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LAW IN CONTEXT, FIDELITY TO CONTEXT

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If the LSA had a banner, it might well display two bold slogans: "Law in action" and "Law in context." Each brings concreteness and dynamism to the study of legal ideals and institutions; each draws that study into the mainstream of social life and places it firmly within the ambit of social science. In this paper I explore, very briefly, some aspects of "law in context" that have received insufficient attention: how law is *disciplined* by context, and how contexts are transcended by more comprehensive principles and ideals.

In law-and-society theory, "law in context" points to the many ways legal norms and institutions are conditioned by the insistent realties of

culture, practice, and social organization. We see how legal ideas, such as property, contract, or conceptions of justice, are conditioned by the intellectual history of the West; how the authority and self-confidence of legal institutions are founded in the realities of class and power; how legal norms fit into broader contexts of custom and morality. In short, we see law as in and of society, adapting to its contours, giving direction to its evolution. We learn that the legal order is far less autonomous, far less self-regulating and self-sufficient, than often portrayed by its leaders and apologists. Therefore we recognize, as an insistent reality, the blurring of boundaries between law and morality, law and tradition, law and economics, law and politics, law and culture. This blurring of boundaries is healthy in some ways, pernicious in others. It is pernicious when legal rules and decisions are designed and manipulated by economic and social elites, for their own benefit. It is healthy when legal institutions gain nurture and insight from the necessary or desirable continuities of social life, including popular attitudes of criticism, self-restraint, and deference.

All this is well understood; it is a fruitful perspective we would do well

to maintain. There is, however, another way of taking context seriously. This is to recognize that law must be adapted to—make sense of, and deal with the distinctive problems of whatever special context we think should be governed by law and should redeem, in its own way, the ideals we associate with the rule of law. The guiding principle is *fidelity to context*. To meet this standard something more is wanted than a roving commission to treat law as a dependent variable. The inquiry must be more focused, based on a full understanding of the social sphere, practice, or institution. We can then know what kinds of law are necessary or convenient, given the nature of the setting. Fidelity to context overcomes legal formalism; it makes law more responsive and therefore more effective. Legal institutions take many forms and work in many different ways; the context tells us what limits must be accepted and what tradeoffs must be negotiated.

We cannot balance rights and responsibilities without knowing the particular requirements (and dynamics) of family life, business, education, or science. Consider academic freedom, for example. The rights and duties of professors and students largely stem from values we share about teaching,

learning, and scholarship. We want to foster free academic inquiry at all levels of academic life. Academic freedom protects teachers from political interference and arbitrary dismissal, students from unprofessional demands and evaluations. But these freedoms have limits, which are determined by norms of scholarly achievement, professional ethics, and academic organization.

In December 1964, faced with a major crisis of principle and order, the Academic Senate of the University of California at Berkeley adopted a resolution which stated in part: "The content of speech or advocacy should not be restricted by the University." This statement seemed to cover all speech, but in reality a particular context was taken for granted and tacitly understood. The free-speech principle thus bravely proclaimed was meant to apply to debate and discussion on the campus, understood as a public forum, not to norms of speech in the classroom or in scholarly work. It was not meant to apply to what students should say or hear in class, or what they should write in examinations or research papers.

A similar analysis pertains to other rights-generating contexts. The U.S.

Constitution famously protects Athe freedom of speech,@ which has been expanded by the Supreme Court to include artistic expression. Indeed, Aexpression@ and Aspeech@ are often identified, so that almost any public utterance can be thought to have constitutional protection. Rights of property and speech are especially vulnerable to the lure of absolutes, which save us from the need to make context-governed judgments about claims of right.

An absolutist, noncontextual approach to property rights is especially misleading. Since the seventeenth century, in part under the influence of John Locke's writings, property rights have become abstract, individualized, and market-oriented, detached from contexts, such as land tenure and inheritance, which limited the claims of ownership: the idea spread that ownership carries with it rights of domination. The owner can do what he wants with his own. This perspective has captured the legal imagination, despite he fact that many restrictions and responsibilities have been recognized and enforced. The rhetoric of private property has obstructed rational public policy affecting environmental protection, gun control, and corporate governance. Corporate shareholders are treated as owners, who can

do what they want with their shares, which may result in wholly self-interested decisions regarding corporate policies, including mergers, despite the realities of limited commitment and a fluid market for corporate equities.

This argument is not a disparagement of rights. Rather, it is a way of looking closely at the ways rights are defined, asserted, and protected. Sometimes rights are in the foreground of institutional design and practice, as when we investigate or adjudicate serious criminal offenses. In other contexts, rights are mostly in the background. They are brought into the foreground when a marriage is headed for divorce or when business arrangements fall apart.

As these examples suggest, fidelity to context recalls us to familiar specialties of social science. It tells us to study with care the distinctive characteristics of a given social field. This may temper interdisciplinary ardor, because it leads to regained appreciation for the distinctive contributions of sociology, economics, administration, political science. We cannot be faithful to contexts if we do not understand the special needs of democratic politics, business enterprise, families, or urban life. Fidelity to

context compels us to be aware of different kinds of social experience, and the different purposes and conditions of collective life. Each calls for appropriate rules and standards.

Not so fast. Although fidelity to context is essential, and the lure of absolutes should be resisted, we must also recognize that contexts are *transcended*—and also *governed*—by broader standards and ideals. Concepts of growth, freedom, rationality, caring, fairness, and justice are among the criteria by which we *judge* contexts and make proposals for their reconstruction. These are ideals we expect the context to honor and make good. Put another way, a contextual approach is not an abandonment of principle. Rightly understood, it tells us how an ideal is to be realized in the context at hand. Although the context may impose constraints, the latter are not self-justifying. The justifications speak to what may be needed for practical success, but also for the realization of relevant ideals.

Thus, in courts we ask what rules of evidence, what kinds of judges and jurors are appropriate, given our dual concern for truth and fairness. In education we bring to bear ideals of learning, growth, and freedom. In

business we consider not only profitability but the requirements of consumer protection, safety on the job, fair dealing for shareholders, and for prospective shareholders.

Legal pluralism Fidelity to context resonates with the concept of legal pluralism. This is the idea that distinctive social fields generate their own modes of self-government, their own rules of right conduct. This is partly a descriptive program, recognizing the irrepressible diversity in social experience; in part it is a normative expression of respect for that diversity. Legal pluralism has a very practical significance, in that it justifies a principle of *self-regulation*. Social spheres and institutions will work better, be better governed, and be more responsible, if they are encouraged to govern themselves.

Here again, however, the claims of particularity are limited, not absolute. We may admire and support self-regulation, but that policy is not the same as complete autonomy or absence of regulation. Instead a different kind of regulation is called for, one that focuses mainly on structure and procedure, rather than on substantive rules and outcomes. This was the spirit

of the Wagner Act which in the 1930s, established new frameworks for collective bargaining and industrial justice.

Legal pluralism upholds an optimistic view of self-determination. We think good outcomes will ensue when rules are made in the light of local experience; we assume that a human community is best understood as a unity of unities rather than as a system of coordinated activities directed by a central authority. But this Afederal@ principle cannot be effective without concern for both comprehensive values, and distinctive contexts. Much depends on how the comprehensive values are defined and implemented; on how much sensitivity is shown to diverse ways of realizing the values at stake and at risk in education, or politics, or economic life. This difficult balance makes plenty of work for students of institutional design.

Human rights I close with a brief comment on the relevance of human rights for fidelity to context. Paradoxically, an appreciation of human rights has been much fostered by the study of cultural variability, that is, the many ways of being human, and the dependence of those ways on distinctive histories and circumstances. Recognizing this plurality has undergirded

universalist principles: respect for diverse ways of life, including diverse ways of raising children, legitimating authority, and imagining divinity. Furthermore, this principle of respect is sustained by and connected to a more general doctrine--human beings in all cultures are much the same. They exhibit what some anthropologists called Athe psychic unity of mankind.@ This psychic unity leads to similar kinds and sources of suffering, joy, attachment, pride, humiliation, aesthetic appreciation , and symbolic expression. Implicit is an elusive, still-inchoate theory of what makes for human well-being, a theory from which we derive conclusions regarding what people need if they are to live healthy, satisfactory, self-respecting lives. At the present time there is no canonical formulation of these needs, and of the correlative rights that should be recognized. We do better with atrocities, or minimum Anegative liberties@ such as rights against torture, genocide, and ethnic cleansing, and coercive assimilation of indigenous peoples. The American Declaration of Independence mentioned Aunalienable rights of Alife, liberty, and the pursuit of happiness,@ but these are comfortably vague; and they did not include, for example, the colonies′ right to political

independence for which special justifications (Aa long train of abuses@) were required. For the moment we must be content with conceptions of oppression, but even these are contested, as in how we understand the treatment of women in Muslim cultures.

Whatever the outcome of this inquiry, it shows that we want to judge contexts, which we do by appealing to transcendent values. Fidelity to context is wholly consistent with upholding transcendent values. It does so, however, by learning from the context which values are relevant and how they may be realized. This is the logic of responsive law, which seeks to vindicate legal ideals while adapting to contexts by seizing opportunities and accepting restraints.