

Introduction

Like any other law-school coursebook, the book you are holding in your hands has lots of cases in it. Cases and problems from the lives of real people caught up in a conflict situation. We will look at these cases from the perspective of justice.

When we do so, we soon realize—like Moliere’s character who realized that all his life he was speaking “prose”—that every case is a case about justice. Not just the cases in this book, but every case in every law book. Not all cases will precisely articulate the conception of justice that made a difference in the decision that was reached, but justice arguments were there anyway—in the background when not in the foreground.

But if cases are not always articulate about justice, good lawyers must always be. A lawyer cannot be effective in practice today without knowing what kinds of arguments to make to support claims of fairness and justice. Law schools can no longer afford the indifference that Harold Berman reminds us was their attitude decades ago:¹

Oliver Wendell Holmes, Jr., once said: “I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.”² It was in those days that a Harvard Law School student asked in class, “But sir, is that just?” and the professor replied, “If it’s justice you’re looking for, you should have gone to divinity school!”

But today’s practicing lawyer would make as grave an argumentative error to *ignore* justice considerations as a lawyer decades ago would have made to *emphasize* such considerations in front of a judge such as Justice Holmes.

We believe that this new course on *Justice and the Legal System* may help in actualizing a lifelong perspective that justice, after all, is what law is all about. Not simply doing justice, though that is of immense importance, but also arguing about justice. The most important task of a lawyer—the thing he or she can do best of all—is to articulate and present as powerfully as possible the justice of the client’s position.³ The lawyer must appeal

¹ Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 784 (1988).

² O.W. HOLMES, HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 201 (H. Shriver ed. 1936).

³ If the client’s position appears to be unjust, a good attorney will work with that client to modify the position such as making a bona fide offer of settlement to the other side. Often, however, further investigation of the client’s position will reveal that the client acted out of his or her own sense of justice. Such further investigation may prove to be the decisive factor in structuring a legal argument that will present the client’s fact situation in terms of societal fairness and justice that may appeal to the judge or decisionmaker.

to the sense of fairness of the tribunal that is charged with passing upon the merits of the client's case. If the client can be shown to *deserve* to win the argument, then the lawyer's job is nearly finished. What remains is the presentation of a justificatory legal argument. Even then, the degree of persuasiveness of the legal argument overtly or covertly derives from the soundness of its foundation in the justice of the client's cause.

We are not saying that arguments about law are unimportant compared to arguments about justice. Far from it. A naked appeal to justice in the course of an argument or negotiation is almost always a tip-off to the decisionmaker that the arguer is resorting to "justice" to get around what the law clearly demands. The frank, even if heartfelt, appeal to justice alone is often a losing strategy—this is the "lesson" of the previous quotation from Oliver Wendell Holmes. Rather, the attorney must show that the client's position is just and right *within the law* properly interpreted. The present course on *Justice and the Legal System* is addressed primarily to accomplishing this task. The materials you will be reading involve the intersection of justice and law. You will find that justice is not something apart from the law; rather, justice informs the law.

We offer this new course to you in the faith that you share with us the intellectual challenge and excitement that comes from examining the deepest foundations of the legal system and attempting to put into words the sense of justice that we all have and that we dedicate our professional lives toward helping to achieve.

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