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The American Legal System: A Ball Game Played by Lawyers and Jurists

The Why of Not Doing the Right Thing

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The unfairness of American society is being recognized by many. Eighty-nine percent of Americans say they don't trust their government; Congress has a mere 9% approval rating; America's financial institutions are widely considered to be corrupt; the Occupy movement has emerged, some are seeking to enact an amendment to the Constitution to undo the Court's decision in Citizen's United. But not doing the right thing, unfairness, injustice has deep roots in America. Oliver Wendell Holmes once confirmed that fairness or justice is not the concern of the Supreme Court. Only playing the game according to the rules is. Since the Court cannot be relied upon to "do the right thing," why should anyone believe that any American institution can be counted on to do it? What is required is a complete overhaul of the legal system.

Half a century ago, I served on a commission in the state of North Carolina which was tasked with revising the state's criminal code. The commission was comprised of law school professors, prominent judges, and practicing attorneys. We were appointed by the state's newly elected attorney general who had hoped that the commission would improve the law in substantive ways that would reduce the injustice that had been written into statutes and case law. He and I both quickly learned, however, that the members of the legal community on the commission were not about to do that; they insisted that no changes be made that would burden the legal community by requiring it to relearn even parts of the code and adjust practices and procedures accordingly. As a result, all that was done was that some ambiguous sentences were rewritten to be less ambiguous and some outdated diction was changed to more modern locutions. Chalk one up for changeless change. If the law was unjust, well, it was left so.

Now it is being reported that when fairness and the law collide, Justice Alito is troubled:

"the Supreme Court considered the case of Cory R. Maples, a death row inmate in Alabama whose lawyers had missed a deadline to file an appeal. 'Mr. Maples lost his right to appeal,' Justice Alito said, 'through no fault of his own. . . . But a ruling for Mr. Maples,' Justice Alito continued, 'could require the court to adopt principles that would affect many, many cases and would substantially change existing law.' He said he was reluctant to impose new burdens on government officials and to allow clients to second-guess their lawyers' decisions in order to provide relief to Mr. Maples."

Notice how easy it is for Mr. Alito to justify denying Mr. Maples justice because of a "reluctance to impose new burdens on government officials." My, my, those poor overburdened governmental officials! Does their need for protection from their being

overburdened trump a plaintiff's need for just treatment? Apparently so.

The Court's justices claim that "error correction" in particular cases is not their function but that the Court's task is to "establish legal principles that will apply in countless cases." But the Constitution never tasks the judicial system with that function, although it does direct not only the Court but the nation to "establish Justice." Furthermore, if the establishment of legal principles were the Count's primary function, after almost two and a half centuries, one would expect to have on hand a list or booklet of such principles that have been established. But no such booklet or list exists. Establishing legal principles is not what the court does. To understand what the Court does do, see my piece, *The Supreme Court's "Make Believe Law."*

Cases such as *Cory R. Maples, Petitioner v. Kim T. Thomas, Interim Commissioner, Alabama Department of Corrections* where a conflict exists between some legal principle and justice are not rare. At the present time several such cases are before the Court: a Georgia case about whether government officials are protected from civil lawsuits even if they tell lies that lead grand juries to vote for indictments, and an appeal from Charles Rehberg who was indicted three times involving charges that he harassed doctors affiliated with a politically connected south Georgia hospital system. After the third indictment was dismissed even before a trial, Rehberg sued local prosecutors and their investigator, James Paulk arguing that Paulk's false grand jury testimony led to the indictments. In two other cases, the Court has shown little enthusiasm for reopening the cases of criminal defendants who lost good plea deals because of bad advice or bungling by their lawyers. At issue is whether to extend the right to competent legal advice to plea deals. Most of the justices seem to be reluctant to give defendants a new trial or a shorter prison term because a lawyer's mistake caused them to miss out on a favorable plea.

Most people, I suspect, would say that it is unfair, and in a legal context unjust, to penalize someone for someone else's mistakes. But not the Court. Fairness or justice is not it's concern as Oliver Wendell Holmes once confirmed:

In a 1958 lecture, Judge Learned Hand, a towering presence on the federal appeals court in New York, recalled saying goodbye to Justice Oliver Wendell Holmes Jr. as the justice left for the Supreme Court. "I wanted to provoke a response," Judge Hand said, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" Justice Holmes gave a sharp retort: "That is not my job. My job is to play the game according to the rules."

Well, there you have it, plain and simple, straight from a horse's mouth. The American legal system is nothing but a game played by lawyers and jurists to rules they have made up themselves. Justice, fairness, doing the right thing, has nothing to do with it. How could this ever have come about?

Well, it happened a long time ago. In 1803, the Court issued what is often referred to as a "landmark" decision that is a paradigm for the Court's unjust opinions.

William Marbury, who had been appointed by President John Adams as Justice of the Peace in the District of Columbia but whose commission was not subsequently delivered, petitioned the Court to force Secretary of State James Madison to deliver it. Although the Court, with John Marshall as Chief Justice, held that Marbury had a right to the commission, the petition was denied. Marshall held that the part of the statute upon which Marbury

based his claim was unconstitutional. So here, in this “landmark” case, the Court denies a plaintiff what he is entitled to. No justice here!

Of course, Marshall provided an argument, but it is entirely specious. What this case is most famous for is not what was done to Marbury but for what the Court did to the Constitution. This case was used by the Court to establish its superiority over the other two branches of the government. Marshall claimed that, “It is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is,” thus establishing what is known as the doctrine of judicial review in American jurisprudence. However, nothing in the text of the Constitution explicitly or even implicitly grants that power to the Court.

There is much dispute over the origins of the doctrine, but it certainly can be traced to England in the 1600s, a time when the Monarch was supreme and the legislature was subordinate. But the English abolished this practice in the Glorious Revolution (1688) when the idea that courts could declare statutes void was abolished as King James II was removed and the elected Parliament declared itself supreme. The Glorious Revolution began modern English parliamentary democracy; never since has the monarch held absolute power, but Marshall introduced this anti-democratic practice into America by making the Court’s decisions absolute. There is no procedure for voiding them. So John Marshall destroyed democracy in America a century after the principle he relied upon was removed from English law as the English progressed toward becoming a democracy. Marshall gave America the monarchial legal system of England that was in effect in the 1600s, and since the American constitution presented no easy way to overturn this decision, America has been stuck with a 17th Century legal system ever since. The backwardness of American society was insured in 1803. Marshall usurped the young nation’s constitution and made the United States into just another reactionary seventeenth century European authoritarian society adorned with the trappings of democracy. At that moment, America’s fate as a failed state was assured, if success is measured by the goals set forth for the nation in the Constitution’s Preamble.

Marshall knew this, of course. He knew that he and his colleagues on the Court could rule any way they wanted to and nothing could be done about it. They could just as easily have granted Marbury’s petition and justified it on the grounds of having to “establish justice.” But they didn’t! In a sense, what the Court did can be viewed as unconstitutional.

This decision opened the door for the Court’s long history of unjust and spuriously argued opinions issued by people, such as Louis Powell and the members of the current Court, with personal agendas. These decisions stand only because no method of rejecting them exists. So the Court cannot be relied upon to ever “do the right thing.” It will always do merely what the majority of the Court’s justices want to. A long line of justices have used this power to write their own predilections and opinions into American case law, a result of which is a plethora of unjust principles embedded in American jurisprudence which results in the injustices being repeated over and over.

So not doing the right thing, unfairness, injustice has deep roots in America. And since that is so, why should anyone believe that any American institution can be counted on to do the right thing if the courts cannot?

The unfairness of American society is being recognized by many. Eighty-nine percent of Americans say they don’t trust their government; Congress has a mere 9% approval rating; America’s financial institutions are widely considered to be corrupt; some are seeking to

enact an amendment to the Constitution to undo the Court's decision in *Citizen's United.* But the overturning one decision will not ameliorate no less solve America's problem with unfairness. It requires a complete overhaul of the legal system.

What's most difficult to understand, however, is why no one respected in the legal community will stand up and say, "It's wrong"! Where are the deans of our law schools, our eminent legal scholars, our judges, our practicing attorneys? Why have none either the moral courage or the intellectual honesty to stand up for "doing the right thing"? Is a legal education so brain washing that these people have no minds of their own? (If you want an example of the type of student that is attracted to law, read, *Massachusetts Law Professor Calls Care Packages for U.S. Troops 'Shameful'*.

The framers of the Constitution wanted to insure that the government created by it could never become strong enough to become tyrannical. They sought to put checks and balances on the branches of government; however, they neglected to place a check on the Court and the Court's justices quickly used that failure to become an absolute oligarchy whose opinions could not be overturned. They became James II puppets. The only way to correct this problem is to place a check on the Court's power, not overturn a decision here or there. The Court's power needs to be limited. I can think of at least a half dozen ways of doing that, but I suspect that the most effective would be by giving the American people the power to reject Court decisions by means of referenda. Such a practice would put the power right in the hands of the people; thus, not only limiting the Court's power but enriching American democracy at the same time. *Marbury v Madison* would be undone.

What this piece presents is not especially new. Thoughtful people have known it since *Marbury v. Madison* was promulgated. Thomas Jefferson knew it immediately, and said so. Was he the only true patriot America ever had? It's certainly possible.

John Kozy is a retired professor of philosophy and logic who writes on social, political, and economic issues. After serving in the U.S. Army during the Korean War, he spent 20 years as a university professor and another 20 years working as a writer. He has published a textbook in formal logic commercially, in academic journals and a small number of commercial magazines, and has written a number of guest editorials for newspapers. His on-line pieces can be found on http://www.jkozy.com/ and he can be emailed from that site's homepage.
