



On Our Dysfunctional Criminal Justice System

by Stephen M. Krason May 1, 2013

Criminal law and criminal justice in the United States may reasonably be said to be in a state of crisis in many different aspects: the increasing amount of criminal law, the kinds of things it tries to address, its enforcement, the level of criminal activity, and punishment.

The sub-title of a book published by the Cato Institute some years ago underscores the reality of the explosion of criminal law in recent decades: *The Criminalization of Just about Everything* (the title was a not-so-humorous take-off from the old “Monopoly” game: *Go Directly to Jail*). What were formerly merely torts are now criminalized. The federal criminal code has ballooned; few things used to be federal offenses, now many are. Things that a few decades ago no one would have dreamed would bring the heavy hand of the law on someone result in criminal charges (like the case of the West Virginia middle-school student recently jailed for “disturbing the educational process” for arguing with his teacher about whether he could wear his pro-NRA tee-shirt). An increasing amount of statutory law—both in the criminal and non-criminal categories—is vague and unclear. Among the best examples are the child abuse and neglect laws, triggered by the passage of the federal Mondale Act forty years ago. The result has been a child protective system (CPS) spending most of its time investigating innocent childrearing behaviors and a veritable national crisis of false reporting (80% or so of the reports are unfounded). Many federal criminal law provisions are now contained within the mountain of regulatory law—taking up somewhere around 75,000 pages in the Federal Register—some of which is contradictory, unclear, or unworkable. As federal appellate judge Edith Jones stated several years ago, federal agencies “have made the law so complicated that it is difficult to decipher and often contradicts itself.”

The effect of all this is to make a mockery of law and to encourage a lack of respect for it. It also makes it difficult to take seriously the old standard—hearkening back to Roman law—that “ignorance of the law is no excuse.” How many of us can reasonably work our way through 75,000 pages (and that’s just one type of current law), even if we could decipher it? It also encourages arbitrary government action. The obvious implication of such developments is the weakening of the rule of law, which was a bedrock principle of the American Founding to help protect against just such arbitrariness and insure liberty. Catholic social teaching also stresses the essentiality of the rule of law.

It is not surprising that the amount of positive law—the law of the state—has mushroomed. As Russell Kirk said, “order is the first need of all”; without it life becomes intolerable, and so men will give up almost anything else to get it. At a time when most of the other traditional means of securing order—religion, the family, sound morality, and strong community life—have in large measure broken down, all

that seems to be left is the coercive power of the state as expressed through its laws. Externally imposed order intensifies when internal order—which makes self-control possible—weakens. Still, this does not completely explain our current situation. It is also a result of an ideological atmosphere that increasingly sees the state as the all-purpose solution—this probably reflects the influence of a vague, vulgarized Marxism—and simply of a certain way of thinking that increasingly took hold in America as the twentieth century progressed (“there oughta be a law”).

Not only has the breakdown of internal control meant more external control, but it has led, of course, to more criminality in the first place—and increasingly degraded and brutal kinds of it.

Other troubling developments concern criminal law enforcement. The tendency, when confronted with more and more criminal activity, is to lower the standards of proper conduct expected of those in the criminal justice system and to allow traditional liberties to be more and more compromised. We think that we have to make their jobs easier for the sake of our own protection. So, we witness such things as: astoundingly invasive full-body scans at airports; security cameras watching our every move in many parts of our cities; the storing of massive amounts of data on vast numbers of our citizens and routine criminal background checks for an increasing array of activities; an explosion of plea-bargaining so police and prosecutors don't have to go to the trouble of building cases and the criminally accused don't get their Sixth Amendment right to a trial (over 90% of criminal cases nationally are settled by plea bargains); the routine keeping of arrest records (even when there is no conviction or if an arrest was illegal); the erosion of traditional common law requirements such as mens rea (which holds that there must be criminal intent for there to be a crime); the routine use of various kinds of sting operations, even though many are virtually entrapment; police who seem so weak on knowledge of basic citizen liberties that they see no problem doing things like providing back-up for CPS operatives so they can force their way into the homes of innocent, hapless families to interrogate children and find reasons to accuse parents; and, as became clear in the recent Boston Marathon bombing case, in the name of combating terrorism we will even go to the point of letting police and investigators stretch Miranda rights requirements and impose lockdowns of whole communities to pursue a single suspect (which may become a precedent for future cases that have nothing to do with terrorism). At the lower end of the offense scale, we witness not just police speed traps but increasingly pervasive traffic cameras whose purpose appears to be the mere raising of revenue (what the “Men of '76” might have called “eating out our substance”). We could go on and on about abuses in American criminal justice today.

Once again, a lot of this hardly encourages respect for the rule of law, nor does it seem fitting for a free people or even respectful of human dignity. Does a pervasive “security state” promote human dignity? For that matter, does it even truly insure security? In recent years, fighting terrorism has been a major justification for this, but in the cases of 9/11, the 2009 Christmas Day airline bomber, and apparently also in the Boston Marathon bombing, bureaucratic bungling by the very agencies that have fashioned such security regimens helped cause the problems.

On the punishment side, we increasingly witness an almost reflexive tendency to imprison offenders, warehousing, and high rates of recidivism. The purpose of imprisonment—and more broadly of punishment—seems to be obscured. Should most of those guilty of white-collar crimes be imprisoned? How about those convicted of political crimes, such as campaign-finance violations or influence-peddling? Might long-term civil fines, removal from prominent corporate positions, and restitution—which victims of economic and property crimes seldom receive—be better for the former, and a permanent ban from public office and public disgrace for the latter? Shouldn't prisons perhaps be primarily for people who pose a physical danger to others or the community? In light of today's prison conditions, is it just to spend time behind bars and be exposed to the brutal possibility of physical and sexual assault? Also, what about the fact that it's said that our prisons today are full of mentally ill people? Do we perhaps have to reflect more on what to do differently about offenders whose mental illness or psychiatric problems were major factors in their crimes? Do we not have to ask if we are doing something wrong when we have the largest prison population in the world? Illicit drug use is also in the equation, since it is tied to so many crimes today and has been a major factor ballooning the prison population. While the libertarians' solution of legalizing these drugs would be a disaster, it seems clear that how to deal with this requires renewed reflection and debate.

Also shouldn't the findings of the various "Innocence Projects" about the numbers of inmates on death row because they were wrongly prosecuted and convicted give us pause? Don't such problems require serious questioning?

Traditionally, punishment has had four purposes: restoring justice, retribution, deterrence, and rehabilitation. A sound ethicist would say that restoring justice is of overriding importance, but it seems as if deterrence has become overriding (even though our crime statistics signal that this is not working). One wonders if we made justice the central concern, instead of the more utilitarian matter of deterrence, we would succeed better at both. The recidivism rate indicates that rehabilitation is mostly failing, and while pushed in the 1960s it has little popular appeal today. Should we be so surprised that rehabilitation has been problematical when our cultural *weltanschauung* gives such little attention to personal moral formation and, indeed, sees the individual as his own moral arbiter?

In case anyone thinks that concern for rehabilitating criminals instead of simply imposing harsh punishments is some "bleeding-heart" liberal concoction, he should consider that the great Father of the Church, St. Augustine, exhorted clemency for offenders so they might have the opportunity to correct themselves. The famous pre-Vatican II American theologian, Fr. Francis J. Connell, C.S.S.R., wrote that a Catholic judge should take account of the troubled backgrounds of offenders and avoid "the crushing of aspirations toward improvement by excessive rigor." The Church's concern about human dignity and human rights hardly permits a Christian to cast a blind eye to the conditions inside many prisons. Also, a

Christian concern for our fellow man and the common good cannot help but trouble us about the disproportionate percentage of criminal behavior among certain demographic groups in the country.

This is just a small taste of the problem, and a few of the many questions that must be pondered. When it comes to something like criminal justice, Christians can easily slip into assessments from the lens of the political left or political right, or just simply embrace what seems to be so. This is a topic in the United States today that demands a serious analysis from a distinctly Christian standpoint (which puts human dignity, the true nature of man, sound morality, and simple fair play at the forefront). That is also a standpoint that is in line with American legal, social, and cultural traditions, which were so substantially forged by Christian influence.