance on the land is sufficiently egregious as to be antithetical to the rights of the land possessor to exclusive possession and use of the land."[12]

With respect, this is hardly the declaration of a proposed rule of law but rather a morally-charged direction to courts to do what they think best, together with a license to use the term "flagrant trespasser" to describe the persons as to whom possessors of land should retain some residual portion of their common-law immunity. There is little doubt that such an approach does not produce what the founders of the American Law Institute would have considered a "restatement" of the law. It does not further the objective of producing a more uniform common law among the states nor is it a clear statement of what the academic community believes should be the law on that subject. This sort of open-ended delegation to the courts does not even provide the loose guidance "found in European continental codes" which the founders of the American Law Institute found inadequate, let alone a faithful adherence to their insistence on the "necessity for precise statements."

Much the same can be said about more socially important areas of the law. Rather than providing courts some concrete advice on how to adjust the law to an evolving social order, on which courts could rely to share responsibility for controversial changes in legal doctrine, such an approach thrusts the entire burden on the courts. In documents such as the European Convention of Human Rights, courts are provided with a list of important human goals and values such as rights to privacy, to freedom of religion, and to freedom of expression, all of which are defeasible for a number of important social reasons as well as because of conflict

[10] *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*; § 52 cmt. a (2012).
[11] *Id*.
[12] *Id*.

with other enumerated rights.[13] As a result, courts are required to decide whether a woman can be prohibited to cover her face in public in order to achieve the aim of preserving "the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others.'"[14] In conflicts between individuals those between rights of privacy and freedom of expression are the most frequent and arguably the most difficult to resolve because it has been determined that, in conflicts between individuals, privacy and freedom of expression are of equal value.[15] In Europe it has been determined that when challenged as an invasion of privacy even truthful lawfully obtained information can only be disclosed to a wider audience if it meets a judicially determined finding that it contributes to a "debate of general interest to society."[16] As interpreters of national constitutions and international conventions with similar approaches to conflicts among competing human rights, courts are being asked to decide conflicts between important basic social values and goals and the vaguely defined and often competing human rights of different individuals with only minimal direction and even less political oversight. Whatever courts might decide in exercising such a largely unfettered discretion in resolving conflicts among competing values and goals, and even deciding the proper allocation of public resources,[17] is not easily subject to correction through the democratic process. In a rapidly changing world this conferral of decision-making power to the judiciary would seem to be an unwise policy choice. In areas such as conflicts between freedom of expression and privacy, it can also have the unfortunate result of allowing relatively narrow elites to impose their notions of social propriety on an increasingly diverse population.

At the end of the day, the very important issue which we must confront is whether courts can claim that, in exercising the role of moral and political arbiter, they are not merely fulfilling the awesome responsibility imposed on them by the body politic but also that their decisions are guided by the law. Or, if that is not possible, can they point to some other quasi-objective source so that the major responsibility for their decisions may rightfully be placed on those sources and thus free themselves from the criticism that their controversial judicial decisions are merely reflections of the collective preferences of the judiciary and of the social classes from which their members are drawn?

[13] I discuss this subject at some length in G. C. Christie, *Philosopher Kings? The Adjudication of Conflicting Human Rights and Social Values* (2011). *See also* G. C. Christie, "Freedom of Expression and Its Competitors", 31 *Civ. Just*. Q. 466 (2012).
[14] *S.A.S. v. France*, Application No. 43835/11, Grand Chamber Judgment of 1 July 2014, at 157 (ECHR).
[15] Resolution 1165 of the Parliamentary Assembly of the Council of Europe (1998). *See e.g.*, *von Hannover v. Germany*, Application No. 59320/00, Judgment of 24 June 2004 (ECHR).
[16] *Id.* 76.
[17] There have been significant decisions of the German Constitutional Court on such issues. *See e.g.*, BVerfG, 1BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 (9/2/2010), 82 BVerfGE 60 (29/5/1990).