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Abstract

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KEYWORDS: law, age, statutes

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*Reviewed by Ronald Benton Brown**

In common law days, the law evolved gradually on a case by case basis as courts applied the general principles to new and different fact situations. Each adjudication was merely a step in the process by which the judges made the law. The guiding principle was that like cases should be given like treatment. Earlier cases, precedents, were consulted to produce a semblance of consistency as a changing environment caused the law to change and grow.

The twentieth century, particularly since the New Deal, has seen the " 'statutorification' of American law"[1] as legislatures responded to rapid social and technological changes by an "orgy of statute making".[2] Consequently, courts have been forced to learn a new role, that of primarily applying the law given to them rather than creating it. Judges have not always taken this demotion gracefully, especially when the legislation before them is less than perfect. When the statute under consideration is obsolete, the loss of the common law power to change the law is particularly frustrating.

Inertia tends to insulate even an obsolete statute from repeal. Not until a sufficiently powerful group has been offended will there be a change. The legislature may not even realize that a statute is out of date until there is some public uproar about its application. Guido Calabresi, the Sterling Professor at Yale Law School, proposes in *A Common Law for the Age of Statutes* that it is appropriate in the course of adjudicating disputes, for courts to discover which statutes are no longer consistent with the current legal topography. Judges have the training and experience necessary for this task, and the judicial process is particularly likely to reveal any anachronism in the law. Moreover,

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1. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

2. G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977), *quoted in* G. CALABRESI, *supra* note 1, at 1.

courts are already engaged in this discovery mission.

More importantly, Professor Calabresi points out, courts often refuse to stop at discovery of anachronisms but rather proceed to employ a number of techniques for dealing with obsolete statutes. A court may overreact by finding the statute in question to be constitutionally infirm due only to its obsolescence, or may strain to interpret the statute to eliminate the flaw or to magnify the flaw so as to coerce some legislative reaction. The court might, alternatively, refuse to enforce the statute on the basis of desuetude, vagueness, or invalid delegation. But each of these techniques is a subterfuge for what the court is actually doing and each involves dangers to our political system.

The greatest danger is that all are inherently dishonest. In each technique the court claims to be making its decision on a ground other than the true one—the obsolescence of the statute. The result may be incomprehensible to the electorate. Worse, if the subterfuge is detected, it could deprive the court of its credibility.

If the obsolete law had evolved from cases in the traditional common law fashion, the court could react to the obsolescence by changing the law openly and directly. Faced with an out-of-date statute rather than out-of-date case law, the court encounters a dilemma. The legal literature reveals no doctrine which would justify judicial modification of a statute and, therefore, such judicial action lacks all legitimacy.

Professor Calabresi proposes considering a doctrine which would allow courts to deal with the archaic statute candidly. His proposal would allow the court, after finding the statute no longer fits into the current legal framework, to allocate the burden of the next step according to the appropriate competence of the legislature, judiciary or even an administrative agency. The court would be allowed to alter, nullify, or even enforce the statute subject to a specific statement that a legislative reconsideration resulting in a revision, repeal or reaffirmation is necessary.[3] This procedure would have the benefit of providing the

3. Legislative reaffirmation of a statute becomes possible if the court has expressed its opinion that the statute is defective solely because it no longer fits the legal topography. The legislature may respond that it is still supported by a majority and is therefore valid. If the court had used a subterfuge such as unconstitutionality, such a direct and simple response from the legislature would be impossible. What would be required would be either a reworking of the statute to squeeze within constitutional limits or a constitutional amendment.

court with a legitimate course of action. It would also increase the flexibility with which a legislature could subsequently deal with the obsolete statute.[4]

Calabresi denies advocating the adoption of this novel doctrine; he claims to be merely presenting it as a possible alternative to the present situation because it would allow courts to continue substantially on their present course, but without deception. The latter aspect might increase the credibility of the courts, garnering majoritarian support.[5] However, he implies that it is really the only viable alternative because our system lacks an effective mechanism to stop the courts from nullifying or modifying statutes by subterfuge. The present dishonest approach will end only if courts are offered a more attractive method of eliminating out-of-date statutes.

Unfortunately, Professor Calabresi fails to address another hypothesis which might better explain the present system. The judicial reaction to statutes might not be a result of the fact that judges are better trained and in a better position to discover the outdated statute, but rather that as a result of their education and professional socialization, judges are convinced that the final word on what is the law should lie with them.[6] Judges, aware that nonlawyers may not share this be-

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4. If the court were to determine that a statute is invalid due to vagueness, the legislature in enacting a replacement would have to avoid the "vague" language. Likewise, if the court were to find a statute constitutionally defective, any subsequent statute must avoid a similar defect. If the actual basis for the judgment was that the statute was obsolete rather than vague or unconstitutional, the legislature in reacting must not only produce a modern statute but must also avoid the "vague" language or constitutional defect.

5. This hypothesis is based upon the theory that the electorate would respond affirmatively to a court decision which was based upon an easily understood concept, obsolescence, rather than on esoteric legal doctrine and also would responds affirmatively to court decisions which did not preclude in absolutist terms any response by the electorate through the legislature.

6. The education at Harvard Law School at the time Felix Frankfurter entered in 1902 is described as follows: "Langdell's innovations [the case method] reinforced the conservative legal values that dominated the training of most students, who learned the superiority of judge-made common law over legislation. . . ." M. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 18 (1982). Moreover, one of the most influential of Frankfurter's professors, John Gray, pointed out explicitly that "[A] judge might be swayed by precedent, expert opinion, custom, moral principles, or legislative statutes, "but in truth all the Law is judge-made law." M. PARRISH, *id.* at 20

lief,[7] avoid a confrontation with the legislature and the electorate by utilizing subterfuge to reclaim the lost common law power. Adoption of the proposed doctrine would simply legitimate the judiciary's return to primacy by its own edict.[8] Such a bold grasp of power may eliminate

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(quoting in part from M. COHEN & E. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY] 407-15 (1951).

The same bias in legal education still exists. *See generally* E. GEE & D. JACKSON, FOLLOWING THE LEADER? THE UNEXPLAINED CONCENSUS IN LAW SCHOOL CURRICULA (1975); O. Lewis, Curricula Study (1982) (unpublished manuscript); J. SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL (1978). *See also* Brown, *The U.C.C. (Sales) as an Introductory Law School Course,* 30 J. OF LEGAL EDUC. 592 (1980) arguing that at least one statutory course, such as Sales, should be taught in first year of law school based upon the experience that law students, following a typical first year of common law subjects, strongly resist utilizing even clearly applicable statutes rather than the common law.

7. In 1848 Alexis de Tocqueville criticized American Law because: "Our written laws [the French Civil Law Code] are often hard to understand, but everyone can read them, whereas nothing could be more obscure and out of reach of the common man than a law founded on precedent." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 267 (J.P. Mayer ed. 1969).

It may be hypothesized that one impetus for the "statutorification" of the twentieth century was the electorate's desire for understandable laws. The shift of lawmaking power from the judiciary to the legislature would appear to be a first step in accomplishing that majoritarian desire.

The electorate believes that courts are bound to enforce statutes which are constitutional. Only if there is no statute can judges make their own law. This may be illustrated by an excerpt from a popular college text: "What happens if there is no statutory law governing a case that comes before a court? What if the legislature has not formalized any rule to apply to the dispute? *Then* the judge must apply the *common law.* Common law is judge-made law." J. BURNS & J. W. PELTASON, GOVERNMENT BY THE PEOPLE 514 (1966) (emphasis added).

The currentness of this belief was recently evidenced in the Senate confirmation hearings of Justice Sandra Day O'Connor. Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society,* 67 IOWA L. REV. 711 (1982).

8. de Toqueville pointed out the special status enjoyed by judges and lawyers in the early 19th century: "If you ask me where the American Aristocracy is found, I have no hesitation in answering. . . . It is at the bar or the bench that the American aristocracy is found." DE TOCQUEVILLE, *supra* note 7, at 268.

Few would argue that judges enjoy such elevated status today. *See, e.g.,* Yankelovich, Skelley & White, **Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders in State Courts: A Blueprint for the Future** 5 (proceedings of the Second National Conference on the Judiciary held in Williams-

the very marjoritarian support which Professor Calabresi hopes it will garner.

If the power to make, revise and repeal statutes properly belongs to the legislature alone, then the judicial behavior which Professor Calabresi has described is improper and the discussion should focus on the formation of an effective mechanism to curb such behavior in the future. Only if the courts are legitimately exercising revision and repeal powers do we need a doctrine to explain the proper limits of that activity. *A Common Law for the Age of Statutes* makes fascinating reading but shifting the discussion to statutory obsolescence and the effect of inertia in statutory revision seems uncomfortably like a subterfuge to avoid tackling the real issue: whether the ultimate lawmaking power should reside with the courts or with the legislature.[9]

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burg, Virginia, (March 19-22, 1978). *See also* McConnell, *Why People Today Distrust the Courts,* 17 JUDGES' J. 12 (1978).

9. The point is illustrated by the following hypothetical conversation about a hypothetical statute which prohibitied removal of another person's gall bladder.

"that law couldn't conceivably pass."

"But suppose it did."

"Come on, it wouldn't. We've got problems enough without hypothesizing absurdities."

"Suppose it did."

"Okay, I'll play your game. If it passed, I think we could get it repealed pretty quick."

"What if we couldn't?"

"Then I'd suppose my elected representatives had found out something about gall bladders that you and I are unaware of."

"Suppose they hadn't. Suppose they were just acting crazy."

"Vote them out. Impeach them. Repeal the law."

"Can't. Most people believe they're doing the right thing."

"And they're just acting crazy too?"

"Right."

"I don't suppose we can reason with them."

"Nope."

"You know what you're telling me? That you don't believe in democracy. . . ."

J. ELY, DEMOCRACY AND DISTRUST 182 (1980).

Ely's book, of course, focuses on the scope of judicial review for constitutional violations while Calabresi focuses on the scope of judicial review of obsolete statutes. Both books are, however, reactions to the same ultimate question, what is the appropriate role of courts, *vis a vis* legislatures, in our democratic system. A subsequent ques-

tion would be how the courts can perform their tasks without alienating the popular support necessary for continued successful performance of these tasks.