

## A. INTRO

The idea for this talk about the consequences of a belief in what I will call "personal justice" was triggered by Don Krosin's talk about Theories of Punishment last April. I am using the phrase "personal Justice" to mean that component of the established Justice System that deals with people problems and the peoples expectation of the Justice system. This talk is about what I believe are the peoples unrealistic expectations of the workings of the Justice system.

Now, what about the personal justice that people expect. As Don had presented, people expect some kind of punishment of the identified offender after an offence or crime is committed. But in some cases the persons offended or injured claimed they had been denied justice because they disagreed with some decision, so they felt they had been treated unfairly. It is straight forward common logic to feel that if you have been dealt an injustice, you deserve to have justice. And most people think our system of Government supports and promotes this idea. What our Government actually promotes is the idea that we may all seek justice. It does not guarantee that you will ever achieve Justice to your satisfaction.

Two recent cases, out of many in the news, seem to demonstrate a desire of some people to bypass some of the standard procedures of the justice system because they disagree with the results of one or more of these procedures. I refer to the case of the police shooting of the 12 year old boy here in Cleveland's west side, and the case of the so-called "choke hold" death in New York City. In each case the police officer thought to be most directly involved in the actions leading to the deaths were not indicted, and it is the failure to indict that is being protested. What makes me use the phrase "bypass the standard procedures" is the call of many of the protesters for the police officers to be convicted of the crimes the protesters claim they committed. More on these cases later.

## B. HISTORY

My concept of the start of what we now call a Justice System, starts way back with the concept of the intimate connection between cause and effect. This assumption inserts itself into this conversation because of another assumption we all make. That is, we all assume, or at least act as if we have free will. That is, we believe we decide which actions we will do. Since we, with our free will, made the decision to do this action, we are the cause of the action and therefore can be held responsible for the consequences the action. This belief seems to be the basis for the concept of justice.

Another factor which I think was involved in the start of our justice system is the concept of fairness. I don't know how far back this concept became important, but I include it here because recent experiments with some monkeys who have a well-established social structure, demonstrate what the experimenter called "an awareness of being treated unfairly." The animals who thought they were being treated unfairly would reject all attempts to placate them until the perceived unfair treatment was stopped. This seems like some protestors behavior today. In the monkey cultural and in ours, this obstinate and unruly behavior of the injured party was a pathway to try to achieve the fair treatment demanded. If the concept of fairness is the product of social grouping, then I will assume that it was present in the early social groups of the ancestors of the humans we have now become.

Thus, in most cases of early human groups, the group leader will have established a set of rules and procedures for acceptable interactions between members of the group. This is now called an ethical code of behavior. When deviations from these early ethical & moral codes occur, and they always do, most groups have a set of rules and procedures for dealing with the deviant behavior.

One of the earliest steps in this system is to determine if the violator should be held responsible for the action of interest. In these early days, the dividing line between being responsible and not being responsible was likely to be an evaluation of your other actions by your social group. If most of your everyday actions were outside the set of acceptable actions, then you would be identified as not-normal, and you might not be held responsible for the specific action in question. On the other hand, if you were evaluated as normal, then it was, and still is, assumed that you knew the rules and willfully violated them.

In such groups, the process of carrying out the prescribed procedures for establishing guilt and carrying out the prescribed punishment of those found guilty, permits the people seeking justice to accept that justice has been achieved. In small communities there is great social pressure to accept the prescribed punishment as justice delivered, so there is very little questioning of the justice system.

As social groups grew in size, so did the ethical code become more complex and complicated. So much so that some Roman Emperors spent time & effort trying to organize the existing ethical & legal codes. In the year 518, the Emperor Justinian appointed a commission to gather together numerous laws of the Roman legal system into a single text. This was the Codex Justinianus. A second commission was appointed to select matters of permanent value from this work. In 529 this commission produced the 50 books of the Digesta. The content of these books were eventually passed on to Northern Europe, where, I am told, they formed the basis of many legal systems including our own.

Today we have 2 different types of organizations trying to establish an overlapping set of rules that tries to cover everything that can & does happen when a large collection of people live together for one reason or another. The two types of organizations are currently labeled as the religious & the secular.

#### C. MY VERSION OF THE LATER HISTORY

The religious groups are busy trying to turn what they choose to believe into a set of ethical & moral codes for all the people in their group. But even in small groups there were variations in the details which frequently led to fractionation, friction and violence. The fractionation and friction only got worse as the groups enlarged and contacts between different religious groups became extensive. The reaction of the religious leaders was often to fortify the religious beliefs they wanted to enforce and to use the threat of force to maintain the flock. This enforcement almost always makes some of the people in the group feel like they are un-justly treated and to seek freedom from this religious oppression.

Over the years, this freedom from religious oppression has been achieved in many ways and to various degrees but in most cases the people kept most of their religious beliefs, while creating a separate so called secular organization which would undertake to create a set of rules of interactions based on the necessities of maintaining a functioning civil society. Over the years these secular groups have prospered in various ways for many reasons. The long term result of this success has led to the application of the increasing liberal beliefs in modifying the secular State rule set. But these increasingly liberal Laws have again started to cause some people to feel unfairly treated.

#### D. WHAT IS JUSTICE?

But now we must cut to the real problem. What is Justice? From Wikipedia we have, "**Justice** is a concept of moral rightness based on ethics, rationality, law, natural law, religion, equity and fairness. That seems simple enough. We all know all the many words in the definition. But the many words may, in fact, be a clue that the concept of justice is not simple. Let us look at these many words.

First we see that justice is a concept. A concept is a set of statements about some field of interest. The idea in this case is about how to treat one another, and what will happen if you vary from the prescribed treatment. But is it something that is real or not real. In this case, the idea of justice is not real in the sense that it cannot be held in the hand, because it is an idea created by man. But like many ideas created by man, the written descriptions of this idea are real things that can be held in the hand. Thus begins, in my view, one of the major problems with the peoples view of any justice system. Because the written works can be held in the hand, many people confuse the realness of the written works with the abstract concept of Justice. So I conclude that justice is an abstract concept that has consequences in the real world.

Next we see that it is a concept of moral rightness. The established religions each try to maintain their distinctive differences by strongly teaching their particular set of moral values to the young. But even with the success of this indoctrination, there remains some variation in what is claimed to be moral rightness in any given culture. In the world, these various sets of moral rightness values are said to be based on several more variables.

Rationality refers to the process of thinking while using rules of a particular man made logic. It is considered rational if the conclusions can be traced, without gaps, back to the initial assumptions. So, in my mind, rationality does little to reduce the variability of moral rightness ideas unless the initial assumptions are similar.

But people expect their Justice System to be rational even though they may not know the original basic assumptions. One of these basic assumptions seems to be that people are rational beings. Our idea that knowledge of the punishment will deter the crime assumes rational thinking about the consequences of a given action. But crimes keep happening. For this and other reasons I conclude man is not a rational animal. Man is an emotional animal covered with a thin veneer of rationality, which has been created by & for group living. So a Justice system based on the expectation of the innate rationality of humans is unlikely to meet everyone's expectations.

Another reason why any Justice System is unlikely to meet everyone's expectations is that we each have our own set of unacknowledged basic assumptions by which we live. Our assumptions determine whether we agree with a delivered outcome in any specific case. When we don't agree, we tend to claim that we, or some other injured party, have not received the justice 'deserved.'

The use of the word 'deserved' points to another problem. The word implies, and far too many people believe, that we deserve justice just because we are alive. This is a serious unreasonable expectation because our government system does not guarantee justice, only the right to seek justice. I think it is obvious that we don't know how to guarantee justice even though many think it would be a great thing.

The influences of ethics, law, equity & fairness will be lumped together for this discussion because they all are products of the particular cultural group that has created them. These rules and laws often contain pathways toward justice that try to establish concepts of equity by specifying what offences are equal to what penalties. I include fairness in this group because, even though I consider the determination of what is fair to be an individual activity, it can only be exercised in a group. Thus in some cultures with well-developed ethical & legal systems the concept of justice may appear to be well defined. In actual practice, the determination of equity & fairness seems to introduce significant differences in what different people think is the proper justice for the offence they believe they suffered. When different cultures are considered, the concept of justice becomes even more variable.

The last mentioned contributor to moral rightness is 'natural law'. I can identify two different kinds of things that use the phrase 'natural law' in describing themselves. First, there is the set of people generated natural laws created by one group of humans when, for a variety of reasons, the activities of another group of humans are deemed so repugnant that the other person or group gets labeled as unnatural. The implication of this labeling is that the others doing these unnatural acts are not human. We did this to the Native Americans when we wanted the new American land. These people made 'natural laws' can be seen as a mechanism for achieving goals for the generating group, but only the generating group claimed to achieve justice.

Second are the 'natural laws' discovered by the human activity called science. These laws deal with the properties of and interactions between the various things, tangible and intangible, identified in nature. But these human declared 'natural laws' are the result of extensive but not exhaustive investigations, so the existence of the extensive data sets and the 'natural laws' derived from them do not and cannot prove in any absolute sense that the

hypothesis or the model truly represents the real world. These laws represent our current best estimate of the nature of the real world.

The concept of justice must recognize the existence of the phenomena implied by the identified 'scientific natural laws', and I think they should also recognize that these natural laws are only the current understanding of the natural state. They may on rare occasion change.

But even if the Justice System and the people acknowledge the existence of the few discovered 'natural laws', this information can only be used in setting limits on the expectations of what ideas of Justice can be achieved. For instance, knowing about the 'natural law' that all living things die, it would seem unlikely that any justice system would establish a term of punishment longer than the expected life time of the person being punished. Nevertheless, in recent years, the declared term of punishment handed down has sometimes exceeded the maximum reasonable lifetime of the guilty person. There may be many reasons for these extraordinary long terms of punishment, but I always suspect that the Judge is catering to either his/her own or the injured party's personal justice desire for an extraordinary punishment.

But these cries for Justice coming from the injured parties sound a lot like calls for revenge when the injured party is not able to accept the decisions of the Justice System. They use the word Justice in place of revenge, because currently, crying for Justice implies that the caller is doing something approved by the culture, whereas, calling for revenge implies that the caller is doing something often not approved by the culture.

#### EXAMPLES

I will briefly remark about some recent cases which I believe are the type of situation which adds to the public's growing disillusionment in their belief that the Justice System can deliver what all claim they want, that is, justice, as they see it. In the first two cases there was no doubt that the perpetrators were guilty of the crimes for which they were being sentenced. In a third case, it appears that serious errors of omission were made by the police and by the prosecutors in the extended process of achieving the expected justice.

In the first case, a very jealous former husband threatened to and did kill the new boyfriend of his former wife. The wife then turned her former husband over to the police. The former husband was sentenced to 25 years to life, which some thought a very light sentence. Some people also said that the former wife led the new boyfriend on, knowing that her former husband would kill him. If this were to be the case, it would seem that the wife was the instigator of this crime with the purpose of getting her former husband put in prison so she would be free of his threat to her ongoing life. The former wife was never charged. Most people would consider this a light sentence for what they viewed as a serious planned crime.

In my view, the light sentence for the ex-husband implies that the Court considered him a pawn of the former wife who planned the crime but could not be tried due to lack of evidence. In any case the light sentence, while implying that the judge had considerable latitude in setting a sentence, would not be considered justice delivered by the family of the killed boyfriend because their expectation of a harsh sentence was not fulfilled.

The second case involved a high school boy who baked a pan of brownies for his friends. The brownies contained an extract of the Marijuana plant. His crime was discovered and he was sentenced to 15 years to life. Many people thought this was a very harsh sentence for what they considered a prank.

In my view, this harsh sentence was the direct result of our long term cultural commitment to preserve life at all cost. Our array of drug laws seems based on this commitment. The fact that the drug use laws have never been as successful as the promoters desired has led to the prescription of stronger & longer punishments with very little flexibility for the Judge.

This is clearly a long struggle between those who believe they, using the force of government, can control what people can and will do to themselves, and those who essentially believe their life is theirs to use as they please. At the moment, in this country, the first group is in control and are trying to use the justice system to achieve their goal of eliminating all drug use. The continued failure of this policy and the filling of our jails is slowly changing the beliefs of large sets of people because the consequences of this policy do not meet their expectations.

The next two example cases are of a different nature. They both appear to be cases where the normal expected deliberate processes of the initial stages of the long judicial procedures were lost.

The first case is about the Central Park Five. This case started in 1989 when a 28 year old white woman who had been jogging in Central Park was found battered, nearly naked, partially bound & clearly raped. The Central Park Five were 5 black teenaged boys who hardly knew each other, who were selected from the large number of people rounded up because they were in the park. They were interrogated independently for 30 hrs after which all 5 signed confessions. In the subsequent weeks before the trial the local media vilified them in every possible way. Despite the fact that there was no physical evidence connecting any of them to the crime and the recovered semen sample did not match any of them, they were all convicted and sent to prison for many years.

Near the end of their time in prison, another person being sent to prison for a recent rape admitted that he had raped the white lady in Central Park in 1989. He was matched to the semen sample. The courts vacated the convictions of the five men, but the police & the prosecutors would not agree. Several years ago the 5 men were released and they sued the City of New York for wrongful imprisonment.

In retrospect, this case seems to represent a situation where the public pressure to convict someone already vilified and convicted by the local media overcame the expected need to clean up all the unattended leads like the unmatched semen. The police and the prosecutors still refuse to accept any error on their part.

And in some sense, they may be correct. If the police are led to believe, by constant pressure from above, that their job is to solve the crime and make an arrest as soon as possible, then they did not error. They came up with 5 plausible candidates who could have committed the crime. It is not their job to determine if they actually did the crime. But the public and the justice system also believes that their job involved a serious evaluation of all the evidence, and this part of the job was not done.

The prosecutors can also believe they did not error. As I understand their job, it is to evaluate the evidence provided by the police and decide if the existing evidence is sufficient to get a conviction from a jury trial. If they believe the evidence is sufficient, and they did, they had documented confessions from all 5 persons charged and the media was busy painting them as monsters, then they should issue an indictment and bring the case to trial. The jury at the trial is to make the determination of guilt or no guilt. All this they did. But again, the public believes the job includes evaluating the nature of the evidence and something of the history of the persons being charged. People who read the confessions after the trial said it should have been obvious to the prosecutors that the boys charged did not know where the crime had been committed and did not know what crime had been committed.

Thus the public now believes that the prosecutors did not do the job the public expected. Again I claim that this demand for perfection is a major consequence of believing Justice is some perfect thing that can always be achieved.

The point of including these cases is that they each illustrate a failure of our current justice system to meet the expectations of perfection many people have about our justice system.

## E. EXPECTATIONS OF THE JUSTICE SYSTEM

We all claim to want an unbiased universal justice system and many expect such a system to be perfect. But our process for creating this system is long and tedious. Any final rule is often the result of many good people trying very hard to produce a rule that is close to what they wanted at the start of the process. And even if the new rule is a great improvement on the rule of the past, it is and never can be as effective & universal as is desired by both the groups putting the compromises together. The new rule is generally accepted after some short term arguments, but ill will engendered by the inevitable unexpected consequences is likely to be long lasting.

These examples illustrate some of the major unreasonable expectations about the development and maintenance of the less than perfect System of Justice we have achieved. I consider these expectations unreasonable because the system is both created and operated by people who make errors of one kind or another in the course of their work. To expect perfection in these circumstances is bound to provide a source of dissatisfaction with the current system.

Another source of dissatisfaction arises from the problem of how to keep the people who operate the system from the appearance of allowing their own personal biases to affect the outcomes. The major problem in the two cases I mentioned in the introduction seem to be examples of this source of dissatisfaction. Many in the black community are led to believe, due to a long history of unfair treatment, that the failure to indict the white police officers is another example of the personal bias of the people in charge. And In some cases, this assumption may be true.

Most of the public do understand that the job of a police officer is very risky. Decisions about life & death matters often have to be made now, on the spot, in the middle of whatever is happening. Bad decisions are sometimes made. But the public demands perfection, ignoring the fact that perfection will be impossible to achieve. So, if an error is made, then someone must be held accountable in some way. This demand for perfection is a major consequence of believing Justice is some perfect thing that can always be achieved.

But there are many other factors at work in these situations. In these two cases, there is no doubt that the police officers did take action that resulted in the death of the victims. In the eyes of the families and friends of the victims, the actions of the two officers means they are guilty and should be indicted.

The justice system, while admitting that they committed the actions leading to the deaths, must also decide if the actions were justified by the immediate circumstances. The police forces have a long list of dead officers whom they believe died because they did not respond fast enough to aggressive actions from the persons they were contacting. It is reasonable to expect that a man fearing he might be killed, on either side of a potential conflict, will be more likely to use any available weapon and activity to protect himself. The, after the event, accepted facts in these two cases seems to be that neither of the dead victims had the ability to be as lethal to the police officer as the officer claimed to believe. Another, after the event, accepted fact is that neither victim made motions to submit to the officers demands to do so. In fact each victim made what the officers thought were aggressive actions. So in each case, the justice system concluded that the police actions were justified and did not indict the officer.

The families and friends of the victims can be expected to disagree with this decision to not indict the officers, but a large number of sympathizers and the media are claiming that the failure to indict is the result of biases in the police forces. Many are claiming that the biases are racial or that some bias is certainly present.

The police have not been very successful in selecting candidates for police training who can stand up to the emotional stresses involved in confrontation.

## F. THE CONSEQUENCES

So what are the consequences of our long history of trying to assemble a perfect system to ensure fairness in how we treat one another. The system may have minimized crime in small homogenous groups but it could not eliminate crime. I imagine it eventually failed for two major reasons. The first is that it assumes that humans are rational. And second, it fails to allow for human error and human ingenuity in finding new ways to mistreat each other.

And we still expect people to be rational. But there is ample evidence that people are not fully rational beings, and even if they were, they often don't have the time to think about the actions they are about to engage in.

So a few feel they have not received the justice their personal sense of justice demands, and they do make a lot of noise about their perception of the failure of the justice system.

This then is my view of the consequences of the successful promotion of the idea that the "pursuit of justice" is one of the primary rights granted to all citizens. We have the right to pursue justice. We are not promised we will achieve justice. For the most part, the Justice System has been relatively successful in this impossible job. I claim perfection in this job is impossible because of many factors. I will comment on some factors:

Factor 1. The system is made and operated by humans who make errors and have biases. Unfortunately, the public expects perfection which is not attainable.

Factor 2. No existing set of rules is going to cover every possible case of apparent violation of one or more rules. So we have an elaborate three stage structure to decide if a rule has been violated. I will present my limited understandings of the working of each of these stages.

Stage 1. The police are the first responders. The police are responsible for finding and establishing the facts of the event. When the investigation ends, with or without knowledge of the identity of the presumed rule violator, the accumulated information is passed to a prosecutor. There are several steps involving human actions here, any one of which may be a site where error or bias may influence the investigation.

Stage 2. The prosecutor evaluates the information and decides if a rule has indeed been violated and if sufficient evidence is available for conviction. The prosecutor is often assisted in his evaluation of the case by a selected group of people called a Grand Jury. This Jury only evaluates evidence presented by the prosecutor. An issued public indictment is a statement saying that the prosecutor believes that a rule has been broken. It is not proof of guilt, but it is a call to exercise the third step of the justice system. Again, there are several steps involving human actions here, any one of which may be a site where error or bias may influence the investigation.

Stage 3. The evaluation step is often a trial wherein a collection of people is assigned to hear evidence presented by both the prosecutor trying to prove the guilt of and from the defense, trying to prove the innocence of the accused. The collection of people assigned to evaluate the evidence and make a decision can vary from a single judge, a group of judges, or collection of ordinary people called a Jury. The decision making group, of whatever makeup, is supposed to make the decision of guilt or innocence, based only on the evidence presented. Again, there are several steps involving human actions here, any one of which may be the site of error or bias.

Factor 3. The population is much too large & inhomogeneous for any set of rules to be well known much less accepted by everyone.

## G. CONCLUSIONS

I believe that the 3 major threats to our justice system come from three basic assumptions made by many people. These basic assumptions are:

1. That humans have free will which makes them responsible for their actions. This assumption is still in good standing with most people and may even be close to the true state of affairs. But current research in neurology has found some evidence that this assumption may not be on as firm ground as we might like. As one researcher has said, "if free will were not present, we would have to invent it." And this may be the case. Perhaps we did invent the concept in order to have social order.

2, That humans are able to function in an error free way. The Justice system is loaded with decisions that may often be considered in error after the dust has settled. Our assumption that the system processes, even with all its checks & balances, can reasonably be expected to function error free does not match what we all think we know about the reliability of people. But our demand for perfection and intolerance of error results in removing good people who could benefit themselves and the rest of us if they were to learn a lesson and continue.

3. That justice is a perfect thing to be acquired. The public delusion is that the Justice System delivers the TRUTH. I believe it delivers a decision that may be true, but the system does not guarantee the truth. In recognition of this fact, the current system includes a mechanism of appeal which allows the activities and decision of lower courts to be reviewed by an upper court. Occasionally, these reviews may get to the Supreme Court which will render a final decision. The court decision, at any level, is considered the best estimate of the truth available in these people problems, based on the evidence provided.

The unreasonable assumption, that Justice is or can be a perfect thing that delivers the truth will, as the population grows in number and diversity, exert an increasing pressure to modify the system so these few dissatisfied people can get what they want. We need to find a way to change these assumptions. To emphasize that seeking justice is a long slow imperfect process. The process we have is not now, and never will be perfect, but it seems better than anything else in sight.

Thank you for your attention.