MULLAHS OF THE WEST: JUDGES AS MORAL ARBITERS

In the first half of the last century, American political theory was obsessed with the expert. The key to effective government, it was thought, was to take the direction of government agencies out of the hands of politicians, and to place it within the control of men experienced and knowledgeable within the various fields of government regulation. Accordingly, despite the fact that the United States Constitution calls for all executive power to reside in a nationally elected President, Congress created a series of agencies insulated from presidential control, in that their managers were not subject to presidential direction and could not be removed from office by the President except for malfeasance. Typically, these so-called "independent regulatory agencies" were headed by a board of five or more members, no more than a bare majority of whom could be from the same political party, appointed for staggered terms of years exceeding the President's four-year term. In this way, it was thought, politics could be taken out of the job of managing the economy; it would be done by experts. Thus there was created what came to be known as the Headless Fourth Branch of American government—a series of alphabet agencies such as the ICC (Inter-state Commerce Commission), the FTC (Federal Trade Commission), the SEC (Securities and Exchange Commission), the FCC (Federal Communications Commission), and the CAB (Civil Aeronautics Board).

It is fair to say that the project was a grand failure—for two basic reasons. First, and most important, it was discovered (and this should have been no surprise) that many of the most important issues to be decided by government agencies—even agencies dealing with seemingly technical fields such as telecommunications and transportation-have no right or wrong answers that experts can discover. They involve social preferences which, in a democracy, can only be expressed through the political process. How many television stations should the FCC permit a single company to

own? It depends upon how much you care about quality of programming (by and large, bigger operations can deliver more expensive programs) compared with how much you fear big-company domination of television, including its news and public-affairs programming. There is no right answer to the question; only a policy preference. How much should the ICC permit railroads to charge for the hauling of municipal waste? If they are allowed to charge their cost (including a reasonable profit), it will be very expensive to dispose of waste in this fashion. But perhaps we want to subsidize the burying of municipal waste in landfills, so that cities will not pollute the environment by incineration. We can apply that subsidy by requiring railroads to charge below their cost for carrying municipal waste, the deficit to be made up for by permitting over-compensatory rates for other cargos—which amounts to a tax imposed on the consumers of those other cargos. So, how much you permit railroads to charge depends upon 1) how much you care about the environment, and 2) how much you are willing to subsidize cities. There is no right answer to the question; only a policy preference.

And the second reason the project of the so-called independent agency was a failure is that it is quite, utterly impossible to take politics out of policy decisions. (That is not just a reality, it is, for those of us who believe in democracy, a blessed reality.) The reduction in the elected President's control over the independent regulatory agencies was simply replaced by augmentation of the elected Congress's control. Agency heads were no longer removable by the elected President, but they were also no longer protected by his political power; he had no interest in protecting them since their acts were not his acts, their failures not his failures. Thus, the independent regulatory agencies became all the more subservient to the policy direction of the Committees of Congress responsible for their budget and for their oversight.

By the end of the twentieth century, independent regulatory agencies were no longer fashionable. Indeed, two of the oldest of them, the Interstate Commerce Commission and the Civil Aeronautics Board, were abolished. But in the United States, and indeed throughout the world, belief in the expert has been replaced by belief in the

judge-moralist. Whereas technical questions, we have come to learn, do not have any single right answer, surely *moral* questions do. Whether a woman has a natural right to an abortion. Whether society has the right to take a man's life for his crimes. Whether it is unfair (and hence, in the terminology of the American Constitution, a denial of equal protection) to permit marriage between people of opposite sex, but not between people of the same sex. Whether a human being has an unalienable right to take his own life, and to have the assistance of others in doing so. These, and many similar questions, involve basic morality, basic human rights — and surely there is a right and wrong answer to them.

Well, I believe firmly that indeed there is. That is to say, I believe in natural law. The problem is that my view of what natural law prescribes is quite different from others' views—and none of us has any means of demonstrating, with anything approaching scientific certainty, the correctness of his position. Thus, as a matter of democratic theory, there is no more reason to take these issues away from the people than there is to take away issues of economic policy—because there is no moral expert to answer them. This is not to say that the people' s conclusion can always override my own conscience on these questions of right and wrong. In Nazi Germany, for example, even if it had been democratically determined that Jews and Poles had no right to live, I would be obliged to protect and defend them, in defiance of the law if necessary. But we are not talking about individual responsibility; we are talking about who, in a democratic society, should have the power to determine the government's view of what the natural law is. That seems to me obvious. Given that there is a natural law, the question becomes: what do the American people, or the Dutch people, or the Italian people, believe the natural law to be? Does it permit abortion, or forbid abortion? And in an open democratic society the people can debate these issues, each side trying to persuade the other to its way of thinking. And the people (unlike the courts) can even *compromise* on these issues-for example, by leaving the issue of abortion to be dealt with in divergent fashion by the sub-units of a federal state, or by prohibiting only

abortion performed in a particularly brutal fashion, or by permitting abortion in case of rape or incest.

But in these early years of the 21st century, that is not the way we proceed. We have become addicted to abstract moralizing. That is relatively harmless when it appears in the operating documents of such international organizations as the United Nations—which can implement the moralization or not implement it, as political convenience dictates. Stop, or do not stop, for example, what our Congress has termed the genocide occurring in the Sudan; nothing forces the UN's hand. But abstract moralizing is a dangerous practice when it is reflected in the operating documents of a nation-state (or a federation of nation-states) which require the moralizing *to be judicially enforced.* There is nothing inherently wrong, for example, with Article 8 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, which provides, in part, that "[e]veryone has the right to respect for his private… life." Who could possibly disagree with such an inspiring sentiment? Any more than one could disagree with the inspiring sentiment of Article V of the 1789 French Declaration of the Rights of Man and of the Citizen, that "(t)he law ought to prohibit only actions hurtful to society." But whereas the latter was left to languish as an inspiring sentiment, with no attempt to have judges enforce it against the French Parliament, the former—the "right to respect for … private … life"— has been made enforceable against the democratic governments of Europe by judgment of the European Court of Human Rights. What does "respect for private life" consist of? Who knows, other than the European Court of Human Rights?

Nine years ago, that provision was held to invalidate a provision of the United Kingdom's law against gross indecency which said that the law's permission of private homosexual conduct did not apply "when more than two persons take part or are present." The Court of Human Rights held that the gross indecency law could not, by reason of the required "respect for *private* life," be applied against a 5-man homosexual orgy, which the participants considered so little confidential that they videotaped it.[1]

[1] *A. D. T.* v. *United Kingdom,* No. 35765/97 (July 31, 2000).

(The Court did not specify how many people had to be participating in the sexual conduct before it would cease to qualify as part of each one's "private life." Presumably it is some number between 5 and the number required to fill the Coliseum. Unless, of course, all sexual activity not intentionally displayed to nonparticipants is part of one's "private life," in which case even Yankee Stadium is a permissible venue for the living out of one's private life.)

In the course of its opinion, not only did the 7-judge chamber of the Court of Human Rights definitively resolve for the people of Europe the scope of legally protected privacy. It also ruled definitively upon what is "necessary in a democratic society … for the protection of health or morals." For Article 8 of the Convention makes that an explicit exception to the right of privacy. I take no position, of course, on whether the prohibition of sex orgies is necessary for the protection of morals. I do assert, however, that in a democratic society the binding answer to that value-laden question should not be provided by 7 unelected judges.

The European Court of Human Rights does not, of course, stand alone in making value-laden judgments for the society. My Court does it all the time. *Roe* v. *Wade* is perhaps the prime example, requiring abortion-on-demand throughout the United States. But there are many more examples. Six terms ago, we held laws against private consensual sodomy, laws that had existed in perfect conformity with the Constitution for over 200 years, to be impermissible, citing, *inter alia* the Court of Human Rights' *Dudgeon* case[2] to prove the meaning of the Due Process Clause of the American Constitution.[3] We have held it impermissible to let juries decide (as they have done in the past) that a murderer should be condemned to death despite his mental retardation,[4] or despite the fact that he was under 18 years of age when he killed.[5] We have held it impermissible for a State to maintain a military college for men only, despite the fact that West Point, the Citadel and the Virginia Military Institute had for

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[2] *Dudgeon* v. *United Kingdom*, 45 Eur. Ct. H. R. (Ser. A) (1981).
[3] *Lawrence* v. *Texas*, 539 U. S. 558 (2003).
[4] *Atkins* v. *Virginia*, 536 U. S. 304 (2002).
[5] *Roper* v. *Simmons*, 543 (J. S. 551 (2005).

more than a century not been thought to be in violation of the Constitution's requirement of equal protection of the laws.[6] We have rejected, for the time being, a constitutional right to assisted suicide, but have reserved the right to revisit that issue.[7] And I could go on.

Why have judges not *always* been such pioneering policymakers? The answer is that until relatively recently the meaning of laws, including fundamental laws or constitutions, was thought to be *static.* What vague provisions such as a right to "respect for … private life," or a right to "equal protection" meant at the time of the constitution's enactment could readily be determined (in most controversial areas) from the accepted and unchallenged practices that existed at that time. And what the constitution permitted at the time of its enactment it permitted forever; only the people could bring about change, by amending the constitution. Thus, in 1920, when there had come to be general agreement that women ought to have the vote, the United States Supreme Court did not declare that the Equal Protection Clause of the Constitution had "acquired" a meaning that it never bore before; rather, the people adopted the Nineteenth Amendment, requiring every State to accord women the franchise.

Under a regime of static law, it was not difficult to decide whether, under the American Constitution, there was a right to abortion, or to homosexual conduct, or to assisted suicide. When the Constitution was adopted, all those acts were criminal throughout the United States, and remained so for several centuries; there was no credible argument that the Constitution made those laws invalid. Of course society remained free to decriminalize those acts, as some States have; but under a static Constitution *judges* could not do so.

A change occurred in the last half of the 20th century, and I am sorry to say that my Court was responsible for it. It was my Court that invented the notion of a "living Constitution." Beginning with the Cruel and Unusual Punishments Clause of our Eighth Amendment, we developed the doctrine that the meaning of the Constitution

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[6] *United States* v. *Virginia,* 518 U. S. 515 (1996).

[7] *Washington* v. *Glucksberg,* 521 U. S. 702 (1997).

could change over time, to comport with "the evolving standards of decency that mark the progress of a maturing society."[8] And it is we, of course, the Justices of the Supreme Court, who will determine when there has been evolution, and when the evolution amounts to progress. On the basis of this theory, all sorts of entirely novel constitutional requirements were imposed, from the obligation to give a prior hearing before terminating welfare payments[9] to the obligation to have law libraries in prisons.[10]

For a time, the American Supreme Court was the envy of the judicial world. Ah, judges thought, if only we all could have such power to do good! And then, with the creation of constitutional courts in Europe, and ultimately creation of the European Court of Human Rights, the Power to Do Good came into every judge's hands—or at least the hands of every judge empowered to override legislative acts. The Court of Human Rights was quick to adopt the proposition that the Convention was (as the Court put it in 1978) a "living instrument which … must be interpreted in the light of present-day conditions."[11] And thus the world, or at least the West, has arrived at its current state of judicial hegemony.

Let me make it clear that the problem I am addressing is not the social evil of the judicial dispositions I have described. I accept for the sake of argument, for example, that sexual orgies eliminate social tensions and ought to be encouraged. Rather, I am questioning the propriety—indeed, the sanity—of having a value-laden decision such as this made for the entire society (and in the case of Europe for a number of different societies) by unelected judges. There are no scientifically demonstrable "right" answers to such questions, as opposed to answers that the particular society favors. And even if there were scientifically "right" answers, there would be no reason to believe that law-trained professionals can discern them more readily than, say, medical doctors or engineers or ethicists or even the fabled Joe Six-

[8] *Trop* v. *Dulles,* 356 U. S. 86, 101 (1958) (plurality opinion).
[9] *Goldberg* v. *Kelly,* 397 (J. S. 254, 263-64 (1970).
[10] *Bounds* v. *Smith*, 430 U.S. 817, 828 (1977)
[11] *Tyrer* v. *United Kingdom,* 26 Eur. Ct. H. R. (ser. A) at para. 31 (1978).

Pack.[12] Surely it is obvious that nothing I learned in my law courses at Harvard Law School, none of the experience I acquired practicing law, qualifies me to decide whether there ought to be (and hence is) a fundamental right to abortion or to assisted suicide.

Judges' lack of special qualification to deal with such questions is disguised by the fact that they provide their answers in classic, legal-opinion form, with boring recitations of the facts, the procedural history of the case, the relevant provisions of law, the arguments of the parties, and finally, the court's analysis, which takes pains to demonstrate the consistency of today's result with earlier decisions of the court. The problem is that those earlier decisions, like the present one, fail to address the real issues, which are of a nature too fundamental to be logically resolved by a law court. Thus, the Court of Human Rights' opinion in the Dudgeon case, which held that the prohibition of homosexual sodomy violated Article 8, found that the prohibition was not necessary for the protection of morals while yet purporting not to "make […] any value-judgment as to the morality of homosexual relations between adult males."[13] Surely **the morality of the practice was central to the question whether proscription of it is necessary for the protection of morals**. I suggest that the court disclaimed any determination of the morality of homosexual conduct, not because it was irrelevant to the case, but because it is blindingly clear that judges have no greater capacity than the rest of us to determine what is moral. The same phenomenon of disclaiming resolution of the central issue in the case appeared in *Roe* v. *Wade*, where my Court said that, in order to decide whether a State must allow termination of a fetus's life at the wish of the mother, it was unnecessary to decide when human life begins. Of course that question is central to intelligent discussion of the issue—but judges obviously know no more about it than the rest of us.

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[12] Joe Six-Pack is the modern American name for The Common Man.
[13] *Dudgeon*, 45 Eur. Ct. H. R. (Ser. A.), at para. 54.

Which brings me back to the comparison I suggested at the outset of these remarks. Just as scientific "experts" were unqualified to give the people's answer to the many policy judgments that inhere in any economic regulation, so also judges are unqualified to give the people's answer to the moral questions that inhere in any *a priori* assessment of human rights. And just as it proved impossible to take politics out of economic regulation, it will prove impossible to take politics out of the year-by-year refashioning of society's official views on human rights. In the United States, the mechanism for the infusion of politics has been the appointment and confirmation process. Federal judges in general, and Supreme Court Justices in particular, are nominated by the President and confirmed by the Senate. Every Republican presidential candidate since Richard Nixon has complained about an activist Supreme Court, and has promised to appoint Justices who believe in "judicial restraint." And every Democratic presidential candidate since Michael Dukakis has promised to appoint Justices who will uphold *Roe v. Wade*, which is synonymous with judicial activism. Each year the conflict over judicial appointments has grown more intense. Recently, it has expanded to the Court of Appeals level, Democrats in the Senate refusing to permit a vote on Court of Appeals nominees whom they expect to disagree with *Roe* v. *Wade.* Because of this political controversy, a number of seats on our Courts of Appeals remain unfilled. The lesson is, that in a truly democratic society—or at least the one in America—one way or another the people will have their say on significant issues of social policy. If judges are routinely providing the society's definitive answers to moral questions on which there is ample room for debate—rather than merely determining the meaning, when enacted, of democratically adopted texts—then judges *will* be made politically accountable. The people, through their representatives the President and the Senate, will no longer select candidates for the bench according to the traditional criteria—legal ability, integrity, judicial temperament, etc. Those qualities are all well and good, but they are no longer the most important thing we should be looking for. We should be looking for people who agree

with us as to what the annually revised Constitution ought to say. And you have seen this revision of criteria come to pass, now that the people—after about fifty years of the "living constitution"—have figured out the name of the game. I was confirmed to the Supreme Court 23 years ago by a vote of 98-0; today, an originalist like me cannot even get 60 votes to sit on a Court of Appeals . What has occurred is betrayed even by the terminology with which the confirmation debates are conducted. The Senate is looking for "moderate" judges—"mainstream" judges. What in the world is a moderate interpretation of a constitutional text? Half-way between what it says and what we would like it to say? It makes no sense to speak of a "moderate" lawyer. But it makes a lot of sense to speak of a moderate policy-maker-a moderate draftsman of an ever-evolving new Constitution. The "moderate" judge is one who will interpret the Constitution to mean what most people would like it to mean; and the "extremist" judge is one who will invent a new Constitution that most people would not approve. Once one adopts this criterion, of course, the Constitution ceases to perform its principal function: to *prevent* the majority from doing some things it *wants* to do.

I would predict the same politicization of the European judicial process, but I frankly do not know what mechanism would make that possible. One of the checks upon judicial power that the Framers inserted into the American Constitution was precisely the appointment of judges in a highly visible and highly political fashion—so that judicial appointments can be an important issue in a presidential election. I am not aware that effective political checks exist with respect to European constitutional courts, the Court of Justice, or the Court of Human Rights. Moreover, unlike in America, political hostility towards your courts cannot be personalized. Your courts have many members, and in numbers there is anonymity. Adding to the inability to assess blame is the fact that your judges ordinarily sit in panels rather than en banc—so that any single judge can be criticized for only a portion of the judgments. And the opinions for the court are not signed by a particular judge, but are anonymous. For all these reasons, you will not see in Europe placards that are the equivalent of *Impeach*

Earl Warren or *Impeach Harry Blackmun*—or political mailings similar to the *in terrorem* letter a fundraiser for the Democratic Party recently sent to my house (I presume in error), reading, on the front of the envelope "Imagine *Chief Justice* Scalia."

I am not happy about the intrusion of politics into the judicial appointment process in my country. But frankly, I prefer it to the alternative, which is government by judicial aristocracy. I shall observe with interest the development of this issue in Europe.