

LAW AND JUSTICE IN THE TWENTY-FIRST CENTURY

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Professor Rhode's new book¹ invites all people seriously interested in law to think about the relationships between law and justice as they may exist in the years ahead. It is notoriously difficult to make accurate predictions of the future, especially as the rate of social change brings our futures into being with ever-increasing rapidity. As a practical matter, thinking about the future therefore is pretty well limited to extrapolating from the immediate present. Even such a modest basis of projection affords room enough to look foolish. But where angels fear to tread . . .

My thesis here involves three propositions. I believe these are valid in retrospective or historical analysis, i.e., how we have come to our present state. They seem to me of even greater weight in contemplating the future. Our country, and indeed the world at large, will be more intensively governed by law and legal institutions in the century ahead than has been the case in the centuries immediately past.

My first proposition is that talk of "justice" is empty unless it not only references general normative considerations, such as equality and liberty, but also references or posits specific and definite legal rules and legal institutions. Second, when the legal rules and institutions through which justice is constituted are specified, that is, when discussion shifts from generalities to particulars, political controversy is almost always immediately encountered. And, third, following from the second proposition, serious discussion of "justice" must address politically controversial issues concerning specific policy proposals.

I. JUSTICE WITHOUT LAW

The concept of justice without law perhaps is not incoherent, but it is unavoidably vacuous. Justice is an ideal form of interpersonal relationships. The ideal is expressed in various formulas: Life, Liberty and the Pursuit of Happiness; Liberty, Equality and

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1. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000).

Fraternity; From Each According to His Ability, To Each According to His Need; Due Process and Equal Protection of the Law, etc. As we have been instructed by Aristotle, the concept of justice includes distributive justice as well as commutative justice, a duality that roughly corresponds to the modern ideas of substantive and procedural justice.² It has been said by the philosopher Immanuel Kant that justice requires every action to be in accordance with a universal principle.³ It has been said by the pragmatist Jeremy Bentham that justice consists of the greatest good for the greatest number.⁴ According to John Rawls, justice can be realized only by normative choices made behind the veil of ignorance.⁵ All these formulations connote that all persons should be treated equally and according to general principles.

Stated negatively, the concept of justice is the avoidance of injustice. Formulated in this way the concept has strong psychological force because everyone has suffered injustice and feels such suffering deeply and lastingly. But a private and subjective sense of injustice, although entirely real, is insufficient material with which to construct a system of justice. To transform a personal recognition of injustice into interpersonal or social justice requires, at the very least, some process of interpretation and articulation. The process can begin with the person aggrieved, for example, in a statement of grievance or, more formally, in allegations in a legal complaint.⁶ But voicing blame is only the beginning of the process of seeking justice, as distinct from simply seeking revenge. In seeking justice there must be a next stage in which the grievant presents the complaint to someone who can exercise authority. In a constitutional regime, such a person is a judge or other legally constituted official. And in a constitutional regime the judge must respond according to legal procedures and in accordance with legally prescribed substantive legal standards.

A quest for justice in a constitutional regime in the real world therefore entails an encounter with a real legal system, staffed by real judges who decide cases according to established procedure and in light of prescribed substantive legal standards.

All this is elementary, which is to say fundamental. But for that reason it bears repeating. "Justice" that is not embedded in a legal system, administered by duly appointed magistrates according to rules of procedure and in accordance with legally prescribed substantive

2. See Aristotle, *The Ethics* 139-70 (E.V. Rieu ed., J.A.K. Thomson trans., 1955).

3. See Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* 19 (Marvin Fox ed., Thomas K. Abbott trans., 1949) ("I am never to act otherwise than so that I could also will that my maxim should become a universal law.").

4. See Jeremy Bentham, *The Limits of Jurisprudence Defined* 113-18 (1945).

5. See John Rawls, *A Theory of Justice* 52-56 (1971).

6. See William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *Law & Soc'y Rev.* 631, 633-37 (1980).

norms, is at most an idealized aspiration and at worst merely a shibboleth. In contemporary American academic discussion there is much talk about “justice” that is not anchored in the mundane apparatus of judges and court clerks, pleadings and procedural motions, and the technicalities of legal interpretation. In my view these discussions are vacuous.

The significant questions about “justice” are encountered in concrete situations where real choices must be made. For example, is the legal principle of equal protection compatible with a rule giving preference to minorities in the award of public contracts; is an unborn child a “person” in the context of a wrongful death action, having in mind that the categorization may be invoked in the context of abortion; were the electors in Florida properly constituted in the presidential election of 2000? Similar concrete issues arise in more mundane contexts, as illustrated in the work of the American Law Institute (“ALI”). The ALI had to address, for example, the precise formulation of the rule governing the scope of discretion of members of the board of directors of a business corporation, and the extent to which the directors could rely on advice from technical specialists such as accountants and lawyers. Another intensely debated issue was the definition of a defective product in the context of the law of products liability. In another part of the legal forest are efforts to define more precisely the scope of discovery under the Federal Rules of Civil Procedure, and the terms on which class actions can be maintained in the federal courts.

All these deliberations are at some level interesting, both technically and philosophically. The participants in these legal deliberations have sometimes been judges, as in the cases before the courts; sometimes legislators and lawyers, as with regard to proposals being considered by legislative bodies; and sometimes legal academics. The participants in these focused deliberations have thought that their efforts were worthwhile and important. They were aware that the result of their work would or might become law.

Whatever the outcome of specific proposals for change in the law, the aggregate of the responses is “justice.” Obviously, an enactment or judicial pronouncement of positive law does not foreclose further debate about the merits of the provision in question. Nor does it preclude amendment or repeal, in the case of a statute, or distinguishing or overruling a precedent, in the case of judicial decision. Until subsequent deliberations and legal and political processes yield such a change, however, the operative content of “justice” is that expressed in positive law. It is in at least this sense that Justice Oliver Wendell Holmes was correct in saying that

“prophecies of what the courts will do in fact . . . are what I mean by the law.”⁷

II. LAW AND POLITICAL CONTROVERSY

The legal rules through which justice is administered at any given time are themselves the product of political controversy and disputation among various constituents in a particular political regime. At any given time, of course, most legal rules are not in dispute. Not everything in the law is always “up for grabs.” Accordingly, most members of the political community, including lawyers, accept the resolutions of earlier disputes concerning legal rules and carry on daily routines within the framework of law as thus established. This is true of rules of procedure, including constitutional law, and rules of substantive law.

For example, no sober person would want to revive the rule in *Plessy v. Ferguson*,⁸ even though some commentators would be willing to question the basis of *Brown v. Board of Education*.⁹ So also, it has come to rest that the police must continue to give *Miranda* warnings,¹⁰ even though the logic and legitimacy of the original decision in the *Miranda* case remains questionable. But we should not forget that constitutional formulations announced in the *Brown* and *Miranda* decisions resolved intensely controversial political choices.

Legal rules emanating from the legislative process are no less controversial and obviously are political. Reference need be made only to the pending battle over “patients’ rights” in the health care system, or to the debates over capital punishment. But controversies over older legislative proposals, some of which have been adopted and others rejected, remain in public consciousness and often still simmer. Some examples include the terms on which workers can decide whether to unionize and the basis and extent of liability for environmental injuries. It is only a matter of social convenience and necessity that the issues involved in these controversies can be considered “settled.”

Alexis de Tocqueville famously observed that “[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question.”¹¹ But, by the same token, there is almost no judicial question that is not subsumed in some kind of political controversy. Law *is* politics, of a particular form, to be sure,

7. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897).

8. 163 U.S. 537, 550-52 (1896).

9. 347 U.S. 483 (1954); see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 26, 31-34 (1959).

10. See *Dickerson v. United States*, 530 U.S. 428 (2000).

11. Alexis de Tocqueville, *Democracy in America* 257 (Mansfield & Winthrop eds., 2000).

but politics nevertheless, and actually or potentially controversial as such.

Thus it can be said that “justice” in real-world terms necessarily includes rules and regulations as actually administered in courts of law; that “law” is what courts “will do in fact,”¹² as Holmes had it; and that what the courts will do in fact always involves potential political controversy and often excites actual controversy. Of course, political controversy concerning the suitability of a specific rule of positive law is conducted through the medium of more general normative concepts (such as equality and liberty). Furthermore, the controversy proceeds on the premise that the proper measure of these general normative concepts have *not* been particularized in the rules and regulations as they stand. Nevertheless, the object of criticism, debate and controversy includes the positive law at any given moment.

III. INSTITUTIONS FOR RESOLVING POLITICAL/LEGAL CONTROVERSIES

The argument thus far is that issues of “justice” are political questions whose resolution is in legal terms. The fact that resolution of the issues is in legal terms, however, does not signify that the process for resolution of any particular controversy is “legal.” In this country, the terms “legal” and “legal process” signify resolution through judicial decision obtained in the course of litigation. Most important controversies about “justice,” however, are resolved through legislation of some kind, either in legislatures such as Congress and the state-level counterparts or in rule-making proceedings in administrative agencies. The technical terms of the statutes and regulations are no less “legal” for having been formulated through legislative technique.

In today’s world, the legislatures such as Congress generally resolve the important major political controversies through statutes, while administrative agency rule-making typically addresses more specific issues within a statutory framework. Administrative rule-making in our system has some similarities to the judicial process, primarily through requirements of “notice” and “opportunity to be heard.” Also, the decisional process in administrative rule-making usually is couched in technically intricate terms—hence “legalistic” terms—concerning the agenda to be addressed, “fact finding,” etc. But not far underneath, administrative rule-making is very political, often as much so as the legislative process.

Resolution of political disputes in the legislative process depends on appreciation of interests and interest groups, on bringing influence to bear, on trade-offs, on counting votes, and so on. These legislative decisional instrumentalities are alien to the judicial process, indeed

12. Holmes, *supra* note 7, at 461.

antithetical to it. Their use is unfamiliar and indeed uncomfortable to many legally trained minds.

It seems likely, perhaps certain, however, that the major political issues of the twenty-first century will be resolved through legislative processes, including administrative rule-making, and not through judicial decision. In this connection I refer to issues such as the death penalty, abortion, school vouchers, financial support for public education in the inner city, and so on. Those issues can be framed as problems of "justice" and many of them in the past have been framed as legal issues. But they are "political" in the sense of being controversial in terms of normative values, as well as "legal" in terms of formal expression in statute or regulation. Put differently, address of issues of "justice" cannot escape the technical problems involved in positive law.

CONCLUSION

The critical problem of "justice" in the future is not whether issues of normative value can be framed as legal issues for resolution by the judicial process through initiative of lawyers. They certainly can be. But it is foreseeable that the courts will feel increasingly reluctant to accept responsibility for resolving major issues in those terms. The conservatism now evident in the Supreme Court of the United States may well be a powerful trend quietly affecting the courts at all levels. The trend, if it is such, can be said to reflect a sense that the judicial forum is simply not the appropriate place to resolve disputes that are obviously and deeply political. If so, we may have to adopt different concepts, language and professional techniques in considering issues of "justice."