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William Quigley
Loyola University

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JUSTICE AND LAW: THE ONE HUNDRED YEAR RULE

William Quigley†

What is the difference between Law and Justice? How do we evaluate and critique current law in light of the principles of justice? One way I have found helpful to discuss the difference between law and justice is to use a tool I call “The One Hundred Year Rule.”

The difference between justice and law should be a fundamental part of every law school course. But law students around the country tell me justice is too rarely discussed in law school. Justice is talked about at Orientation and at Graduation, but in between? Not so much.

Some suggest the pursuit of justice is not what law is even about. For example, many judges reject any suggestion that the pursuit of justice is even part of their job description. Recall the story of Judge Learned Hand, who called on Supreme Court Justice Oliver Wendell Holmes to “Do justice!” Holmes replied, “That is not my job. My job is to play the game according to the rules.”¹

There is a huge difference between law and justice. What is legal is often not the same as what is just. But how do we distinguish? We may disagree about what justice is, but we can often agree about what is unjust.²

The one hundred year rule can help provoke discussion about the difference between law and justice. It might also help challenge us to labor for justice even when injustice seems to rule the day and the foreseeable future.

† Bill Quigley is the Janet Mary Riley Professor of Law at Loyola University New Orleans College of Law. He previously served as the Legal Director for the Center for Constitutional Rights from 2009–2011.

¹ Many in the judiciary do not even aim to provide justice. *See e.g.* Learned Hand, *A Personal Confession*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 302, 306–07 (Irving Dilliard ed., 3d ed. 1960).

² I prefer the John Rawls definition of justice: “First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.” JOHN RAWLS, *A THEORY OF JUSTICE* 53 (Belknap Press rev. ed. 1999).

STEP ONE: LOOK BACK ONE HUNDRED YEARS

The first step in applying the one hundred year rule is to look backwards a century. What, a hundred years ago, was perfectly legal but is now clearly unjust? I am writing in 2011, so let's take just ten examples from 1911 of things that were perfectly legal but in hindsight absolutely unjust.

In 1911, women were not allowed to vote in federal elections. Though campaigning for the right since the early 1800s, it was not until the passage of the Nineteenth Amendment in 1920 that women were allowed to vote.³

In 1911, racial segregation was the law of the land in many states and was practiced in most of the other states. Not until the 1960s did civil rights movements prompt substantial federal legislation challenging widespread segregation by laws.⁴

In 1911, it was legal to employ children in factories, mines, textiles and many other industries. While hundreds of thousands of children still work in the United States, widespread child labor was outlawed nationally with the 1938 Fair Labor Standards Act.⁵

In 1911, a man could legally rape his wife.⁶ Domestic violence protections were largely unknown.⁷ What we now condemn as domestic violence was then called a bad marriage. In the 1950s and 1960s, domestic violence was so commonplace and accepted that it was a comic trademark of the 1950s classic sitcom *The Honey-mooners*. Ralph Kramden (Jackie Gleason) repeatedly threatened to slug his wife Alice (Audrey Meadows) in the face. Cocking his arm, he bellowed "one of these days . . . POW! Right in the kisser! One of these days Alice, straight to the Moon!" as the audience

³ See *THE CONCISE HISTORY OF WOMAN SUFFRAGE: SELECTIONS FROM HISTORY OF WOMAN SUFFRAGE* (Mari Jo Buhle & Paul Buhle eds., Univ. of Ill. Press 2005).

⁴ The post-Civil War history of racial discrimination in voting alone is outlined by Judge John Minor Wisdom in *United States v. Louisiana*, 225 F. Supp. 353, 366–81 (D.C. La. 1963). For example, in but one of many purges, the number of African American voters in Louisiana dropped from 130,344 in 1897 to 5,320 in 1900. *Id.* at 374.

⁵ Though many states had laws limiting child labor before the federal government outlawed it, those statutes were not very strong. A 1916 federal law outlawing the interstate transportation of products of child labor, the Keating-Owen Act of 1916, was struck down by the Supreme Court in 1918. *Hammer v. Dagenhart*, 241 U.S. 251 (1918). Even today child labor continues in the U.S. with an estimated 126,000 to 400,000 children working on farms. See Megan McGinnis, *Child Labor Under the Fair Labor Standards Act*, 20 KAN. J.L. & PUB. POL'Y 155, 156 (2010).

⁶ See Lalanya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 352 (1995).

⁷ See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2130 (1996).

roared with laughter.⁸

In 1911, organizing for labor unions was not protected by law. It was the 1935 National Labor Relations Act that first promised protection to employees who chose to organize, join labor unions and bargain collectively.⁹

In 1911, lynching of African Americans and Latinos was still prevalent in the United States.¹⁰ Numerous attempts to pass a federal law to make lynching a crime were blocked in the United States Congress.¹¹

In 1911, there was no provision for medical care for the elderly or for poor children. Not until the 1960s were Medicare and Medicaid instituted.¹²

In 1911, companies were allowed to dump waste in waterways and cloud the airways with soot and toxic dust with no regulation at all. Not until the Clean Air Act of 1970 and the Clean Water Act of 1972 did the federal government start down the road towards cutting back on pollution.¹³

In 1911, it was perfectly legal to discriminate against people with disabilities. It was legal to prohibit people from public schools with disabilities, to refuse to hire people with disabilities, and to terminate people who developed disabilities. Not until the 1990 Americans with Disabilities Act was disability discrimination more

⁸ See *The Honeymooners* (CBS 1952). The Family Violence Prevention and Services Act passed in 1984. 42 U.S.C. § 110 (1984). The law was considerably broadened in 1994 with the passage of the Violence Against Women Act. Pub. L. No. 103-322, § 40302, 108 Stat. 1941 (1994) (codified as amended at 42 U.S.C. § 13981).

⁹ 29 U.S.C. §§ 151–69 (2006). For examples of the hostility towards labor during this period, see generally WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991). See also 1 NLRB, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR MANAGEMENT RELATIONS ACT OF 1947* (1948).

¹⁰ See generally STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930* (1995); Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297 (2009).

¹¹ See Associated Press, *Senate Apologizes for Not Passing Anti-Lynching Laws*, FOX NEWS, June 13, 2005, <http://www.foxnews.com/story/0,2933,159348,00.html> (stating that Congress blocked more than 200 attempts to pass anti-lynching laws).

¹² Medicaid Program Description and Legislative History: Annual Statistical Supplement, 2010, U.S. SOC. SEC. ADMIN. OFFICE OF RET. & DISABILITY POLICY, <http://www.ssa.gov/policy/docs/statcomps/supplement/2010/medicaid.html> (last visited May 14, 2012); Peter A. Corning, *THE HISTORY OF MEDICARE* (1969), available at <http://www.ssa.gov/history/corning.html>.

¹³ Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, codified at 42 U.S.C. §§ 7401–31; Federal Water Pollution Prevention and Control Act, Pub. L. No. 92-500, 86 Stat. 816 (1972). See Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549 (1991); Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167 (1983).

comprehensively prohibited.¹⁴

In 1911, a person could be arrested for a crime, put in jail, go to trial, be convicted, even be sentenced to death and executed without ever consulting with, much less being represented by, a lawyer. Not until the 1963 Supreme Court decision of *Gideon v. Wainwright* were people actually entitled to a lawyer if they were facing jail.¹⁵ In *Powell v. Alabama* of 1932, the court ruled that a lawyer was probably necessary in many but not all death penalty cases.¹⁶

In each of these instances, the law was clear. And in each of these ten instances we now know, with the benefit of hindsight, that the laws were wrong and were actually unjust.

There is an unlimited number of other examples that could be used, from the firing of workers injured on the job, to monopoly powers of titans of capitalism, barring nonwhite immigrants from becoming naturalized citizens, banks looting the savings of main street people, the savagery of wars that used chemical weapons, to the internment of thousands of people of Japanese or South Asian ancestry.

In 1911, churches, synagogues, mosques and other good government institutions were preaching that good people must follow the law. People must not take the law into their own hands. Universities and colleges followed the laws and made their students follow them.

When we look back at 1911, we wonder why people did not see that so many of their laws were unjust. What could they have been thinking? How could they not see?

STEP TWO: LOOK FORWARD ONE HUNDRED YEARS

Today, there is frequently an implied political and legal sense that our laws are the best of all possible laws. We are taught they

¹⁴ The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101; Corning, *supra* note 12. See BERNARD D. REAMS, JR., PETER J. MCGOVERN & JON S. SCHULTZ, *DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990* (1992).

¹⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁶ *Powell v. Alabama*, 287 U.S. 45 (1932). In this case, the famous Scottsboro Boys trial, the Supreme Court ruled that the failure of the trial court to make an effective order of counsel was a violation of the Constitution. This was explicitly limited. "All that it is necessary now to decide . . . is that in a capital case, where defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him a necessary requisite of due process of law . . ." *Powell*, 287 U.S. at 71.

have evolved over time by advocacy and legislative and judicial refinement. Again, the implication is that current law has become pretty likely the closest possible approximation to justice that we can imagine. Are there laws that are unjust? Well probably so. But if there are patently unjust laws, they are few and far between.

The second part, however, of the one hundred year rule is to imagine the people in the year 2111 looking back on us today. What will those looking back from 2111 think of our laws and our commitment to justice? What will they say about us when they list ten or twenty or a hundred laws that are widely accepted now but will have been by then determined to be clearly unjust? Which of our current laws will look as foolish and as unjust to people one hundred years from now as these examples from 1911 look to us?

There are some themes that emerge from the laws of 1911 which might prove helpful in our critique of current law. These themes might be useful in figuring out what current laws will be determined to be flatly unjust one hundred years from now.

One theme that runs through several of the since determined to be unjust laws is that there were large groups of people whom the law essentially considered or treated as outside the protection of justice, who had limited rights, and were essentially legally non-persons.

Another theme displayed in those laws is that people and institutions which accumulated massive and disproportionate amounts of property and power were able to bend and distort the laws to protect their unjust shares of property and power.

Who are those still essentially considered non-persons by our current laws? Whose rights do current laws regularly disregard or minimize? I suggest consideration of: the two million plus prisoners in our country; our millions of sisters and brothers called undocumented immigrants, especially people from Mexico, Latin America and the Caribbean; many in the LGBTQ community; Guantanamo prisoners; people whom the United States keeps in other open and secret prisons around the world; the tens of thousands we keep in solitary confinement in the United States; anyone we label as a terrorist; drug dealers; sex offenders; narco-terrorists; most of the people released from prison after convictions for felonies; people in other countries who are inconveniently in the way of our perceived security needs (collateral damage); and the billions of people who are living economically marginal lives in a world where so many live well.

Which people and institutions today have successfully accumu-

lated disproportionate amounts of property and power and have bent the laws to protect their unjust gain? I suggest consideration of: multinational corporations of such size and influence that it is a challenge for any of the big and powerful countries to really hold them accountable and which run roughshod over less powerful governments; the hugely distorting role of money in electoral campaigns; corporations which are so unaccountable that they have only to pay slap on the wrist fines for manipulating financial markets or which soil the air and water while plundering natural resources or making disposable consumer products while small time drug users endure life sentences for three strikes laws; the financial titans who cling to fortunes made on bets that helped millions lose their homes; the hundreds of thousands of others across the globe who prosper by manipulating the stock, bond, commodities, currency and futures markets; and legislators and bureaucrats worldwide who do not enforce laws against the rich and powerful but instead seek only their own personal priorities while allowing the resources of the people to be diverted or wasted.

In addition, what do we expect people a century from now will say about: the continued use of the death penalty; our toleration of millions of homeless roaming our streets; the accelerated growth of economic inequality; the sharp global inequities between the United States and the industrialized world and the billions of poor people in the rest of the world; the use of drones to assassinate people in other countries; the use of the economic system as a weapon of domination; the continued assault on our shared environment; the continued threat from nuclear weapons; allowing corporations personhood protections but not the environment; and so many other questions.

How will our defenders answer people one hundred years from now? Will they say we did not know better? Will they say that our churches and colleges and universities helped us go along with current laws? Will they say we were too busy to notice? Will they say that we thought we had the best of all possible laws and that justice was close? Or will they apologize for our blindness and arrogance and our ignorance?

CONCLUSION

Law cannot long stand in the way of justice. History shows us that justice remains possible no matter what the law says. Justice continues to march on.

People have been laboring for justice over law long before

1911. When women fought for the right to vote they were discounted and jailed. When African Americans and Latinos challenged segregation and lynching they were reviled and laughed at and threatened. When people struggled for human rights for people with disabilities they were dismissed as unrealistic idealists. When people tried to form a union and advocate for safer workplaces they were considered agitators and fired. Despite how it looked back then, they were right and they made progress for us all.

Looking back and looking forward a hundred years or more can help place current laws in a more accurate context and give hope and energy to those courageous enough to fight for justice. It is those who struggle for justice despite the limitations of current laws who will make us most proud one hundred years from now.

